**ENTRY ORDER**



SUPREME COURT DOCKET NO. 2009-027

OCTOBER TERM, 2009

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| Howard W. Loso and Hazel H. Loso | } | APPEALED FROM: |
| v. | } | Chittenden Superior Court |
| Yankee Medical, Inc. | } | DOCKET NO. S1178-06 CnC |
| | | Trial Judge: Dennis R. Pearson |

In the above-entitled cause, the Clerk will enter:

Plaintiffs Howard and Hazel Loso, who sued defendant Yankee Medical, Inc. for its employee's failure to exercise reasonable care in fitting Mr. Loso for a pair of diabetic shoes, appeal a jury verdict in favor of Yankee Medical. We affirm.

Mr. Loso is a diabetic who suffers from a condition called diabetic neuropathy, which is manifested by a diminished sense of feeling in the extremities, including the feet and toes. On October 13, 2003, Mr. Loso went to Yankee Medical to be fitted for a pair of diabetic shoes for which he had received a prescription from his podiatrist. An employee of Yankee Medical fitted Mr. Loso with a size 8.5 shoe. Although Mr. Loso complained that the shoe felt too tight, the employee re-measured his foot and assured him that it was the right size. Some time later, Mr. Loso's wife noticed that he had developed a crack along the side of his big toe. Mr. Loso discontinued wearing the shoes and scheduled another appointment with Yankee Medical for October 27, at which time he exchanged his shoes for a larger size. That same day, however, his doctor advised him to discontinue wearing the shoes and begin medical treatment. He did so, but eventually he developed an infection and had to have the toe amputated, which also required a corresponding distal bypass procedure.

In October 2006, plaintiffs sued Yankee Medical, alleging negligence, consumer fraud and loss of consortium. As part of discovery, Yankee Medical sent plaintiffs a copy of its employee's personnel file in March 2008. Six months later, one week before the scheduled trial and after the jury had been selected, plaintiffs sought to amend their complaint by adding a claim of negligent supervision. The trial court denied the motion, stating that the new claim would require plaintiffs to produce an expert to establish the standard of care, which in turn would require Yankee Medical to respond. After the close of evidence, the court dismissed the loss-of-consortium claim, ruling that plaintiffs had failed to produce any evidence to support the claim. The jury considered but rejected the negligence and consumer fraud claims, indicating in special interrogatories that Mr. Loso's own negligence was more than 50% of the cause of his injuries and that neither Yankee Medical nor its employee had expressed any misrepresentations of fact. On appeal, plaintiffs argue that the superior court erred by denying their motion to amend their complaint, excluding evidence of the employee's previous and subsequent job performance, dismissing their loss-of-consortium claim, and denying their motion for a new trial.

Plaintiffs first argue that the trial court abused its discretion by denying their motion to amend their complaint. We conclude that any error must be considered harmless, given the jury's rejection of plaintiffs' negligence claim. "[T]he tort of negligent supervision must include as an element an underlying tort or wrongful act committed by the employee." Haverly v. Kaytec, Inc., 169 Vt. 350, 357 (1999). Because the jury returned a verdict in favor of defendant on the negligence claim, plaintiffs could not have prevailed on a claim of negligent supervision. Insofar as Yankee Medical had conceded it would be liable for its employee's negligence because the employee had been acting within the scope of his employment at all relevant times, plaintiffs' proposed negligent-supervision claim was effectively subsumed within their negligence claim, which ultimately proved to be unsuccessful. Accordingly, to the extent that the court may have abused its discretion in denying plaintiffs' motion to amend, the error was harmless.

Plaintiffs next argue that the trial court erred by excluding evidence of the employee's previous and subsequent job performance. Plaintiffs wanted to bring into evidence (1) a written warning, given to the employee by his previous employer in April 2003, criticizing his attitude and job performance; and (2) notes written by Yankee Medical in the summer of 2004 criticizing the employee's attitude and job performance. The trial court allowed plaintiffs to present in evidence a contemporaneous critical note from the employer on the basis that it was marginally relevant because the jury could have believed that the note pressured the employee into hurrying fittings or made him think that the quality of his work did not matter because his termination was imminent. The court, however, concluded that the aforementioned evidence was inadmissible because it was not relevant or material to the core issue of whether the employee was negligent in this instance and because it strayed into the forbidden area of trying to prove propensity to commit the act at issue by showing other bad acts. See V.R.E. 403 (evidence, though relevant, "may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury"); V.R.E. 404(b) (evidence of other wrongs or acts "is not admissible to prove the character of a person in order to show that he acted in conformity therewith").

The trial court acted well within its discretion in making this ruling. Boehm v. Willis, 2006 VT 101, ¶ 12, 180 Vt. 615 (mem.) (noting that trial courts "enjoy broad discretion in deciding whether to admit or exclude evidence"). None of the evidence tended to establish that the employee improperly fitted Mr. Loso for a diabetic shoe on October 13, 2003. Given the absence of a link between the proffered evidence and the October 13 incident, the principal purpose to introduce the evidence would be to persuade the jury that the employee must have fitted the shoes improperly on that date because his attitude and job performance had been criticized on other occasions, albeit not with respect to fitting shoes. In this way, admission of the evidence threatened to distract the jury into an examination of the employee's general work performance rather than his conduct with regard to Mr. Loso on October 13, 2003. Cf. John A. Russell Corp. v. Bohlig, 170 Vt. 12, 23 (1999) (overruling trial court's decision to allow employer to present evidence that employee was fired for dishonesty in previous job to prove that it had terminated employee for dishonesty on this occasion).

Nor do we agree with plaintiffs that the trial court was obligated to admit the evidence under V.R.E. 406, which provides that evidence of "the habit or the routine practice of a person . . . is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit or routine practice." This rule has the potential to swallow Rule 404(b) if construed too liberally. Hence, "[a]s the Reporter's Notes to V.R.E. 406 point out, a properly established habit requires a 'uniformity and semi-automatic character.' " State v. Larose, 150 Vt. 363, 366 (1988); see 23 C. Wright & K. Graham, Federal Practice & Procedure §

5273, at 33-38 (1980) (discussing specificity, frequency, invariability, and visibility as elements of habit, and cautioning that Rule 406 seeks to admit "those kinds of repetitive acts that provide strong proof of conduct on a specified occasion without the danger of bogging down the trial in collateral issues or unfairly prejudicing the case of one of the parties"). The evidence proffered by plaintiffs does not meet these requirements. The documents refer to a variety of the employee's shortcomings with respect to four patients out of hundreds over a long period of time. The shortcomings noted in the documents are not in the nature of a uniform, semi-automatic habit or practice warranting admission under Rule 406, particularly in light of Rules 403 and 404(b). See Reporter's Note, V.R.E. 406 ("Even the evidence allowed under this rule will . . . be weighed carefully by the court to be sure that it is necessary in the individual case.").

Next, plaintiffs argue that the trial court erred by dismissing their loss-of-consortium claim at the close of evidence. According to plaintiffs, Mrs. Loso's testimony regarding her care for her husband following the surgery as well as Mr. Loso's testimony regarding his depression and loss of ability to do yard work was sufficient to support a loss-of-consortium claim. We need not determine whether the trial court should have allowed the claim to go to the jury because loss of consortium is a derivative claim that cannot survive without a finding of liability on the underlying tort. See Denton v. Chittenden Bank, 163 Vt. 62, 70 (1994) ("loss of consortium is a derivative action . . . [that] depends on the viability of the underlying tort claim"). Given the jury's verdict in favor of Yankee Medical on the negligence claim, the loss-of-consortium claim could not have survived even if the trial court had allowed the jury to consider it. Accordingly, any error on the trial court's part in dismissing the claim was harmless.

Finally, plaintiffs argue that the trial court erred by denying their motion for a new trial because no evidence supported the jury's negative response to the special interrogatory asking whether Yankee Medical or its employee made any statement or provided information concerning the sale of diabetic shoes to Mr. Loso on October 13, 2003. According to plaintiffs, each witness agreed that the employee made some representations to Mr. Loso regarding the sale of the shoes that day. We conclude that the trial court did not err in denying the motion. See Boehm, 2006 VT 101, ¶ 19 (in reviewing trial court's decision on motion for new trial, this Court will view evidence in light most favorable to jury's verdict and will accord trial court all presumptive support). In instructing the jury on the elements of the consumer-fraud claim, the trial court charged the jury that any statement made by Yankee Medical or its employee must have been "a statement or presentation of fact and not an expression of opinion or other subjective evaluation." The evidence concerning statements made by Yankee Medical's employee to the Losos could have led the jury to reasonably conclude that the statements were opinions or subjective evaluations rather than a presentation of facts. Accordingly, the trial court was not obligated to grant a new trial on this basis.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice