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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4484-08T2

RELIASTAR LIFE INSURANCE
COMPANY,

Plaintiff-Appellant,

v.

ROGER SMITH and AON RE, INC.,

Defendants-Respondents.

Argued January 20, 2011 - Decided March 1, 2011

Before Judges R. B. Coleman, Lihotz, and J. N. Harris.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-3916-03.

Henk Brands (Paul, Weiss, Rifkind, Wharton & Garrison, LLP) of the New York bar, admitted pro hac vice, argued the cause for appellant (McCarter & English, LLP, and Mr. Brands, attorneys; Mr. Brands, Theodore V. Wells, Jr., and Brad S. Karp (Paul, Weiss, Rifkind, Wharton & Garrison, LLP) of the New York bar, admitted pro hac vice, of counsel; William J. O'Shaughnessy and Mr. Wells, on the brief).

Shand S. Stephens of the California, District of Columbia, and New York bars, admitted pro hac vice, argued the cause for respondents (DLA Piper, LLP (US), attorneys; Mr. Stephens,

Megan Shea Harwick, of the New York bar, admitted pro hac vice, and Carrie S. Parikh, on the brief).

PER CURIAM

In this complex commercial litigation involving the business of reinsurance and retrocessional insurance, we are asked to set aside a jury verdict on grounds that, as a result of a handful of determinations out of the hundreds made by the trial judge in the course of a twenty-three day trial, plaintiff did not receive a fair trial. Our appraisal of the record reveals that even if plaintiff did not get a perfect trial —— no party is entitled to such a faultless process —— it received all that it was due to resolve its multi-million dollar dispute with defendants. Having full confidence in the jury verdict that engendered this appeal, largely the result of the careful management by the trial judge, we affirm.

I.

A.

In the mid-1990s, Unicover Managers, Inc. (Unicover) gathered together a small group of insurance companies and assembled them into a pool (the Pool) for the purpose of selling reinsurance to insurance companies selling workers' compensation insurance. The rights, duties, and obligations of the members of the Pool, and of its manager, Unicover, were governed by the

terms of their Occupational Accident Reinsurance Pool Management Agreement (the management agreement). John E. Pallat, III, was Unicover's chairman and chief executive officer, with oversight of the Pool's operations.

Reinsurance is an arrangement in which a company, the reinsurer (here, the Pool), agrees to indemnify an insurance company against all or a portion of the primary insurance risks that it has underwritten. Reinsurance companies themselves also purchase reinsurance, a practice known as a retrocession. They purchase this reinsurance (sometimes called retrocessional insurance) from other reinsurance companies. A reinsurance company that sells reinsurance to a reinsurer is a retrocessionaire.

The Pool operated on an annual basis, and members executed management agreements reflecting each year-long period with Unicover. An individual member, acting alone, could not contractually terminate a management agreement until it had given ninety days' notice of its intent to terminate its participation and then such termination was not effective until the next anniversary date. Acting unanimously, however, all of the members could contractually terminate the management agreement before the year expired if Unicover "engage[d] in

fraud, willful misconduct, the commission of a crime, or a material breach."

Pursuant to the management agreement, Unicover was delegated as the administrator of the members' cooperative arrangement and "authorized to market, administer, service, and underwrite the reinsurance business written by the [members] through the Pool, and otherwise act in the best interests of the Pool as a whole." Although there were certain limitations on the type and location of business Unicover could accept on behalf of the Pool, there were no express caps or limits on the amount. Any reinsurance contracts signed by Unicover automatically bound the Pool and its members, and Unicover was entitled to a management fee equal to 7.5% of certain premiums received by the Pool. The management agreement was governed by Illinois law. Unicover was also responsible for procuring retrocessional insurance for the Pool to backstop the members' underwriting obligations.

Although the management agreement did not permit Unicover to delegate "the entirety of its duties and obligations" to a third party, it was allowed to employ third parties that were "specifically approved in writing by [the members], such approval not to be unreasonably withheld." Unicover "ha[d] authority to agree to any and all terms and conditions of its

use or cooperation with such third parties . . . [, and] Unicover [was] responsible for the payment and adjustment of any commissions to such third parties."

In 1997, Unicover hired defendant Aon Re, Inc. (Aon) to serve as a co-broker with Rattner Mackenzie, Ltd. (Rattner) for the Pool. Defendant Roger Smith was Aon's representative who dealt with Unicover. By the beginning of 1999, only Aon was conducting brokering operations on behalf of the Pool.

In 1997, Rattner and Aon secured retrocessional insurance for the Pool. They negotiated a three-year non-cancelable retrocession contract —— the Occupational Accident Excess of Loss Whole Account Retrocession Agreement (the Whole Account Retrocession) —— with a pool of retrocessionaires (the retrocessionaires or the Centaur Pool) that was managed by Centaur Underwriting Management Limited and its President, John R. Cackett.

The Whole Account Retrocession ran from December 1, 1997, to December 1, 2000. It provided that the retrocessionaires were required to automatically cover all risks associated with the Pool's inventory of business during those three years, with certain listed exceptions. It contained no restrictions on the amount of business that Unicover could sell and thereby obligate the Centaur Pool to indemnify. Instead, it contained a written

representation that the Pool's so-called "Estimated Gross Subject Annual Premium Income" to be covered by the retrocessionaires would be $150 million in the first year, $200 million in the second year, and $250 million in the third year.

In addition, the Whole Account Retrocession declared that all communications about the arrangement would be transmitted to the Pool through Rattner and Aon. Also, "[a]ny dispute arising out of the interpretation, performance or breach of [the Whole Account Retrocession] . . . will be submitted for a decision of a panel of three arbitrators." The Whole Account Retrocession provided that it was governed by Illinois law.

After this framework was already in place, sometime in 1998, Smith approached plaintiff Reliastar Life Insurance Company (Reliastar) to become a member of the Pool. Paul Kersten, Reliastar's in-house workers' compensation underwriting expert, conducted a due diligence analysis of the proposal. The Pool's retrocessional insurance was critical to Reliastar's decision to participate in the Pool as a member. Notwithstanding any misgivings that it harbored, which were unearthed as part of its due diligence, Reliastar joined the Pool as a five percent member effective on March 1, 1998.

By mid-1998, the Pool experienced dramatic growth, having placed $400 million in reinsurance, which was well in excess of

the estimated amount disclosed to the retrocessionaires in the Whole Account Retrocession. Cackett expressed concerns to Smith that the rapidly increasing volume posed a significant risk to the Centaur Pool and its coverage. By August 1998, he threatened that the retrocessionaires would take legal action to have the Whole Account Retrocession voided.

Smith downplayed some of Cackett's complaints, but forwarded others to Pallat. However, he never sent any written communication to the Pool's members about the potential problem, and he did not tell Pallat or anyone at Unicover to do so. Continuing its wild success at underwriting, by the end of 1998 the Pool had sold more than $1 billion of reinsurance.

In early 1999, two members of the Centaur Pool separately wrote Unicover to advise that they considered the Whole Account Retrocession terminated. When Reliastar received these letters, it did not instruct Unicover to stop writing business, audit Unicover, or formally notify Unicover that it would not be renewing its own membership in the Pool for the next year.

In due course, the retrocessionaires initiated an arbitration proceeding, ultimately completed in October 2002, alleging that the Whole Account Retrocession should be rescinded due to "misrepresentations and nondisclosures prior to, during, and after the underwriting of [the Whole Account Retrocession],"

and claiming that the Pool incurred a much greater risk than the parties had originally intended. Rejecting much of the retrocessionaires' claims, the arbitral panel nevertheless tersely determined that any reinsurance that the Pool had sold after August 31, 1998, was not covered by the Whole Account Retrocession, and required the retrocessionaires to return premiums to Pool members:

> [Pool members'] request that the [arbitral] panel declare that the [Whole Account Retrocession is] valid is granted to the extent of business bound or renewed to such [Whole Account Retrocession] on or before August 31, 1998. The [retrocessionaires] will not be liable for any losses arising from business bound or renewed to such [Whole Account Retrocession] thereafter, and will repay to the [Pool members] all premium amounts paid, which relate to such business.

B.

On May 22, 2003, Reliastar filed a complaint in the Law Division against Pallat, Rattner, Aon, Smith, and several other individuals, asserting claims of: (1) engaging in a pattern of racketeering activity contrary to the New Jersey RICO statute, N.J.S.A. 2C:41-1 to -6.2; (2) fraudulent misrepresentation; (3) fraudulent concealment; (4) twin conspiracies to defraud; (5) aiding and abetting a fraud; (6) conversion; (7) breach of fiduciary duty; (8) aiding and abetting a breach of fiduciary duty; (9) breach of contract; (10) unjust enrichment; and

(11) breach of the duty of good faith and fair dealing. Reliastar claimed damages of $40 million, contending that the named defendants, as the Pool's agents and brokers, had breached their fiduciary duties by selling too much reinsurance, thereby jeopardizing the Pool's retrocessional protection, and by not alerting Pool members when the retrocessionaires began to complain.

In February 2006, Reliastar filed a first amended complaint, reducing its targeted defendants to just Aon and Smith, and eliminating certain causes of action. In January 2009, a second amended complaint tailored Reliastar's final grievance to two theories of liability: (1) breach of fiduciary duty and (2) aiding and abetting Unicover's breach of fiduciary duty.

Pretrial management —— including discovery and motion practice —— was overseen by Judge Ann G. McCormick. The trial was conducted over a seven-week period before Judge McCormick and a jury between February and March 2009. On March 26, 2009, the jury returned a verdict, finding that Aon and Smith neither breached a fiduciary duty owed to Reliastar nor aided and abetted Unicover's breach of fiduciary duty to Reliastar.

On April 2, 2009, Judge McCormick entered judgment memorializing the verdict, dismissing Reliastar's second amended

complaint with prejudice, and ordering Reliastar to pay defendants' "reasonable costs" pursuant to Rule 4:42-8. This appeal followed.

II.

Reliastar contends that the trial court committed reversible error in three areas. First, it erroneously excluded three pieces of evidence; second, it misinstructed the jury on two occasions; and third, it wrongly limited Reliastar's ability to prove damages. Because we disagree with Reliastar's first two contentions, we need not address the last. Moreover, from our review of the extensive record in this case we are satisfied that the verdict was not the product of legal error, abuse of discretion, or anything else that had the capacity to result in a miscarriage of justice.

A.

Reliastar's first argument on appeal is that the trial court committed reversible error by excluding evidence of the arbitration panel's decision. As noted, the arbitration panel held that the Whole Account Retrocession was valid, denied rescission, and awarded no damages against Unicover. However, for reasons it never expressed, the award limited the retrocessionaires' liability to risks bound into the Pool on or before August 31, 1998, leaving the Pool and its members

responsible for losses on reinsurance policies bound after that date.

The trial court excluded the award because of the view that it was not relevant to Reliastar's claims, and that it represented inadmissible hearsay. It was noted that the arbitral decision and resulting award (1) did not implicate Aon or Smith, who were not parties to the arbitration; (2) did not establish proximate cause as to any of Reliastar's claimed damages; and (3) was incapable of being used to compute Reliastar's quantum of damages.

Reliastar argued that the arbitral award was relevant because it established both the fact and extent of its economic injury. This was plainly a bootstrap approach that sought to implicate Aon and Smith for causing events —— the truncation of the Whole Account Retrocession's term —— that they were not accused of causing. Instead, the trial court rightly required the presentation of competent evidence of all of the elements of Reliastar's causes of action without the facile and potentially misleading expedient of introducing the unilluminated arbitral award. We detect no error in the trial court's careful assessment of the issues and its ruling of non-admissibility.

A trial court's decisions about the admission or exclusion of evidence are discretionary. Benevenga v. Digregorio,

325 N.J. Super. 27, 32 (App. Div. 1999), certif. denied, 163 N.J. 79 (2000). "Evidentiary decisions are reviewed under the abuse of discretion standard because, from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010). We will not reverse such decisions unless they are "so wide of the mark that [they] result[] in a manifest denial of justice," Bitsko v. Main Pharmacy, Inc., 289 N.J. Super. 267, 284 (App. Div. 1996), or, stated differently, they present "a clear abuse of that discretion resulting in an injustice." Ripa v. Owens-Corning Fiberglas Corp., 282 N.J. Super. 373, 389 (App. Div.), certif. denied, 142 N.J. 518 (1995). Thus, "[e]ven where there may have been error, reversal is required only when an unjust result occurred." Dinter v. Sears, Roebuck & Co., 252 N.J. Super. 84, 92 (App. Div. 1991).

Relevant evidence is "evidence having a tendency in reason to prove or disprove" a material fact. N.J.R.E. 401. Such evidence is usually admissible unless an exception applies. N.J.R.E. 402. The inquiry "focuses upon 'the logical connection between the proffered evidence and a fact in issue.'" Verdicchio v. Ricca, 179 N.J. 1, 33 (2004) (quoting State v. Hutchins, 241 N.J. Super. 353, 358 (App. Div. 1990)). N.J.R.E.

403(a) provides that "relevant evidence may be excluded if its probative value is substantially outweighed by the risk[s] of . . . undue prejudice, confusion of issues, or misleading the jury." "[A] trial court is granted broad discretion in determining both the relevance of the evidence to be presented and whether its probative value is substantially outweighed by its prejudicial nature." Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999).

It was undisputed that Aon and Smith were not parties to the arbitration proceedings and their conduct was not at issue. No evidence was adduced to even remotely suggest that Aon's or Smith's conduct caused the arbitral result.

We note that under Illinois law,[1] to establish a claim for breach of fiduciary duty, a plaintiff must establish: (1) a fiduciary duty on the part of the defendant; (2) the defendant's breach of that duty; and (3) damages that were proximately caused by the defendant's breach. Neade v. Portes, 739 N.E.2d 496, 502 (Ill. 2000). Thus, relevant to liability was the fact that the retrocessionaires considered the Whole Account Retrocession ineffective as of a certain date, and not the fact that a panel of arbitrators had actually validated that

[1] The parties agree that the substantive issues in this case are governed by Illinois law.

conclusion. The jury was presented with such relevant information. For example, the jury was aware that at least one of the retrocessionaires had written threatening to terminate the Whole Account Retrocession, and was reserving its right to seek redress.

Not only was the naked arbitral award of highly suspect relevance, its capacity to mislead the trier of fact was manifest. Aon and Smith ran the unwarranted risk of having imputed to them guilt by association if the arbitration panel's actual award were made part of the trial record. An unjust result did not occur when the trial court refused Reliastar's attempt to place such award before the jury.

Plaintiff next claims that the trial court erred by excluding the deposition testimony of Unicover's chief executive officer Pallat pursuant to Rule 4:16-1(c) when Pallat was unavailable to testify in New Jersey. In refusing to accede to Reliastar's efforts to substitute deposition testimony for the absent Pallat, the trial court acknowledged the unique circumstances of the case and held that Reliastar materially contributed to Pallat's unavailability.

When a witness cannot be compelled to testify, but has already been deposed, Rule 4:16-1(c) indicates that the

deposition of that witness

> may be used by any party for any purpose, against any other party who was present or represented at the taking of the deposition . . . if the court finds that the appearance of the witness cannot be obtained because [the witness] . . . is out of this state or because the party offering the deposition has been unable in the exercise of reasonable diligence to procure the witness's attendance by subpoena, provided, however, that the absence of the witness was not procured or caused by the offering party. The deposition of an absent but not unavailable witness may also be so used if, upon application and notice, the court finds that such exceptional circumstances exist as to make such use desirable in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court.
>
> [Ibid. (Emphasis added).]

Recognizing that live testimony is generally preferable to deposition testimony, a court will consider the witness's absence "procured or caused by" the offering party unless that party exhausts "all reasonable means" to assure the attendance of the witness at trial. Avis Rent-A-Car, Inc. v. Cooper, 273 N.J. Super. 198, 202-03 (App. Div. 1994).

Contrary to its earlier representation that Pallat would be called to testify, in late January 2009 —— just two weeks prior to jury selection —— Reliastar moved for permission to introduce Pallat's December 5, 2005, deposition testimony pursuant to Rule 4:16-1(c). According to Pallat's attorney (and designated agent

for service of process), Pallat had relocated to France several months earlier and was refusing to obey a subpoena to testify during February 2009, because he "was committed to various activities in France."

The trial court denied the motion, finding that Reliastar had not exercised "sufficient diligence" to procure Pallat's attendance at trial. Stating, "the rule contemplates something more than service of a subpoena and a representation [by a party as to witness unavailability,] . . . there has to be more inquiry, more investigation as to this matter," the trial court further noted that Reliastar had not engaged in any process to facilitate transportation and the payment of expenses to enable Pallat's appearance. It also explained that Pallat "does not say in his letter [to his attorney that] he will not appear. He just says it's inconvenient, which is —— also goes to my finding that due diligence wasn't exercised because we don't really know if there were no circumstances under which he would decline to appear."

The trial court revisited the issue four weeks into the trial, finding that even though Reliastar had by then sent an attorney to meet with Pallat in France in February 2009, there was no indication that Pallat had been asked to return to testify or that he had refused to do so. The court cited two

cases in support of its ruling: State v. Hacker, 177 N.J. Super. 533 (App. Div.), certif. denied, 87 N.J. 364 (1981), and Witter by Witter v. Leo, 269 N.J. Super. 380 (App. Div.), certif. denied, 135 N.J. 469 (1994).

In Hacker, we affirmed the judge's decision to exclude the deposition testimony of a witness who was out of the country at the time of trial. We held that the witness "could have been subpoenaed before trial; thus, defendant failed to show that he sought with 'due diligence' to procure the attendance of the witness." Id. at 540. Here, the trial court found our ruling applicable because Reliastar could have directly served Pallat with a subpoena when he was in New Jersey before trial, even though service upon his designated agent for service of process was valid.

In Witter, we reversed the judge's decision to admit the deposition of a witness who was outside New Jersey at the time of trial. The offering party had admittedly procured the witness's absence and then had elected not to call him as a matter of trial strategy. Id. at 390. We explained that the relevant issue was not whether a witness lives outside the state, but rather "why the [witness] is out of the state at the time of trial." Ibid.

> Mindful of the Rule's clear preference for live testimony at trial, we see no

> difference between deliberately suppressing a declarant's testimony by asking the declarant to leave this state or by declining to ask the declarant to come into this state. If a party controls whether the declarant will be in this state to testify and elects not to call him as a witness, that party has at least "caused" if not "procured" the declarant's absence under the Rule.
>
> [Ibid.]

The trial court determined that our ruling was pertinent because, even though Reliastar had served Pallat: (1) it never did anything to facilitate his coming to New Jersey to testify; (2) it never offered anything to make it more convenient for Pallat to testify; and (3) Pallat never actually refused to testify.

Reliastar now asserts that Pallat, through his attorney, had consistently refused to testify, and that it neither had any control over Pallat nor made a strategic choice not to present him as a live witness. Also, the assertion is made that Pallat's testimony would have swayed the jury to find liability against Aon and Smith based upon his reputed statements that: (1) Smith had never told him about the retrocessionaires' complaints and threats; and (2) it was Aon's job to communicate with Pool members.

The issues presented make this an extremely close question. Nevertheless, in light of the thorough knowledge and hands-on

management that the trial court exercised throughout this complicated and lengthy litigation, we believe that the trial court did not make an error of reversible proportions.

Pallat "was an absent but not an unavailable witness." Avis Rent-A-Car, Inc., supra, 273 N.J. Super. at 203. Although he was not in Reliastar's control, there was no indication that Reliastar took the appropriate steps to facilitate his coming back to New Jersey from France, despite paying for its own counsel to travel to France to meet with Pallat. In fact, counsel for Reliastar went to France to meet with Pallat in February 2009, and examined documents in Pallat's possession showing that he had moved to France with his family in July 2008, and was attending classes there at the International School of Management. As the trial court accurately noted, however, counsel's certification never indicated whether Pallat had been offered anything to make it more convenient for him to come to New Jersey to testify, and never indicated that he had actually refused to testify. The trial court did not err in refusing to allow the jury to consider Pallat's deposition.

Our distance from the litigational battlefield makes it particularly difficult to gauge the cross-currents of circumstances that ultimately animated the trial court. Suffice it to say that no one was in a better position to recognize the

unique dynamics of the case, and manage them reasonably, than the trial court. We are loathe to disturb its management prerogative when it precluded Pallat's deposition from reaching the jury.

Reliastar also contends that the trial court erred by excluding several documents authored by Aon's employees and showing the amount of Aon's alleged earned commissions relating to Unicover's sale of reinsurance. According to Reliastar, these documents would have demonstrated Aon's and Smith's motive to breach their fiduciary duty, that is, "the more Unicover sold, the more defendants earned in commissions." Moreover, according to Reliastar, this information was especially important, because Smith and other Aon representatives testified that they could not remember those amounts.

Reliastar moved at various times during trial to admit the documents pursuant to N.J.R.E. 803(b), as statements by a party-opponent. The trial court, however, excluded them because of a failure to lay the proper foundation for admission or to demonstrate that the documents were admissible under any other exceptions to the hearsay rule. Specifically, it ruled that the documents written by Aon's employee, Jim Eggert, had not been written within the scope of his employment, since he had not generated the commission figures himself but had obtained them

from accountants. Next, it was determined that the document written by Smith was unduly prejudicial because it bore an October 2000 date stamp, which was one year after the Pool had collapsed.

N.J.R.E. 803(b)(1) provides that a statement is not excluded by the hearsay rule if it is "the party's own statement, made either in an individual or in a representative capacity[.]" N.J.R.E. 803(b)(4) provides that a statement is not excluded by the hearsay rule if it was made "by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship[.]"

"All that is required for admission under N.J.R.E. 803(b)(4) is that the statement offered against a party be 'a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.'" Spencer v. Bristol-Meyers Squibb Co., 156 N.J. 455, 463 (1998) (quoting N.J.R.E. 803(b)(4)). Admissibility depends upon whether the information was based on "a sufficient foundation of personal knowledge," and whether the witness could have given that same testimony at a trial. Id. at 462. The Court also has noted that New Jersey has "very broad concepts of admissibility of evidence." Ibid.

(quoting In re Opinion 668 of the Advisory Comm. on Prof'l Ethics, 134 N.J. 294, 300 (1993)).

In our view, even if there were errors committed in the exclusion of Eggert's documents, any error was inconsequential. It was undisputed that Unicover received commissions as the Pool's manager, and that Aon received commissions as a subagent for the Pool and as a retrocessional insurance broker. Thus, the more reinsurance the two sold on behalf of the Pool, the higher their commissions would be. Indeed, Reliastar repeatedly informed the jury of Aon and Smith's motive to increase the flow of business into the Pool, because it would generate more commissions. Consequently, any discrete error committed by the refusal to admit the documents with specific commission figures was overcome by the jury's sure knowledge that earned commissions for selling over $1 billion of reinsurance were dramatically greater than the initially projected $250 million.

As for Smith's document, we concur in the trial court's assessment that as presented, it was excludable pursuant to N.J.R.E. 403 insofar as it contained a date in 2000, far beyond the chronological contours of the case. Moreover, given the abundance of related evidence in the record, we do not discern that an unjust result was reached.

B.

Reliastar's next line of argument involves its contention that reversible error occurred in the giving of an erroneous jury instruction on agency law, and by failing to give a curative instruction after defense counsel allegedly misstated Illinois agency law. We disagree.

Although the trial court instructed the jury concerning the fiduciary duties of an agent and subagent, Reliastar specifically argues that the trial court erred by refusing to instruct the jury that Aon and Smith, as retrocessional brokers, had a fiduciary duty —— separate from the subagency relationship —— to convey material information directly to Reliastar and the Pool, especially if that information could result in the retrocessionaires canceling the Whole Account Retrocession. The court, therefore, should have instructed the jury, as requested by Reliastar, that "[t]he law imposes a 'particular burden' on . . . a retrocessional broker," and that such a broker "must 'inform the insured of all material facts within the broker's knowledge.'"

No party is entitled to a jury charge in his or her own words. Gaido v. Weiser, 227 N.J. Super. 175, 199-200 (App. Div. 1988), aff'd, 115 N.J. 310 (1989); Mohr v. B.F. Goodrich Rubber Co., 147 N.J. Super. 279, 283 (App. Div.), certif. denied, 74

N.J. 281 (1977). Nevertheless, a proper charge is essential to a fair trial. Reynolds v. Gonzalez, 172 N.J. 266, 288 (2002). The charge "must outline the function of the jury, set forth the issues, correctly state the applicable law in understandable language, and plainly spell out how the jury should apply the legal principles to the facts as it may find them." Jurman v. Samuel Braen, Inc., 47 N.J. 586, 591-92 (1966).

"[A]n appellate court will not disturb a jury's verdict based on a trial court's instructional error 'where the charge, considered as a whole, adequately conveys the law and is unlikely to confuse or mislead the jury, even though part of the charge, standing alone, might be incorrect.'" Wade v. Kessler Inst., 172 N.J. 327, 341 (2002) (quoting Fischer v. Canario, 143 N.J. 235, 254 (1996)). "Courts uphold even erroneous jury instructions when those instructions are incapable of producing an unjust result or prejudicing substantial rights." Fisch v. Bellshot, 135 N.J. 374, 392 (1994).

Reliastar argues that AYH Holdings, Inc. v. Avreco, Inc., 826 N.E.2d 1111 (Ill. App. Ct. 2005), recognizes the duty of a subagent in the insurance industry "in precisely the same position as Aon . . . to convey material information directly to the insured." AYH Holdings involved a subagent's putative failure to disclose the insurer's unsound financial condition to

the insured. We recognize the import of the holding of AYH Holding, but find it factually and materially distinguishable from the particularized reinsurance milieu in this case.[2] Satisfied that the trial court's entire instruction set —— viewed under the totality of the circumstances —— neither negated the principles of AYH Holdings, nor diluted the jury's consideration of Aon's and Smith's overall conduct, we conclude that Reliastar's highly-refined jury instruction was unnecessary. The trial court's refusal to incorporate the requested language did not unduly prejudice the provability of Reliastar's claims and did not lead to a miscarriage of justice.

Reliastar also protests the trial court's refusal to give a curative instruction after defense counsel suggested to the jury that Reliastar could not have terminated its Pool membership even if it had discovered that its retrocessional insurance was at risk from Unicover's, Aon's, and Smith's actions, since the management agreement was irrevocable for one year. Plaintiff asserts that counsel misstated settled principles of agency law, which allow a principal to revoke an agent's authorization at

[2] Although not argued by the parties, and not a basis for our decision, we question whether, in light of the statute discussed in AYH Holdings, section 2201(b) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-2201(b), Aon and Smith are immunized from civil damages for breach of fiduciary duties in the present circumstances.

any time, even when the agreement purports to make the authorization irrevocable.

When counsel deliberately seeks to skew an argument by injecting an element that is designed to have the effect of prejudicing the rights of the other party, it is the duty of the trial court to guard against such conduct. An absence of curative instructions may "heighten[] the already damaging effect of counsel's ill-considered words and increase[] the likelihood that the jury believed counsel's remarks to have been proper." Geler v. Akawie, 358 N.J. Super. 437, 471 (App. Div.), certif. denied, 177 N.J. 223 (2003).

After objecting to defense counsel's statements, Reliastar asked the court to instruct the jury that Reliastar was entitled, as a matter of law, to terminate Unicover's and defendants' authority to act as agents, subagents or retrocessional brokers at any time. The trial court refused, stating:

> I'm not making a decision as a matter of law. You can make your arguments that under this contract they really weren't allowed to terminate it except on these conditions, and look at this, they never reached out for the other [P]ool members, they never did anything.
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> . . . .
>
> [Reliastar's attorney] can argue, [w]ell, we could have terminated the

> contract. Maybe we didn't, but we could have. We could have terminated the contract. And, yeah, we may have been subject to a breach of contract action. But it's our position that we could have terminated it. And I'm not going to tell the jury that as a matter of law they could have, or they couldn't have.
>
> . . . .
>
> You make your arguments. It's not going to be part of a legal decision by either the jury or me.

Thereafter, defense counsel argued only the following to the jury during summation:

> There is no provision in the management agreement that allows Reliastar to get out of it unilaterally, or to force Unicover Managers to stop accepting business unilaterally. It has to have unanimous consent of the other [P]ool members in order to force Unicover Managers to do anything. And it can't terminate the agreement by itself until a full year had run to March 1, 1999.

In our view, there was no material misstatement about the law. Instead, as the trial court correctly ruled, the parties were arguing simply about the factual scope of the management agreement and Reliastar's contractual ability to terminate or remove itself from the Pool. The proposed curative instruction was unnecessary.

C.

Reliastar's final arguments focus upon putative errors relating to its preclusion by the trial court in presenting evidence showing two of the three species of damages that it incurred. Because we are confident in the jury's verdict that Reliastar did not demonstrate Aon's or Smith's liability for either (1) breach of fiduciary duty or (2) aiding and abetting Unicover's breach of fiduciary duty to Reliastar, we need not address Reliastar's arguments concerning damages.

Affirmed.