STATE OF MICHIGAN

COURT OF APPEALS

DOROTHY CAMARDA and JOSEPH CAMARDA,

Plaintiffs-Appellees,

and

FRIENDLY JEEP EAGLE, INC.,

Intervening Plaintiff,

v

BORMAN'S, INC., d/b/a FARMER JACK and GREAT ATLANTIC AND PACIFIC TEA COMPANY,

Defendant-Appellant.

UNPUBLISHED
July 18, 1997

No. 191715
Macomb Circuit Court
LC No. 92-001063-NO

AMENDED

Before: MacKenzie, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order awarding plaintiffs costs incurred by the trial court's declaration of mistrial. We affirm.

Plaintiff Dorothy Camarda (plaintiff) slipped and fell in a Farmer Jack grocery store owned by defendant. The fall resulted in a back fracture that impaired plaintiff's ability to stand and walk. This lawsuit followed. The case proceeded to a jury trial that ended in a mistrial based on remarks made by defense counsel in his opening statement. Plaintiffs' motion for costs associated with the mistrial was postponed by the court, pending a second trial. The second jury trial lasted through August, 1995. After the jury reached its verdict, but before the verdict was entered on the record, plaintiffs and defendant entered into a "high-low" agreement. A written release was filed the following October. The trial court subsequently entered an order granting mistrial costs and requiring that defense counsel pay the costs to plaintiffs' counsel. It is that order from which defendant appeals.

Defendant first argues that the trial court abused its discretion in declaring a mistrial based on defense counsel's opening statement referring to plaintiffs' attorneys and their colleagues as the "dream team," a phrase applied to O.J. Simpson's criminal defense team. We disagree. Counsel's references occurred at a time when media coverage of Simpson's trial on double murder charges was extensive and pervasive. Counsel tied the phrase to the Simpson trial during voir dire by asking prospective jurors if any had watched the trial and by referring to Simpson defense attorney Johnnie Cochran as "Johnnie Cockroach." Further, in each of his references to the "dream team," defense counsel linked the phrase to an allegation that plaintiffs' counsel and medical witnesses had manipulated the evidence concerning plaintiff's treatment to exaggerate her injuries. After hearing plaintiffs' request for a curative instruction, the trial court noted that counsel's remarks left it with the definite impression that everyone on plaintiffs' side was conspiring to fabricate plaintiffs' case. On this record, we must conclude that defense counsel's references to plaintiffs' lawyers and medical witnesses as the "dream team" were irrelevant, disparaging, and accusatory, and that they were of such a nature as to deflect the attention of the jury from the issues involved and deprive plaintiffs of a fair trial. *Wayne Co Road Comm'rs v GLS LeasCo, Inc*, 394 Mich 126, 138; 229 NW2d 797 (1975). The trial court did not abuse its discretion in granting plaintiffs' request for a mistrial. *Guider v Smith*, 157 Mich App 92, 101; 403 NW2d 505 (1987); *Vaughan v Grand Trunk Western R Co*, 153 Mich App 575, 579; 396 NW2d 440 (1986).

In two related arguments, defendant contends that, even if the mistrial was properly granted, the trial court abused its discretion in awarding plaintiffs costs incurred by the declaration of mistrial. First, defendant claims that the court lacked authority to award costs under MCL 600.2401; MSA 27A.2401 and MCR 2.625(A)(1) because plaintiffs' case was not tried to a conclusion. The claim is without merit. The court postponed ruling on the costs issue until after plaintiffs' case had gone to trial and the jury had returned a verdict for plaintiff on the record. Compare *Carmack v Cichon*, 42 Mich App 233, 235; 201 NW2d 669 (1972). While defendant correctly asserts that the money plaintiffs actually received was paid by defendant pursuant to the high-low agreement, the parties reached that agreement after plaintiffs' case went to the jury. The high-low agreement was not for a sum certain, and thus was not a final settlement and did not conclude the proceedings. See 3 Martin, Dean & Webster, Michigan Court Rules Practice (2d ed), p 730. Rather, the terms of the high-low agreement stated that the jury's verdict would control the amount that defendant would have to pay plaintiffs. Under these circumstances, we are satisfied that plaintiffs' case was tried to a conclusion and that the amount of damages awarded was a product of the jury's verdict rather than a term of a "settlement" for purposes of MCR 2.625. Accordingly, the trial court had the authority to award mistrial costs and we find no abuse of discretion. *Century Dodge, Inc, v Chrysler Corp*, 154 Mich App 537, 545; 398 NW2d 1 (1986).

Next, defendant argues that the trial court had no authority to order the payment of mistrial costs to plaintiffs because the parties did not intend mistrial costs to be assessed separately from the costs made part of the sum paid by defendant to plaintiffs pursuant to the high-low agreement and the written release. Again, we disagree. Both the oral high-low agreement and the written release are silent as to the payment of mistrial costs. See *Young v Robin*, 146 Mich App 552, 559; 382 NW2d 182 (1985). There is no language from which we may ascertain the intention of the parties. The terms of the high-low agreement stated only that mediation sanctions were included in the amount paid to plaintiffs.

The release terms free defendant from liability stemming only from plaintiff's accident, not from misconduct during the litigation. Because neither the high-low agreement nor the release address mistrial costs, we conclude that the trial court did not abuse its discretion in awarding mistrial costs separately from the settlement amount. *Century Dodge, supra* at 545.

Finally, defendant argues that the trial court abused its discretion in awarding attorney fees as part of the mistrial costs without finding the fees reasonable under the factors outlined in *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973). We disagree. Plaintiffs presented the trial court with testimony and affidavits establishing that the fees charged by plaintiffs' counsel for his trial preparation work before the declaration of mistrial and the witness and clerical costs incurred by the declaration were fair, reasonable, and average for an attorney of counsel's standing and experience and in light of the settlement amount plaintiffs received. *Jernigan v General Motors Corp*, 180 Mich App 575, 587; 447 NW2d 822 (1989). Moreover, defense counsel acknowledged plaintiffs' counsel's litigation skills and waived the opportunity to hear testimony on the actual number of hours spent by plaintiffs' counsel preparing for the aborted trial. The trial court also expressly found that "all of the costs that have been established…is [sic] a fair representation of what someone of [counsel's] intelligence, practice and years of experience would be paid." We conclude that the trial court did not abuse its discretion in making the findings of fact underlying its award of attorney fees to plaintiffs incurred because of the declaration of mistrial. *Hovanesian v Nam*, 213 Mich App 231, 238; 539 NW2d 557 (1995); *Jernigan, supra* at 587.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Janet T. Neff
/s/ Jane E. Markey