

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MARY EDDINS, Personal Representative of the  
Estate of CLARENCE EDDINS,

UNPUBLISHED  
April 25, 1997

Plaintiff-Appellant,

v

No. 187762  
Wayne Circuit Court  
LC No. 93-326217 NH

BON SECOURS OF MICHIGAN HEALTH  
CARE SYSTEM, INC, and MICHAEL MILLER,  
M.D.,

Defendants,

and

LUIS M. CAMERO, M.D. and DR. MOHD JAFRI,

Defendants-Appellants.

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Before: Cavanagh, P.J., and Wahls and White, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right the June 21, 1995, order of the Wayne Circuit Court entering judgment of no cause of action in favor of defendants, Dr. Luis Camero and Dr. Mohd Jafri. We reverse and remand for a new trial.

Plaintiff raises multiple issues on appeal; however, we find one to be dispositive. Plaintiff argues that the trial court erred by denying her motion for mistrial based on defense counsel's improper comments. We agree.

When reviewing asserted improper conduct by a party's lawyer, this Court must first determine whether the lawyer's action was error and, if so, whether the error requires reversal. A lawyer's comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. Reversal may also be required where counsel's remarks

were such as to deflect the jury's attention from the issues involved and where they had a controlling influence upon the verdict. *Wilson v General Motors Corp*, 183 Mich App 21, 26; 454 NW2d 405 (1990).

Generally, counsel may discuss the character of witnesses, the probability of the truth of testimony given on the stand, and may, when there is any reasonable basis for it, characterize testimony. *Kern v St Luke's Hosp Ass'n of Saginaw*, 404 Mich 339, 353-354; 273 NW2d 75 (1978). However, witnesses should not be subjected to personal attacks and unsubstantiated insinuations. *Wayne Co Bd of Road Comm'rs v GLS LeasCo*, 394 Mich 126, 134; 229 NW2d 797 (1975). Each party is entitled to present its case on the merits, free from remarks of opposing counsel which may prejudice the jury and divert its attention from the real issues. *Id.* This Court will require a new trial when an attorney, through questioning or argument, shows a studied purpose to prejudice the jury. *Wilson v Stilwill*, 411 Mich 587, 605; 309 NW2d 898 (1981).

The Supreme Court has addressed whether the comments of defense counsel deprived the plaintiff of a fair trial in three cases. In *Wayne County Bd*, *supra*, and *Kern v St Luke's Hosp Ass'n of Saginaw*, 404 Mich 339 (1978), the court held that the conduct of counsel toward the opponents' witnesses was so egregious as to deprive the losing parties of a fair trial. In *Wayne County Bd*, counsel repeatedly belittled the defense witnesses through innuendo and unfounded accusations that they were lying. In *Kern*, defense counsel repeatedly indicated that the plaintiffs' expert witnesses were "professional experts" who were in collusion with each other and whose testimony had been "bought," despite the absence of evidence as to the charges. However, in *Wilson v Stilwill*, *supra*, the Court found no error requiring reversal. The court concluded that defense counsel's questioning of the expert witness did not harass or belittle him; there were no accusations of lying; and in contrast to the repetitive comments in *Wayne County Bd* and *Kern*, there was only a single improper comment during closing arguments.

Most medical malpractice cases involve a "battle of the experts." Because of its relevance to credibility, it is proper to cross-examine an expert regarding the frequency with which he testifies in court or is otherwise involved in lawsuits. See *Wilson v Stilwill*, *supra* at 599-600. Furthermore, it is not improper to characterize an expert as a professional witness when such a characterization is supported by the evidence. *Heins v Detroit Osteopathic Hosp Corp*, 150 Mich App 641, 644-645; 389 NW2d 141 (1986). However, defense counsel is not entitled to harass or belittle a witness, or to make unsubstantiated accusations that the witness is lying. *Id.* at 606.

After carefully reviewing the record, we conclude that defense counsel's comments indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. See *Wilson v General Motors Corp*, *supra*. While defense counsel did not frequently use the word "lying," as counsel in *Wayne County Bd* did, his remarks certainly implied that the witnesses were lying. Counsel's characterization of Drs. Kaufman and Singer as "professional witnesses" suggests a studied purpose to prejudice the jury.<sup>1</sup> Counsel's insinuation that Dr. Kaufman intentionally gave lengthy responses in order to increase his fee for testifying was both unnecessary and irrelevant. Moreover, counsel's repeated sarcastic references to both Dr. Kaufman's comment about being "an advocate for the truth" and Dr.

Spitz' former comment that he would dance in the nude for \$1000, including the reference to Dr. Spitz as "Spitz that thing," constitute belittlement of the witnesses. The repetitive nature of the unwarranted attacks increased the possibility of prejudice. Cf. *GLS LeasCo*, *supra* at 130-131.

We recognize that plaintiff did not object to all the comments she now complains of. With regard to the comments to which plaintiff did object, the trial court struck the challenged remarks. Nevertheless, we believe that a new trial is appropriate because counsel's conduct was deliberate and persistent, and what occurred may have caused the result or played too large a part and therefore denied plaintiff a fair trial. Because we cannot say that the result was not affected, we conclude that plaintiff is entitled to a new trial. See *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982).

Defendant Jafri argues that the verdict in his favor should not be disturbed because the improper remarks were not made by, or attributable to, him but rather were made by counsel for Defendant Camero. However, because the improper conduct may have tainted the entire trial, and Defendant Jafri benefited from that conduct, we reverse the verdict as to both defendants.

Reversed and remanded for a new trial. We do not retain jurisdiction. Plaintiff being the prevailing party, she may tax costs pursuant to MCR 7.219.

/s/ Mark J. Cavanagh

/s/ Myron H. Wahls

/s/ Helene N. White

<sup>1</sup> Dr. Kaufman testified that he received less than fifteen percent of his income from testifying in medical malpractice cases. Dr. Singer testified that approximately eighty percent of his professional time is devoted to the actual practice of medicine, and only fifteen to twenty percent is spent testifying and reviewing medical records for attorneys. Compare *Heins*, *supra* (stating that characterizing a doctor as a professional witness was not inappropriate when the doctor testified that his practice was limited to evaluations only).