

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND
Civil Division

<p>Plaintiff,</p> <p>v.</p> <p>Defendants.</p>	<p>Case No.:</p>
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**PLAINTIFF'S MOTION TO BAR DEFENDANT
FIORAVANTI FROM ATTENDING THE TRIAL**
(Hearing Requested)

Plaintiff, _____ (hereinafter "Plaintiff"), by and through his attorneys,
and Miller & Zois, LLC, hereby files Plaintiff's Motion to Bar Defendant
From Attending the Trial and in support thereof states:

INTRODUCTION

Defendant _____ suffers from dementia that pre-exists the motor vehicle accident that is at issue in this case. She has no memory of the facts of the accident, and is unable to assist her counsel or comprehend the nature of the Court's proceedings. The only reason for her presence at the trial will be to prejudice the Plaintiff by generating improper sympathy with the jury. This prejudice may only be cured by barring Defendant _____ from attending the trial.

FACTS

Immediately after the collision, Defendant _____ was taken to the emergency room at Washington Hospital Center. Exhibit 1. At the emergency room, she did not remember the facts of the accident or whether she had been wearing a seatbelt. Id. As a result of the

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collision, Defendant sustained a left tibia fracture, a left fibula fracture, and a right ulnar fracture. Id. Her emergency room discharge summary noted that “[p]atient has baseline dementia” and that she was noncompliant with medication for her other medical conditions. Id. She was unable to manage her own financial affairs, which were handled by her family attorney pursuant to a power of attorney. Exhibits 1 & 2.

When surgery was recommended for her due to the injuries she sustained in the accident, she was unable to comprehend the nature of the procedure. Exhibit 3. Her surgeons sought consent from her attorney, but were told he was unable to consent on her behalf because Defendant made her own medical decisions and the attorney only handled her finances. Exhibits 2 & 4. Her physicians noted that Defendant understood her life history and had a grasp of current events, but that she was confused about her time in the hospital. Id. The medical notes reveal that Defendant’s physicians concluded that her acute mental status change was the result of the motor vehicle accident and the narcotic medication. Id. Defendant was ultimately determined to be incompetent to consent to the surgery. Exhibit 4. In order for the surgery to take place, two surgeons gave consent on her behalf. Id. Upon discharge, Defendant’s continuing care arrangements had to be made through her attorney. Exhibit 5.

Defendant deposition was taken in this matter on June 6, 2011. Exhibit 6. The deposition was recorded by video. At that time, Defendant did not know her current address. Id. at P. 9, L. 21-22. She was also unable to state where she had resided on the date of the accident. Id. at P. 10, L. 6-11. As of the date of her deposition, she was unsure of whether she suffered from any medical conditions. Id. at P. 13, L. 19-22. She was unable to state the

name of her treating physician. Id. at P. 14, L. 5-11. She did not know when her attorney had begun making her financial decisions. Id. at P. 15, L. 15-18. She did not know what year it was. Id. at P. 16, L. 10-22. She did not know who the President was. Id. at P. 18, L. 2-9.

Defendant did not recall having been involved in the motor vehicle collision in November, 2007. Id. at P. 20, l. 16-22. She had no idea how the collision happened. Id. at P. 22, L. 1-3. She did not know why she left the house that day. Id. at P. 21, L. 19-22. She did not remember being at the scene of the accident or talking with emergency personnel. Id. at P. 21, L. 16-18. She did not know whether she was injured in the collision. Id. at P. 22, L. 10-12. She did not recall having had any broken bones. Id. at P. 24, L. 21-22; P. 25, L. 1-4. She did not remember any part of being at Washington Hospital Center. Id. at P. 22, l. 7-9.

Defendant did not recall being diagnosed with dementia prior to November, 2007. Id. at P. 23, L. 13-22. She did not agree that she had dementia. Id. at P. 24, L. 8-10. She did not recall having ever been told by a physician that she had dementia. Id. at P. 24, l. 11-15. She further testified that if a physician had ever told her that she had dementia, she “would disagree, of course.” Id.

ARGUMENT

It is “clear that a party to civil litigation has a right to be present for and to participate in the trial of his/her case.” Green v. North Arundel Hosp. Ass’n., Inc., 366 Md. 597, 618, 785 A.2d 361, 373 (2001). However, the Court of Appeals of Maryland has “made clear, as have most other courts in the nation, that the right is not absolute- that there are circumstances in which a civil case may proceed without the attendance of a party and, indeed, with the party excluded.” Id. at 618-19, 785 A.2d at 373-74. As the court explained:

The right of a party to a cause to be present throughout the trial is not an absolute right in a civil case and in the discretion of the court, with due regard to the circumstances as to prejudice, the case may be tried or finished when a party, including a defendant, is absent.

Id. (citing, Gorman v. Sabo, 210 Md. 155, 122 A.2d 475 (1956)).

The Maryland appellate courts have not had occasion to consider the requested exclusion of a party from the trial of a civil case under these precise circumstances- where the Defendant was unable to testify, assist her counsel, or even understand the proceedings and the only purpose of her appearance would be to engender sympathy in the jury. In Green, the court was reviewing a trial court's decision to exclude a plaintiff from the liability phase of a proceeding. There, the plaintiff was a child who suffered from severe brain damage, and who as a result was in a vegetative state, was unable to communicate with anyone, and who functioned "at the level of a one-month old infant" even though he was 20 years old at the time of trial. Id. at 604, 785 A.2d at 365. He alleged that his condition was the result of negligent medical care given by the defendants. Before trial, the defendants moved to exclude his presence from the trial. As reasons, the defendants argued that he was in a vegetative state, unable to communicate and to participate or assist in any way in the trial, and unable to even understand what was happening in court. The defendants argued that given these limitations, his presence at trial would be overwhelmingly prejudicial since he required continued nursing care and extensive medical equipment that would "generate noise and distract the jury." The defendants' motion was not merely premised upon the idea that the plaintiff's appearance might upset the jury, but that given his limitations, "his presence in the courtroom could have no meaning other than to prejudice the jury against the defendants."

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The trial court found as facts that the plaintiff did not have the ability to communicate with his counsel, his parents or his nurses, that he would not be able to assist his attorneys in trying the case, and that he "would not understand or comprehend any part of the trial." The trial court concluded that because the plaintiff was in such a vegetative state, there could "be no purpose in presenting him short of prejudice to the Defendants' case." Accordingly, the trial court granted the defendants' motion and excluded the plaintiff from being present during the liability phase of the trial. On appeal, the Court of Appeals of Maryland upheld the trial court's ruling, stating:

Our holding is a narrow one. In the liability phase of a bifurcated trial, the court has discretion to exclude a plaintiff where, after a hearing and an opportunity to observe the plaintiff, either in person or by other reliable means, the court determines, on the record, that: (1) the plaintiff is severely injured; (2) the plaintiff attributes those injuries to the conduct of the defendant(s); (3) there is a substantial prospect that the plaintiff's presence in the courtroom may cause the jury to side with the plaintiff out of emotional sympathy rather than on the evidence; (4) the plaintiff is unable to communicate or participate in the trial in any meaningful way; *and* (5) the plaintiff would be unable even to comprehend the proceeding.

Id. at 626, 785 A.2d at 378. The appellate court went on to explain the reasoning behind its holding:

When all of those circumstances exist, as they did here, the plaintiff's presence is not truly an exercise of his/her right of presence, for the plaintiff is incapable of making a conscious decision in that regard. His presence is rather as an exhibit- a piece of evidence- that is both irrelevant and prejudicial, and thus invokes the balancing process enunciated in Maryland Rule 5-403.

Id. at 626-27, 785 A.2d at 378. Although there are differences between the factual situation present in Green and this case, the appellate court's reasoning nonetheless applies.

The first two factors do not apply in this case because this is a motion to exclude a

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defendant, not a plaintiff. Those factors relate to the idea that the plaintiff sustained a very serious injury that is alleged to have been caused by the defendant, and the prejudice to the defendant that may result from having those injuries displayed to the jury during the liability phase of the trial. Those issues clearly are not present in this case.

With respect to the third factor, Defendant _____ is clearly elderly and infirm. This would be visible to the jury. At a hearing, the court will have the opportunity to observe her videotaped deposition testimony, which reveals that her condition is obvious. She appears frail and infirm, is visibly unable to understand questioning, and looks to others for assistance with that which she is unable to understand. If permitted to remain through the trial, there is no way the jury could avoid becoming aware of her condition. There is a substantial risk that her presence could cause the jury to side with her out of sympathy for her appearance and medical condition, rather than rendering a decision based solely on the evidence in the case.

The fourth and fifth factors depend upon the Court's observations at the hearing on this Motion. The Court is required to make factual findings based upon its observations of the defendant "either in person or by other reliable means." In Green, the trial court observed the plaintiff by watching a "day in the life" video and by reviewing deposition transcripts and medical records. Thus, here the Court may conduct an in-person examination of Defendant _____ as well as reviewing the video recording of her deposition, the deposition transcript, and her medical records. The Court will be able to see for itself what is shown in the facts recited in this Motion. Defendant _____ does not recall the facts of the accident or even leaving the house that day. She does not recall her injuries, her recuperation, or even being in the hospital. She could not communicate with her physicians for the purpose of consenting to

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surgery. She cannot manage her own financial affairs. As of the date of her deposition, she did not know her address, the name of her physician, the year, or who was President. She had another person who made her medical decisions. After a hearing, the Court will find that the fourth and fifth factors are satisfied because Defendant is unable to communicate with her counsel and that she is unable to understand the proceedings or to participate in them in any meaningful way.

CONCLUSION

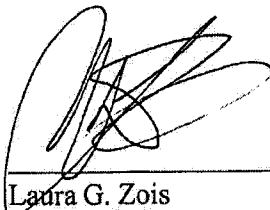
Defendant should be barred from being present at trial because her presence itself will serve to prejudice the Plaintiff's case. Her mental status will be apparent to the jury, and there will be a substantial likelihood that the jury will favor her side of the dispute out of emotional sympathy and not the facts of the case. When this prejudice to the Plaintiff is viewed in light of Defendant inability to communicate with her counsel and to understand or participate in the proceedings, it is apparent that permitting her to be present will prejudice the Plaintiff, while barring her will not prejudice her because her presence would not aid the presentation of her case or the efforts of her counsel. She would be what the court described in Green- merely an exhibit, serving to engender sympathy for her due to her condition and appearance. Consequently, Plaintiff's Motion to Bar Defendant From Attending the Trial should be granted.

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Respectfully submitted,

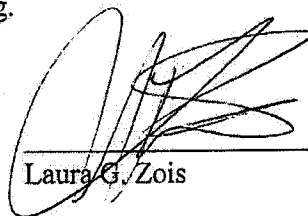
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REQUEST FOR A HEARING

The Plaintiff respectfully requests a hearing.



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