STATE OF MICHIGAN

COURT OF APPEALS

KATHLEEN WINTER,

Plaintiff-Appellee,

v

FITNESS USA HEALTH SPAS CORP.-FLINT/LANSING,

Defendant-Appellant.

UNPUBLISHED
July 22, 1997

No. 188648
Genesee Circuit Court
LC No. 94-027472 CL

Before: Sawyer, P.J., and Saad and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from a jury's verdict against it in the amount of $225,000.00. We reverse.

Plaintiff filed an age discrimination suit pursuant to the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, when defendant discharged her after seventeen years of employment. Plaintiff was thirty-seven years of age when she was discharged, and her replacement was thirty-one years of age. Defendant contended that it discharged plaintiff because her sales statistics were consistently below average. The jury found that age was one of the motives or reasons that made a difference in defendant's decision to discharge plaintiff.

Defendant argues that during opening and closing arguments plaintiff's attorney repeatedly interjected comments concerning defendant's alleged wealth, greed, and brutal corporate nature, and these comments deprived defendant of a fair trial. Defendant preserved this issue for our review by filing a motion in limine to preclude the introduction of evidence regarding its wealth, financial condition, or power, moving for a mistrial after plaintiff's opening argument, and filing a motion for new trial, all of which the trial court denied. After thoroughly reviewing the record in this case, we agree that error requiring reversal occurred, and a new trial is warranted.

Whether to grant a motion for new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *Beasley v Washington*, 169 Mich App 650, 655; 427 NW2d 177 (1988). A new trial may be granted on all or some of the issues when the substantial rights of a party were materially affected and there was misconduct of the prevailing party. MCR 2.611(A)(1)(b). Objectionable comments made by counsel which were designed to, and which undoubtedly did, influence the jury improperly and unfairly during trial are grounds for a new trial. *Willoughby v Lehrbass*, 150 Mich App 319, 333-334; 388 NW2d 688 (1986).

In *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 110-111; 330 NW2d 638 (1982), the Michigan Supreme Court held that even isolated comments that cast a corporation as wealthy, greedy, unfeeling, and powerful, are always improper, although they do not always require reversal. The error becomes incurable and thus requiring reversal when the theme is constantly repeated, so that the error becomes indelibly impressed upon the jurors' consciousness. *Id.* The plaintiff's attorney in *Reetz* commented during closing argument that he was dedicated to representing only individuals and not corporations, the defendant corporation cared nothing about the plaintiff's welfare, and the defendant could afford the best of everything. The attorney also made references to George Steinbrenner III, the owner of the Yankees baseball team, who was chairman of the board of defendant's parent corporation although not personally a party in the case. The Supreme Court noted:

> The effect of these comments was to create in the minds of the jurors an image of Kinsman as an unfeeling, powerful corporation controlled by a ruthless millionaire. Even a juror who harbored no prejudice against corporations or millionaires might have been swayed by these inflammatory remarks to alter his view of the evidence.
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> 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. [*Id.* at 111.]

The Supreme Court further found that the record "shows a deliberate course of conduct on the part of counsel for plaintiff aimed at preventing defendant from having a fair and impartial trial," *Id.*, citing *Steudle v Yellow & Checker Cab & Transfer Co*, 287 Mich 1, 11-12; 282 NW 879 (1938), and ordered a new trial even though the defendant had not objected at trial to the comments from plaintiff's attorney.

Other Michigan cases have followed the holding in *Reetz*. For example, in *Duke v American Olean Tile Co*, 155 Mich App 555; 400 NW2d 677 (1986), the plaintiff's attorney remarked several times about the defendant's corporate nature and wealth. He also argued that a substantial verdict for plaintiff was required because "money talks" and "if you return a substantial verdict against the defendants, they won't snicker at you." *Id.* at 563. This Court called these comments one of three independent grounds for reversal of the jury's verdict for plaintiff, finding that the comments evidenced

"a deliberate course of conduct on the part of counsel for plaintiff aimed at preventing defendant from having a fair and impartial trial." *Id.* at 562.

Similarly, in *Fellows v Superior Products Co*, 201 Mich App 155; 506 NW2d 534 (1993), the trial court erroneously allowed the plaintiff to introduce evidence to support his claim for exemplary damages. This Court determined that striking the exemplary damages award from the verdict was insufficient to eradicate the prejudice suffered by the defendant because the proceedings had been tainted by the improperly admitted evidence that tended to portray the defendant as "a wealthy and callous corporation that deserved to be punished with a substantial judgment." *Id.* at 159. Instead, this Court reversed the jury's verdict and remanded for a new trial.

In the present case, plaintiff's counsel commented during opening statement that defendant corporation was owned by William Hubner, who "has various corporations that own these various Fitness USA's across the state." Plaintiff's attorney advised the jury that "Fitness USA is not a public company like General Motors or Chrysler. Its stock is not sold on the (inaudible) or the New York Stock Exchange. It's a private empire of Mr. Hubner." Moreover, the company was "making good money throughout the time [plaintiff] was employed there," and "had a good profit margin."

In closing argument, plaintiff's counsel went further in portraying defendant as a wealthy and callous corporation, by making the following comments:

> This was an atmosphere more similar to a modeling studio or a Hollywood. You could see that flavor run through the trial. Everybody seemed to be so good-looking. People were so obsessed with greed and money, and there was this shocking ratio of young people all over the place.
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> If we go gather all the Fitness USA managers into a conference room, everybody there would be under 40, virtually. Somebody over 40 would be like a – be like an endangered species. So the general atmosphere was looks and money and greed, and the numbers, the statistical numbers, show a vast disproportion, a vast disproportion of young people.
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> [A]s to the proposition that this company intentionally took age into account before they hired, and this was at least a partial explanation of the reason why they had so many young people there and harkening to our common sense, this greed, this unremitting, insatiable greed for money goes hand in hand with the worship of looks and young women. We see that in all our lives that greed over money walks together with unthinking worship of youthful female beauty.
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That's what happens when money is placed on too much of a pedestal. That's what happens when the smirking face of greed is everywhere in a business. People start to stop thinking about other people's feelings. People start to treat people wrong. Sensitivity is lost for the unrelenting and unconscionable pursuit of money, and people start speaking crudely and viciously about other people, like don't hire that fat pig, enroll her, or she's effin 40. Get her out of here. That's what can happen in a super high pressure, low volley, high volley, low price sales atmosphere, like you saw from Fitness USA.

* * * * *

It's time for her to [get] off her knees and enjoy justice, 'cause she showed you. Vindicate her. Strike this discharge down from this courthouse today. We in Genesee County, the Bethlehem of labor justice, will not let someone be treated like this after 17 years. . . .

* * * * *

And I ask you to speak, to ring the bell loud today. Don't give half justice. Give full justice. Speak in a language they understand, money. That's the only thing that can be done today. Because Fitness USA should not be able to look at this case as just oh, we got rid of her, paid a little money, it was fine.

* * * * *

But when you – if you agree with me, if you agree there is liability when you consider damages, think about what happened to her. Think about the brutality. Think about the greed. And tell them that you're not going to allow it to happen. Tell them in the language that they understand.

We are persuaded that these comments, deliberately injected into the plaintiff's opening and closing arguments, were improper and denied defendant a fair trial. We reject plaintiff's argument that defendant put its overall financial condition at issue by claiming that plaintiff's low sales were the reason for her termination. In this age discrimination suit, defendant was obliged to present its nondiscriminatory reasons for discharging plaintiff after seventeen years of employment. Defendant noted that plaintiff's sales record was among the poorest of its managers, and it therefore dismissed her. By so doing, we do not find that defendant opened the door to comments about its greed and insensitivity or its corporate nature. Plaintiff deliberately injected these comments into the proceedings to inflame the jury. As such, the comments were improper.

The trial court abused its discretion in denying defendant a new trial based on these comments from plaintiff's attorney. Generally, this Court will not reverse unless the alleged misconduct by an attorney evidences a deliberate course of conduct on the part of the offending attorney aimed at preventing the opposing side from receiving a fair and impartial trial. *Guider v Smith*, 157 Mich App

92, 101; 403 NW2d 505 (1987). We find such a deliberate course of conduct in the present case. The remarks of counsel "were of such a nature as to deflect the attention of the jury from the issues involved and had a controlling influence upon its verdict." *Id.*

Because we are vacating the jury's verdict and remanding for a new trial based on these comments by plaintiff's counsel, we need not address defendant's remaining issues.

Reversed and remanded for new trial. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Hilda R. Gage