S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

TEDDY RAY ROBINSON

Plaintiff-Appellant,

v

CITY OF DETROIT, DETROIT POLICE DEPARTMENT, WILLIAM L. HART, FRANCIS FITZPATRICK, TIMOTHY BROUGHTON, RONALD WILLSEY, DENNIS MOORE, MICHAEL FOLEY, NICK KYRIACOU,

Defendants-Appellees.

UNPUBLISHED

No. 173002
LC No. 91-115127 NZ

Before: O'Connell, P.J., and Reilly and D.E. Shelton,* JJ.

SHELTON, J. (Dissenting).

I dissent.

Plaintiff brought this action against the City of Detroit and several police officers alleging that he was assaulted and beaten by two police officers, in part because of his homosexuality. Following a ten-day trial, the jury returned a verdict in favor of defendants. Plaintiff claims in this appeal that the misconduct of defendants' counsel was so egregious that it diverted the jury's attention from the issues involved and deprived plaintiff of a fair and impartial trial. I agree and would remand for a new trial.

The misconduct of defendant's attorney began with his opening statement and continued throughout the trial. His statements to the jury, the Court, opposing counsel and witnesses were at times uncontrollable, notwithstanding the repeated efforts of the trial judge. It became apparent that the "antics" of counsel were not merely overly exuberant advocacy. Contrary to the judge's rulings and admonishments, the transcript reveals a continual tactic of simply running on with objectionable comments and behavior while the judge was attempting to rule on objections, or even after an objection had been sustained. It reached the point where, when plaintiff's counsel

objected to the run-on tactic, the defense counsel countered with a threat to "demand the right to duel" opposing counsel. The judge recognized that counsel's tactics were deliberate:

> *THE COURT*: [Counsel], has nobody told you before that run your mouth?
>
> *[COUNSEL]*: Not what he suggested. Yes, I talk a lot. My wife tells me constantly. I mean, that's fine.
>
> *THE COURT*: All right. Well, let me be the person that - -
>
> *[COUNSEL]*: But in terms of him insulting me, to suggest that I would defy this Court's authority - -
>
> *THE COURT*: [Counsel], [Counsel], please, let this Court be the first to tell you, you run your mouth. I have sustained many objections and which you continued to make your point. You are not fooling me in terms of what you are doing. That may be your trial strategy, but you are doing it, you are going on when the Court sustains an objection. I don't question your integrity.

Specific objections were made to his cross-examination of plaintiff's witnesses, including clearly improper comments such as suggesting to an expert witness that his academic credentials from Wayne State University were only given "because you're so well liked they wanted to give you a little extra credentials to assist in your ability to bamboozle jurors." When the witness replied that such a suggestion was "outrageous," counsel stated, "You're outrageous, sir."

Plaintiff objected to defense counsel's conduct, and was sustained, 106 times during the trial. He was admonished repeatedly by the judge, to no avail. Eleven times his comments were ordered stricken and he was ordered by the judge several times to "get out of the jury box."

Counsel's physical antics included running around the courtroom during an expert's testimony, while defying the instructions of the judge:

> *[COUNSEL]*: He's not running at you, sir, he's running away from you. I don't want you to assume he's running toward you. He's running from you, okay, he's running.
>
> *[COUNSEL]*: As a matter of fact, your Honor, since he wants to say that it's so easy to grab someone, let's --
>
> *THE COURT*: No, no, no.
>
> *[COUNSEL]*: -- let him --
>
> *THE COURT*: Counsel.
>
> *[COUNSEL]*: -- try to catch me and I'm 300 pounds.

THE COURT: Counsel.

[COUNSEL]: Let's do a demo.

THE COURT: No. Please go on to your next question.

[COUNSEL]: Because we can run around this Court all day and he --

THE COURT: You're going to run out --

[COUNSEL]: -- would not catch me.

THE COURT: -- of this courtroom, counsel, if you do not continue.

During cross-examination of the plaintiff, he asked the plaintiff if gay persons "exude a special odor" and then added the following comments and behavior:

> *Q.* They don't have a special mark on their foreheads, somehow H for homosexual or anything like that, do they?
>
> *A.* No.
>
> *Q.* They don't -- I mean, you weren't -- you didn't run like this when you were running from the police (indicating) -- and let the record reflect I'm running in what would be considered an effeminate fashion -- with your wrist bent talking about, oh my, I'm being chased, you weren't running that way, were you?

Appellate courts are reluctant to disturb a jury verdict based upon attorney misconduct. An attorney's comments or behavior is ordinarily not cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. *Wilson v General Motors Corp*, 183 Mich App 21; 454 NW2d 405 (1990). If there is such deliberate misconduct, reversal is warranted if its effect was to divert the jury's attention from the issues or otherwise to control the verdict. *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119; 492 NW2d 761 (1992); *Wayne Co Road Comm'rs v GLS LeasCo*, 394 Mich 126; 229 NW2d 797 (1975).

It is, of course, the responsibility of the trial judge to attempt to limit and control attorney misconduct. See *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 103, fn 8; 330 NW2d 638 (1982). The excellent and experienced trial judge in this case valiantly and repeatedly attempted to do so. There is a point, however, when an attorney's deliberate misbehavior becomes so repetitive and egregious that it necessarily impacts the jury, notwithstanding the judge's efforts. In *Reetz, supra, pp 111-112,* our Supreme Court ordered a new trial because of attorney comments and misconduct, and stated**:**

> Our prior cases should have made clear that even isolated comments like these are always improper, even if not always incurable or error requiring reversal. However,

> when, as in this case, the theme is constantly repeated so that the error becomes indelibly impressed on the juror's consciousness, the error becomes incurable and requires reversal. We find the following statement from *Steudle v. Yellow & Checker Cab & Transfer Co.*, 287 Mich. 1, 11-12, 282 N.W. 879 (1938), to be applicable in this case:
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> > "We believe the record in the instant case shows a deliberate course of conduct on the part of counsel for plaintiff aimed at preventing defendant from having a fair and impartial trial. We think the course of misconduct was so persistently followed that a charge of the court in an effort to obviate the prejudice would have been useless."

The misconduct of defense counsel in this case is within that description. This Court should reach the same conclusion stated by the Supreme Court in *Wayne Co Rd Comm'rs v GLS LeasCo*, *supra,* p 139:

> A substantial doubt regarding fairness of the trial has been raised by the egregious and repetitive nature of the misconduct of the [appellee's] lawyer. On this record, we are not able to say that the jury was not diverted from the merits by the repetitious aspersions, nor could we say that the "mischief done" was cured by the judge's efforts.

The misconduct here was deliberate, repetitive, pervasive and egregious. The incidents described in this opinion are simply examples of comments and antics appearing throughout the transcript that turned this trial into an almost vaudevillian performance. Such buffoonery cannot be inconsequential. It is certainly not inconsequential or harmless when it stoops to a level which includes running around the courtroom daring a witness to catch him, mocking and demeaning gay persons, accusing a respected University of padding an expert's qualifications to "bamboozle" a jury, calling the plaintiff a "devil," and flagrantly ignoring the judge's orders to cease such behavior.

Our legal processes, and in particular our jury system, are under scrutiny from a skeptical citizenry that questions whether verdicts are the result of a rational assessment of the facts and a fair application of the law or instead the result of staged performances by attorneys designed to produce biased and totally emotional jury responses. Justice must be obtained for our citizens by a rational and ordered legal process and not by a staged "show" by an attorney, which is uncontrolled and indeed uncontrollable by the trial judge.

This Court has an obligation to insure, on review, that blatant attorney misconduct is not allowed to skew the outcome of the jury process. This is such a case.

/s/ Donald E. Shelton