SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. Henley Graves
*Resident Judge*

SUSSEX COUNTY COURTHOUSE
THE CIRCLE
P.O. BOX 746
GEORGETOWN, DE 19947
(302) 856-5257

May 19, 2004

Edward C. Gill, Esquire
16 North Bedford Street
P. O. Box 824
Georgetown, DE 19947

Robert B. Young, Esquire
Young and Young
300 South State Street
P. O. Box 1191
Dover, DE 19903

**RE: Bradford v. State Farm**
**C. A. No. 02C-10-036 (THG)**

Dear Mr. Gill and Mr. Young:

This underinsured case was tried over two days in November, 2003. The jury found in favor of Mr. Bradford, and awarded him $185,000.00. Mrs. Bradford received a $50,000.00 award for loss of consortium. The total combined judgment was $235,000.00. The tortfeasor insurance was $30,000.00, and therefore, the jury's verdict would have had to be adjusted to compensate for this sum which the plaintiff already had received. But, because plaintiff's underinsured policy limit was $50,000.00, judgment was entered in the total sum of $50,000.00, with plaintiffs agreeing not to pro rate the award between Mrs. Bradford and Mr. Bradford. Following the trial, the then defense attorney[1] moved for a new trial.

In the Motion for a New Trial, the defense argued that the plaintiff's remarks in closing argument were improper and were designed to prejudice the jury against the defendant insurance company. The Court ordered that a transcript of the closing arguments be prepared. Unfortunately, delays took place in the original defense attorney's obtaining of the transcript, which delayed the final memorandum supplied by the attorneys. The case became ripe on May 5, 2004, and this is the Court's decision denying the application for a new trial. The discussion will be limited to the grounds raised in the timely Motion for a New Trial.

[1]The defense attorney who tried the case is no longer in private practice, and Mr. Young took over the case on behalf of the defendant.

## DISCUSSION

In closing, plaintiff's counsel made the following comments aboaut the dfense medical expert:

> First off, Doctor Hanley does not treat any patients in the State of Delaware. Doctor Hanley has his office over there in Bowie. Doctor Hanley is what I like to describe as a drive-by doctor. He drives to Salisbury, drives by to Dover, drives by a different place in Maryland, drives by to Newark. I guess he flies out to California to do these different evaluations.
>
> Why ask yourselves this: Are there no other doctors in Salisbury that State Farm could have said, hey, you are a local doctor here, take a look at John Bradford. What, do you think there are no other doctors in Delaware who can go ahead and take a look at John Bradford for State Farm? Is there a reason why State Farm says we're not going to take Doctor Marvel, who is a treating physician, or Doctor Wilson, who is a treating physician, or anyone else in this area, or anyone else who is treating people, really to evaluate Mr. Bradford? Or is it reasonable that State Farm is picking the doctor, the professional witness doctor, for purposes of testimony? (B11-12)
>
> Are you going to rely on . . . someone who is brought into the case by an insurance company for purposes of doing just what he did in this case, testifying? (B-12)
>
> Do you believe State Farm is stupid? Do you believe that State Farm would pick doctors who are not going to give them the opinions that they want. (B12-13)

There was no objection by defense counsel after these remarks. At the close of the opening portion of plaintiff's counsel's closing argument, I brought counsel to side bar. I noted my concern that plaintiff's counsel had attacked the defense expert witness based upon his not being a Delaware doctor. I also was concerned that there is a difference in attacking a witness's bias in the case versus inferences that a party has inappropriately "bought" testimony. Over the objections of plaintiff's counsel, I issued the following curative instruction:

> Ladies and gentlemen of the jury, the responsibility and duty of the lawyers is to represent their clients zealously . . . . To the extent counsel may have suggested that you should consider whether or not a doctor has a practice in Delaware or treats patients in Delaware, as a credibility factor, I am striking that portion of the argument and you should not consider that.

> As to the extent counsel has suggested that State Farm has intentionally and/or deliberately selected an expert or a doctor to suit their purposes, I strike that portion of the argument and you should not consider that.

Plaintiff continues to argue that the remarks were not offensive nor objectionable, and he notes defense counsel did not make an objection until the Court *sua sponte* raised the issue. I became involved because I thought the remarks were offensive and inappropriate based upon the manner and context in which they were given. Even after reviewing the cold transcripts some six months later, I remain of the opinion that an argument based upon where a witness comes from, or where that witness practices medicine, is inappropriate. When plaintiff's counsel argued that "State Farm is not stupid", the context of the message was that State Farm had bought a witness to testify exactly the way State Farm wanted him to testify. There was no evidence on which to base such an argument and to create this inference was wrong.

If improper comments are made by counsel, the Court should consider the impact of those comments as to the overall fairness of the trial pursuant to the guidelines of Hughes v. State, 437 A.2d 559, 571 (Del. 1981). While Hughes was a criminal case, the Delaware Supreme Court has applied it to civil cases. DeAngelis v. Harrison, 628 A.2d 77, 81 (Del. 1993). The Court should consider: (1) the closeness of the case; (2) the centrality of the issue affected by the error; and (3) the steps taken to mitigate the effects of the improper comments.

In this case, all the medical experts agreed the defendant had pre-existing medical problems. The issue was once these dormant, pre-existing medical problems became active, whether or not the aggravation would subside. Thus, the credibility of the doctors was a central issue in this case. Plaintiff's doctors said that once triggered, the problem would remain with the plaintiff for the rest of his life. The defendant's doctor said that once triggered, the problem should not continue to be a permanent condition.

Issues of credibility usually will make a case "close" depending on the jury's evaluation of the credibility of each witness. Nevertheless, based on the other evidence in the case, I was not of the opinion that the case was close. This was a case where the Court felt that plaintiff had presented evidence supporting his medical claims, and the issue was going to be a matter of damages. Those damages were, to a great degree, related to the change in plaintiff's lifestyle. Before the accident, he was working and had been independent, but after the accident, he was no longer working and his independence was limited.

As to the final Hughes factor, I note there was no objection, but nevertheless the Court proceeded to give a strong curative by advising the jury to ignore the remarks of counsel. The Supreme Court noted in Adams v. Luciani, 2003 WL 22873038 (Del. Supr.) (ORDER): "Sustaining timely objections followed by clear closing instructions even in a hotly contested and emotionally charged

'close' case, sufficiently cures any potential lingering effects of plaintiff's counsel's ill-advised hyperbole". 2003 WL 22873038, at *4. I am satisfied that the strong curative instruction given *sua sponte* mitigated the effects of the comments which I found to be improper.

A Motion for New Trial, pursuant to Superior Court Rule 59, was timely filed and raised the aforementioned issues. The defendant wishes the Court to allow it to raise additional issues at this time. I am not of the opinion that the filing of a Motion for New Trial, based upon issue "X", allows you to argue other issues. Therefore, I shall not rule upon those collateral issues.

I ask that counsel communicate concerning Plaintiff's Motion for Costs and Prejudgment Interest and get back to me if there is a problem. Thank you.

For the foregoing reasons, defendant's Motion for a New Trial is denied.

**IT IS SO ORDERED.**

Yours very truly,

T. Henley Graves

THG:baj
cc: Prothonotary
Department of Justice