IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

RAYMOND MORANT AND ALICIA MORANT,	)	
Plaintiffs,	)	
	)	C.A. No. 99C-03-162 SCD
v.	)	
DANIELLE M. LANG,	)	
Defendant	)	

Submitted: July 10, 2001
Decided: August 13, 2001

John E. Sullivan, Esquire, Sullivan & Marston, Wilmington, DE.

Louis Ferrara, Esquire, Ferrara, Haley, Bevis & Solomon, Wilmington, DE.

***Upon Motion for New Trial* – GRANTED**

O R D E R

DEL PESCO, J.

This 13th day of August 2001, upon consideration of the Plaintiffs', Raymond Morant's and Alicia Morant's, motion for judgment as a matter or law pursuant to Superior Court Civil Rule seeking a new trial, with plaintiffs arguing that the Court erred as a matter of law in failing to grant a directed verdict on the issue of agency, it appears that:

(1) The accident at issue occurred on April 7, 1997 when the vehicle operated by the plaintiff, Raymond Morant, was struck from the rear by the vehicle owned by the

defendant and operated by a third party, a man whose name remains unknown. The defendant was in the car at the time of the collision but had permitted the third person to drive the vehicle. The defendant/owner, the driver, and a passenger drove to a fast food restaurant in the defendant's car. While there, the defendant consented to transporting an additional person encountered at the restaurant. All four left the restaurant together. The collision occurred shortly after they departed. There is no allegation of speeding or other reckless behavior, just simple negligence. After the collision, the two vehicles pulled into a nearby parking lot. The plaintiff observed the male driver of the defendant's vehicle, spoke to him, and then went into a business establishment to call the police. When he returned to the parking lot, everybody had left the scene, except the owner of the vehicle. The defendant/owner has never been able to conclusively provide the name of the driver, a new acquaintance.

(2) At trial, the question of agency was submitted to the jury in the jury instructions. The jury found that no agency relationship existed between the defendant and the driver; thus, the plaintiffs did not recover.

(3) I have concluded that I erred in giving the question of agency to the jury since the facts regarding the events surrounding the travel in the vehicle were not contested.

(4) This case has a somewhat convoluted history. The lawsuit was filed in March 1999 against the defendant, Danielle Lang, and John Doe a/k/a "Lewis Duffy".[1] The complaint alleges that Danielle Lang negligently entrusted her vehicle to "Lewis Duffy", and that

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[1] Delaware law does not permit fictitious name practice. *See Mohl v. Doe*, Del. Super., 1995 WL 339099 at *1, Babiarz, J. (May 11, 1995); *Collins v. Liberty Mut. Ins. C o.*, Del. Super., C.A. No. 90C-MR-3, Graves, J. (Aug. 27, 1991); *Marshall v. Univ. of Del.*, Del. Super., C.A. No. 82C-0C-10, letter op. at 6 n.2, Del Pesco, J. (Oct. 30, 1989) (filing a claim against a John Doe defendant has no legal effect in Delaware); *Mergenthaler v. Asbestos Corp. of America*, Del. Super., 500 A.2d 1357, 1363 N.11 (1985); *Hutchinson v. Fish Eng'g Corp.*, Del. Ch., 153 A.2d 594, 595 (1959), appeal dismissed, Del. Supr., 162 A.2d 722 (1960).

"Duffy" was negligent in the operation of the vehicle -- that he violated various rules of the road. In spite of the fact that service was never effectuated on "Duffy", the case improperly went to arbitration. An award was entered against "Duffy" and in favor of the plaintiffs. That award was appealed.

(5) The case scheduling order issued in February 2000, required the filing of dispositive motions by October 2000, a pretrial conference in December 2000, and trial on January 10, 2001. Defendant filed an untimely motion for summary judgment in December 2000, alleging that the complaint failed to state a cause of action as to Lang. Within days, plaintiffs filed a motion to amend the complaint, to add a claim that "Duffy" was the agent of Lang, and to add “Lewis Dunphity” -- a newly developed iteration of the driver's name -- as an additional defendant. I denied the motion as to the agency claim and permitted the plaintiffs to attempt to serve Lewis Dunphity, a phonetic spelling, at best, of the driver’s name. I deferred any ruling on the summary judgment motion because there had been no discovery of defendant Lang and I was not willing to consider summary judgment on the available record. I ordered that the deposition of the plaintiffs be taken, and based on that record concluded that the defendant had a duty to know who was driving her car and could not escape liability on that basis. Meanwhile, the plaintiffs had finally intensified efforts to find the driver.

(6) At trial, the agency-related evidence was presented, inevitably, in the context of the facts of the case and the earlier ruling I made, but the missing driver still had not been located in spite of plaintiff's considerable efforts. I permitted the agency issue to go to the jury under Superior Court Civil Rule 15(b),[2] as an amendment to conform to the

[2] Superior Court Civil Rule 15(b) provides:

evidence. It became clear to me during the trial that agency was the critical issue in determining liability. The only testimony presented on the subject at trial was from defendant Lang. She testified that she consented to having the unknown male drive the vehicle because she was not feeling well. She claimed to have been shown a license which she recognized as a Delaware license, but which she did not examine closely enough to observe the name.

(7) The evidence indicates that Lang and the driver had a common purpose -- to go to a fast food restaurant to get something to eat. She was in the front passenger seat of the vehicle as it was operated. She consented when asked to provide a ride to another individual encountered by the group at the restaurant. She owned the car and controlled the occupants and the destination of the vehicle. That evidence was uncontradicted and is sufficient for a finding of agency.[3]

(8) Defense counsel objected to the submission of the agency issue to the jury, and claimed prejudice. The alleged prejudice was that he would have undertaken to locate the unknown driver if he had known the issue of agency would be raised in the case. The defendant was offered the opportunity to have a mistrial declared; however, the offer was declined.

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the Court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the Court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The Court may grant a continuance to enable the objecting party to meet such evidence.

[3] *See Fisher v. Townsends, Inc.*, Del. Supr., 695 A.2d 53 (1997). "An agency relationship is created when one party consents to have another act on its behalf, with the principal controlling and directing the acts of

(9) Under the circumstances, I will grant a new trial, and not enter judgment as to agency because the defendant is entitled to an opportunity to find the missing driver. However, had I not granted the motion on the agency issue, I would have granted plaintiff a new trial, *sua sponte*, based on the improper arguments of defense counsel.

(10) I have reviewed the full transcript of defendant's closing argument. I secured the transcript because I was very concerned about the extent to which defense counsel expressed his own opinion regarding the veracity of the testimony presented, rather than arguing the evidence. There is a well-established body of law which limits the scope of closing argument to the evidence in the case and reasonable inferences which can be drawn from that evidence. When an attorney crosses those boundaries, it is the option of the opposing attorney to object or waive the objection by sitting silent.[4] In this case, plaintiff's counsel made no objection during the defendant's closing argument. Absent an objection, the analysis proceeds to whether or not the comments are so prejudicial that they justify a new trial.[5] While I prefer to leave trial of cases to the attorneys, the extent of the commentary in this instance is so substantial that it cannot be ignored. The following excerpts from the trial transcript make the point:

> First of all, does it make any sense that if he is in that condition that he claims he is in, . . . they are going to tell him to jog two miles? I suggest it

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the agent." *Id.* at 57 (citing to *Sears Mortgage Corp. v. Rose*, N.J. Supr., 634 A.2d 74, 79 (1993); Restatement (Second) of Agency s 1 (1958)).

[4] *See Medical Ctr. of Delaware v. Lougheed*, Del. Supr., 661 A.2d 1055, 1060 (1995) ("A party must timely object to improper statements made during closing argument in order to give the trial court the opportunity to correct any error.")

[5] *See Steiner v. Killeen*, Del. Super., 1999 WL 1223780, Lee, J. (Nov. 3, 1999). "In order to determine if a new trial is warranted in connection with improper comments, 'the Court must consider whether the remark prejudicially affected the substantial rights of the plaintiffs." *Id.* at *2 (citing to *Barriocanal v. Gibbs*, Del. Super., C.A. No. 94C-04-044, Del Pesco, J. (July 3, 1996), *rev'd on other grounds*, Del. Supr., 697 A.2d 1169 (1997). *Accord DeAngelis v. Harrison*, Del. Supr., 628 A.2d 77, 81 (1993)).

> is not very credible. That is what he says under oath looking you guys right in the eye.[6]
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> Then he goes to Florida. That is one of the most incredible parts of this case.[7]
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> Falco, of course, Falco is writing reports without seeing records, any way. Falco says he is still having pain. It is not true. It is not maybe, it is wrong. It is flat out 100 percent incorrect.[8]
>
> So then they do what, I think is the factually most incredible part of this whole case, they go to see a doctor . . ..[9]
>
> They go to Fitzgerald, that's got to be the most bogus explanation of why someone saw a doctor you are ever going to hear in your life. He won't do it. Then the incredible happens. He looks you right in the eye with his hand on the Bible swearing that Patel sent him to Falco. Ladies and gentlemen, that's not true. How can you believe anything he says to you when he tells you that. Because I know, because he already told me, in fact, I told you in my opening that it wasn't Patel, that it was the lawyer. Unbelievably he is still trying to blow that past you.[10]

(11) The jury was instructed, in the usual course, that "[a]n attorney may argue all reasonable conclusions from the evidence in the record. It is not proper, however, for an attorney to state an opinion as to the truth or falsity of any testimony or evidence. What an attorney personally thinks or believes about the testimony or evidence in a case is not relevant, and you are instructed to disregard any personal opinion or belief offered by an attorney concerning testimony or evidence."[11]

(12) Comments about credibility, comments which misstate the law, or comments based on facts not in the record are improper.[12] In the case at bar, there are multiple direct

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[6] CA. TR. at 13, lines 3-8. References to the transcript of defense counsel's closing argument will be cited as CA. TR. at ___.
[7] CA. TR. at 15, line 12.
[8] CA. TR. at 6, lines 20-23.
[9] CA. TR. at 19, lines 13-15.
[10] CA. TR. at 22-23, lines 19-23.
[11] *See* Del. P.J.I.Civ. § 3.3 (2000)..
[12] *DeAngelis v. Harrison*, Del. Supr., 628 A.2d 77, 80 (1993). In *DeAngelis,* a civil case arising out of an automobile accident, the Supreme Court followed the test previously developed in a criminal case to gauge

comments about the credibility of both the plaintiff and his expert physician, subjects central to the claim of damages which, particularly in the context of a rear-end collision, is the central issue.

(13) The case was about credibility. The prejudice of counsel's statements, because of the nature and the number of comments, was not overcome by the instruction at the end of the case.

The plaintiff's motion for a new trial is GRANTED.

IT IS SO ORDERED.

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Judge Susan C. Del Pesco

Original to Prothonotary
xc: Counsel of Record

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the effect of counsel's improper comment. The factors to consider are (1) the closeness of the case, (2) the centrality of the issue affected by the error, and (3) the steps taken in mitigation.