STATE OF MICHIGAN

COURT OF APPEALS

ELEANORE MICOL, Personal Representative of the Estate of EUDORA RUTHERFORD,

Plaintiff-Appellee,

v

LENAWEE MEDICAL CARE FACILITY and LENAWEE COUNTY,

Defendants-Appellants.

UNPUBLISHED
May 25, 2001

No. 220836
Lenawee Circuit Court
LC No. 97-007371-NH

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

PER CURIAM.

Defendants appeal as of right from a judgment entered in favor of plaintiff following a jury trial. We affirm.

I

Defendants first argue that they are entitled to a JNOV or a new trial because of the references plaintiff made to defendants' negligence during the course of trial. Defendants contend that, pursuant to SJI2d 17.01, plaintiff was prohibited from mentioning defendants' negligence to the jury because they had admitted liability in the death of plaintiff's decedent. Defendants also rely on the comment section of SJI2d to support their argument. The trial court instructed the jury as follows:

> Ladies and gentlemen, in this case there are two separate issues in this case for you to decide. In the first instance the defendant has admitted that it is liable to plaintiff to any injury or damage which it caused. You are to decide in this particular case the admission of liability was made and presented to you as it relates to the fall that the plaintiff suffered, Mrs. Rutherford, in this particular case. You are to decide only what injuries, damages were caused by the defendant and the damage to be awarded to the plaintiff for such injuries or damage.

There was no violation of the principle set out in the comment to SJI2d 17.01, because the jury was not permitted to consider the question of defendants' negligence. *Gore v Rains & Block,* 189 Mich App 729, 737-738; 473 NW2d 813 (1991). The court limited the jury's consideration of

the testimony in question and precluded the jury from considering the question of defendants' liability. *Id.* at 738. If some of the testimony elicited from witnesses by plaintiff constituted evidence related to defendants' judicial admission, any error arising out of the admission of such evidence was harmless as defendants have failed to demonstrate how they were prejudiced by this testimony. *Id.*

Defendants allege that they were prejudiced because the conduct of plaintiff's attorney presented them with a "Hobson's Choice." Specifically, defendants state that they were forced to respond to plaintiff's inaccurate recitation of the particulars of their negligence (i.e., that Rutherford was actually tied to a toilet) or remain silent and have an inaccurate description of the particulars of defendants' negligence. However, in their brief, defendants acknowledge that, on the majority of the occasions that plaintiff attempted to inject the issue of defendants' negligence into the proceedings, defendants objected and the trial court gave the jury a limiting instruction. Thus, in light of the trial court's instruction to the jury to focus only on the issues of causation and damages, there is no error requiring reversal. *Id.*

II

Next, defendants argue that they are entitled to a new trial on the grounds that plaintiff argued the existence of a cover up in closing arguments. When reviewing asserted improper comments by an attorney, the reviewing court must first determine whether the attorney's actions were error and, if they were, whether these errors require reversal. *Cox v Flint Bd of Hospital Managers (On Remand),* 243 Mich App 72, 89; 620 NW2d 859 (2000). A lawyer's comments will usually not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 191-192; 600 NW2d 129 (1999). Our review of the record does not support defendants' contention that plaintiff's counsel engaged in any such course of conduct.

Defendants mention three instances where plaintiff accused defendants of engaging in a cover up. The first instance was during plaintiff's opening argument. The second instance occurred during the testimony of plaintiff's husband. Finally, defendants argue that a plethora of statements made by plaintiff during closing arguments were improper.

In analyzing these remarks, the first step is to determine if there was error. *Reetz v Kinsman Marine Transit Co,* 416 Mich 97, 102-103; 330 NW2d 638 (1982). This was a hotly contested and emotionally charged trial which the trial court recognized and carefully controlled. There were a number of occasions when the court admonished counsel for plaintiff and defendants about conduct as well as forbidden areas of inquiry or argument. Prior to closing arguments, the court warned plaintiff and defendants that any reference to defendants' negligence by either party would result in mistrial. The brief testimony of plaintiff's husband regarding a cover up led to an admonishment of plaintiff's counsel. The trial court acknowledged that both attorneys felt strongly about their case and both advocated vigorously which is clear from the record; neither attorney presented his case to the jury blandly.

However, any prejudicial effect which may have been caused by plaintiff's comments was diffused when the court gave the jury its instructions. The court told the jury that the evidence the jury was to consider consists of the sworn testimony of the witnesses and the exhibits offered. *Reetz, supra* at 106. Further, the court informed the jury that the arguments, statements, and remarks of the attorneys were not evidence. When the court denied defendants' motion for JNOV, or in the alternative a new trial, it informed defendants that it felt that any errors made by the attorneys were cured by the instructions it gave the jury. Also, the court told defendants that it agreed with the jury's verdict.

Regarding the closing argument by plaintiff's counsel, it is the trial judge who has experienced the drama of the trial and is in the best position to determine whether the jury's verdict was motivated by such impermissible considerations as passion, bias, or anger. *Phinney v Perlmutter*, 222 Mich App 513, 538; 564 NW2d 532 (1997). Therefore, since defendants have failed to show that plaintiff's comments were a deliberate course of conduct aimed at preventing a fair and impartial trial or that plaintiff's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict, defendants are not entitled to a new trial. *Ellsworth, supra* at 191-192.

III

Next, defendants contend that they are entitled to a new trial because plaintiff allegedly referred to defendants' expert witnesses as paid experts during closing arguments. Again, we disagree.

In response to defendants' argument, plaintiff argues that both witnesses testified that they were being paid for their testimony. In *Heins v Detroit Osteopathic Hosp*, 150 Mich App 641; 389 NW2d 141 (1986), the plaintiff alleged that the defendant improperly referred to the plaintiff's expert witness as a paid expert. In holding that the defendant's comments were proper, this Court stated:

> Counsel's characterization of Dr. Granger [the plaintiff's expert witness] as a professional witness was not inappropriate, as Dr. Granger testified that his practice was indeed limited to evaluations only. [*Id*. at 644-645; see also *Hunt v Freeman*, 217 Mich App 92, 97-98; 550 NW2d 817 (1996).]

Similarly, in the present case, plaintiff's characterizations of defendants' expert witnesses as professional witnesses were not improper. Dr. Pedell acknowledged that he testifies for parties who are defendants in virtually every case in which he is asked to testify. Further, Dr. Faremouth testified that he was being paid for his testimony. Moreover, even if plaintiff's references were improper, any prejudice was alleviated when the court informed the jury that the arguments, statements, and remarks of the attorneys were not evidence. Consequently, plaintiff's statements regarding defendants' expert witnesses were not improper.

IV

Finally, defendants assert that they are entitled to a new trial because of the accumulation of error and prejudice. In particular, they contend that the conduct of plaintiff's counsel at trial

denied them a fair trial. 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. *Badalamenti v William Beaumont Hospital-Troy*, 237 Mich App 278, 290; 602 NW2d 854 (1999). If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for an instruction or a motion for mistrial. *Id.* If the error is so preserved, then there is a right to appellate review. *Id.*

In *Badalamenti*, this Court found that the plaintiff's lead trial counsel completely tainted the proceedings by his misconduct. In holding that the plaintiff's lead counsel's accusations, allegations, and insinuations had no reasonable basis in the evidence presented and were completely improper, the Court stated the following:

> In short, it appears that plaintiff's lead trial counsel here did just what the courts in the above cases condemned: he sought to divert the jurors' attention from the merits of the case and to inflame the passions of the jury. That strategy paid off handsomely here in the form of a large verdict for plaintiff. The cumulative effect of the improper innuendo, remarks, and arguments by plaintiff's lead trial counsel was so harmful and so highly prejudicial that we are unable to conclude that the verdict in this case was not affected. [*Id.* at 292.]

In the instant case, the conduct of plaintiff's counsel was in no sense comparable to that which was admonished in *Badalamenti*. In addition, as noted earlier, the trial court kept a tight rein on counsel for both sides throughout the trial. There were closely contested issues of fact about which counsel sought to persuade the jury one way or the other. Defendants have not shown that the cumulative effect of plaintiff's arguments were improper or so harmful and so highly prejudicial that this Court would be unable to conclude that the verdict in this case was not affected. *Badalamenti*, *supra* at 292.

Plaintiff presented expert testimony that defendants' negligence was, at minimum, a contributing factor in Rutherford's death. In particular, plaintiff's expert witness, Dr. Ebraheim, testified that Rutherford's neck injury hastened her death. Moreover, Dr. Dengiz testified that Rutherford's broken neck probably caused her death, since the treatment of the injury required eight to ten weeks of bed rest. This is also a distinction from *Badalamenti*, where this Court found that the plaintiff failed to present substantial legally sufficient evidence to establish the defendants' negligence. *Id.* at 289. Hence, in the instant case, we conclude that the jury followed the instructions the court gave and based its verdict on the evidence. Consequently, defendants are not entitled to a new trial because of the accumulation of error and prejudice.

Affirmed.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey