

STATE OF MICHIGAN
COURT OF APPEALS

FAYE ANN DUROCHER and HOWARD
DUROCHER,

UNPUBLISHED
September 17, 1999

Plaintiffs-Appellees,

v

No. 204356
Bay Circuit Court
LC No. 92-003419 NO

CENTRAL MICHIGAN RAILWAY COMPANY,

Defendant-Appellant.

and

STRAITS CORPORATION, D. M. CENTRAL
TRANSPORTATION, WILLIAM EWALD, MARY
EWALD, JEFFREY KUSCH, and CAROL KUSCH,

Defendants.

Before: Markman, P.J., and Griffin and Jansen, JJ.

JANSEN, J. (concurring in part and dissenting in part).

I agree with the lead opinion's recitation of the facts and its analyses and conclusions regarding issues I and II raised by defendant. I respectfully dissent with regard to the decision to reverse and remand for a new trial on the finding that plaintiff's counsel's closing argument was so improper, inflammatory, and unfairly prejudicial as to deny defendant a fair trial. The trial court denied defendant's motion for a mistrial on this basis and I would affirm that ruling. Therefore, I would affirm the jury's verdict.

"Generally, this Court will not interfere with a trial court's disposition of a motion for mistrial unless there was an abuse of discretion which results in a miscarriage of justice so that the party has not had a fair and impartial trial." *Vaughn v Grand Trunk W R Co*, 153 Mich App 575, 579; 396 NW2d

440 (1986). Our Supreme Court stated in *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982):

When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted. Tainted verdicts need not be allowed to stand simply because a lawyer or judge or both failed to protect the interests of the prejudiced party by timely action. [Accord, *Rogers v Detroit*, 457 Mich 125, 147; 579 NW2d 840 (1998)].

Further, an attorney's comments usually will not be cause for reversal unless the comments indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996). Reversal is required only where the prejudicial statements of an attorney reflect a studied purpose to inflame or prejudice the jury or deflect the jury's attention from the issues involved. *Id.*

The first challenged comments relate to the corporate background of the defendant. Defendant did not object to any of these comments at trial. Moreover, a reading of the remarks, fully and in context, reveals that they are background information relating to the formation of defendant and its acquisition of the bridge. Plaintiffs' counsel tied in this information with the fact that the corporation that owned defendant did not spend money on safety features for the bridge and that another bridge on the Saginaw River (owned by the same owner of defendant) did have such safety features. Because this case involved an allegation that defendant failed to properly maintain the bridge in a safe manner, I conclude that counsel's comments were proper based on the evidence and plaintiffs' theory of the case.

Defendant also asserts that plaintiffs' counsel improperly charged a certain witness to be lying. Defendant did not object to this comment at trial. The witness, Richard Van Buskirk, was called by plaintiffs as an adverse witness and was employed by defendant at the time of the accident. Van Buskirk initially testified that he was not a shareholder nor had any ownership interest in defendant. When confronted with the fact that the articles of incorporation listed Van Buskirk's name and that he was a shareholder, Van Buskirk later changed his testimony and admitted that he had one share with defendant. Because counsel's argument that Van Buskirk intentionally lied was based on Van Buskirk's own testimony and other evidence presented at trial, the argument was not improper. *Reetz, supra*, p 109; *Firchau v Foster*, 371 Mich 75, 78; 123 NW2d 151 (1963); *Wilson v General Motors Corp*, 183 Mich App 21, 27; 454 NW2d 405 (1990).

Defendant also challenges a comment made about one of defendant's expert witnesses as being a "\$10,000 hired gun." Defendant did not object to this comment at trial. Although I strongly

discourage any attorney from denigrating another in this manner at trial, I do not believe that this isolated comment necessitates reversal, especially in the face of a lack of objection. See, e.g., *Rogers, supra*, p 147 (no trial misconduct where the plaintiff's counsel referred to defense counsel as "slick," a "slick talker," "smooth," and "smoothtalking"); *Firchau, supra*, p 78 (no prejudicial error where the plaintiff's counsel referred to defendant as a "leech" and a "parasite"); *Hunt, supra*, pp 97-98 (no error requiring reversal where defense counsel referred to medical witnesses as litigation doctors who were paid a large amount of money, used extremely colorful language in the form of memorized speeches, and gave pat answers).

Defendant next challenges references to damages made by plaintiffs' counsel. Two references were made to damages. First, plaintiffs' counsel was arguing that there was much more to damages than the loss of three fingers and "what did the one juror say, [defense counsel] wisely knocked her off, but she's the young gal who--." Defense counsel immediately objected and the trial court sustained the objection and instructed the jury to disregard it. Plaintiffs' counsel then made reference to another case, stating, "there's a jury out in L.A. that gave 8.5 million dollars--." Defense counsel again objected, and the trial court sustained the objection and instructed the jury to disregard it. Under these circumstances, the trial court cured any error and the comments, although improper, do not require reversal. Cf. *Reetz, supra*, p 106 (seven references to large awards in other cases required reversal where the trial court failed to instruct the jury to ignore the references).

Defendant also challenges comments made concerning defendant's status as a corporation and its wealth. These include counsel commenting on defendant's "[c]allous disregard; the public be damned; our profits are first." Plaintiffs' counsel also stated:

Again, that – that glaring arrogance of – of disregard for the public is what this trial's all about. You can't find better examples of it. It's a very selfish perspective and it certainly has a[n] anti-community ring. It's like saying Faye Durocher doesn't count. Her life doesn't matter. That's why we don't concern ourselves about hazards to the boating public of smaller craft, because they don't matter. Just our business; just our profits.

Other comments were made by plaintiffs' counsel concerning the bridge owner and his wealth. More specifically, plaintiffs' counsel referred to the owner as an outsider, that the corporation owning the bridge was an outsider, and that they jury should protect the community from outsiders. Plaintiffs' counsel asked for a sizeable verdict and that a large verdict might "wake up Charles Pinkerton the III and let him know that the community values are . . . followed in this town." After objection by defense counsel that this was an improper request for punitive damages, plaintiffs' counsel denied that such was the case and stated that the award was to compensate his clients for their loss and perhaps to "convince Mr. Pinkerton to put a protective pier or a safety barrier around the south end of that bridge."

Not all of these comments were objected to at trial, however, the trial court only sustained the objection to counsel's comment denoting defendant as a community outsider. Comments concerning corporate nature and wealth are always improper; however, they do not necessarily require reversal. *Reetz, supra*, p 111. Read in context, these comments were tied in to the allegation that defendant was

aware of the hazard of the bridge before Faye Durocher's accident, but did nothing to make the bridge more safe. Moreover, the comments were not "constantly repeated so that the error becomes indelibly impressed on the juror's consciousness, [becoming] incurable and requir[ing] reversal." *Id.*

Defendant also challenges plaintiffs' counsel's statement, "Now, I mean, when you really look at it, it's clear that Central Michigan Railway was set up as some kind of a laundering de – device for – for D and M, but I – you know, sort it out, I don't know. You're the fact finder. It's interesting to note these little things, though." The trial court overruled defendant's objection to this statement. Defendant's dispute with this statement is that it cast defendant as a criminal enterprise. Although I agree with defendant that the statement is highly improper, in the context of this ten-day trial in which fifteen witnesses testified, we cannot conclude that this isolated statement indicates a deliberate course of conduct by plaintiffs' counsel aimed at preventing defendant from having a fair and impartial trial. *Reetz, supra*, pp 111-112. Moreover, I note that following defendant's objection to the statement, plaintiffs' counsel responded to the trial court that he was not suggesting that defendant was engaging in criminal conduct. Accordingly, this statement does not amount to error requiring reversal.

Finally, I note that the trial court instructed the jury that "[s]ympathy must not influence your decision, nor should your decision be influenced by prejudice regarding . . . any other factor irrelevant to the rights of the parties," and that the "corporation in this case is entitled to the same fair, unprejudiced treatment as an individual would be under like circumstances and it's your duty to decide the case with the same impartiality you would use in deciding a case between individuals." The trial court also instructed the jury that "[a]rguments and statements of the attorneys aren't evidence and you should disregard anything said by an attorney which was not supported in your opinion by the evidence or by your own general knowledge and experience." These instructions served to dispel any prejudicial effect of the remarks made at trial by plaintiffs' counsel. *Rogers, supra*, p 149; *Wilson, supra*, p 27.

Ultimately, after reviewing the record as a whole, I cannot conclude that plaintiffs' counsel's comments were so unfairly prejudicial that defendant was denied a fair trial. There was a great deal of evidence put before the jury in this ten-day trial and the jury's verdict is amply supported by the evidence. The jury's verdict of \$1,010,000 in favor of the Durochers was substantial, but the jury also found Faye Durocher to be sixty percent comparatively negligent. The jury was obviously not swayed by plaintiff's counsel's comments and followed the trial court's instructions. Moreover, the trial court, who heard and observed plaintiff's counsel, was clearly in a better position than this Court to determine whether the comments prejudiced defendant to the extent that it was denied a fair trial. Any error in plaintiffs' counsel's conduct was harmless and the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

I would affirm.

/s/ Kathleen Jansen