IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

BEVERLY J. BOWERS,

Appellant/Cross-Appellee,

v. Case No. 5D19-1757

ANDREW N. TILLMAN AND
CTM ENTERPRISES, INC.,

Appellees/Cross-Appellants.

_____/

Opinion filed June 18, 2021

Appeal from the Circuit Court
for Orange County,
Emerson R. Thompson, Jr., Senior Judge.

Jeffrey M. Byrd, of Jeffrey M. Byrd, P.A., Orlando, for Appellant/Cross-Appellee.

Jack R. Reiter and Robert C. Weill, of GrayRobinson, P.A., Miami, and Dale T. Gobel and Kristen A. Tajak, of Gobel Flakes, LLC, Orlando, for Appellees/Cross-Appellants.

EVANDER, C.J.

Beverly Bowers, the plaintiff in an automobile personal injury action, appeals from an order denying her motion for new trial. Notwithstanding our displeasure with certain actions taken by the defense below, we affirm.

At trial, Bowers alleged that she had suffered back pain, neck pain, and migraine headaches, as a result of injuries she suffered when the vehicle she was driving was hit from behind by a commercial truck driven by Appellee, Andrew Tillman. The jury awarded Bowers $58,248 for past medical expenses and $27,300 in lost wages. The jury found that Bowers did not suffer any permanent injuries and did not award noneconomic damages, future medical expenses, or future lost wages.

Bowers' motion for new trial was directed to the misconduct of defense counsel and certain improper statements by a defense expert. Bowers did not argue that the trial court had committed error. In its detailed order denying the motion for new trial, the trial court addressed, *inter alia*, whether the manifest weight of the evidence was contrary to the verdict, whether the jury had been deceived as to the force and credibility of the evidence or had been influenced by considerations outside the record, and whether defense counsel's closing argument was so prejudicial and inflammatory that it denied Bowers her right to a fair trial.

On appeal, Bowers argues that in deciding whether to grant a new trial, the trial court was required to apply the "harmless error" test announced by our supreme court in *Special v. West Boca Medical Center*, 160 So. 3d 1251, 1256 (Fla. 2014). We disagree. The harmless error test announced in *Special* is a standard of review to be applied in a civil appeal where a trial court is found to have committed error. In determining whether to grant a new trial in this case, the trial court properly looked for guidance to *Cloud v. Fallis*, 110 So. 2d 669, 673 (Fla. 1959), where the Florida Supreme Court explained:

> When the judge, who must be presumed to have drawn on his talents, his knowledge and his experience to keep the search for the truth in a proper channel, concludes that the verdict is against the manifest weight of the evidence, it is his duty to grant a new trial, and he should always do that if the jury has been deceived as to the force and credibility of the evidence or has been influenced by considerations outside the record.

(Citations omitted).

We review the trial court's order under an abuse of discretion standard. *See Domino's Pizza, LLC v. Wiederhold*, 248 So. 3d 212, 222 (Fla. 5th DCA 2018); *Hashmi-Alikhan v. Staples*, 241 So. 3d 264, 267 (Fla. 5th DCA 2018). In doing so, we expressly reject the suggestion that we should apply the harmless error standard of review announced in *Special*. "'Error' in the

context of harmless-error analysis, is an improper ruling by the trial court, not an improper comment by counsel or a witness." *R.J. Reynolds Tobacco Co. v. Robinson*, 216 So. 3d 674, 682 n.3 (Fla. 1st DCA 2017); *see also Domino's Pizza, LLC*, 248 So. 3d at 226 n.6 ("The more stringent harmless error test announced in [*Special*] does not apply here because the trial court sustained the objection and gave a curative instruction."). As previously noted, Bowers' motion for new trial was not based on alleged trial court error.

There are two events that occurred during the trial that, if combined, may well have supported a decision to grant a new trial. The first event centered on certain improper comments made by a defense expert witness, Dr. Robert Kowalski. Prior to trial, an order in limine was entered precluding the defense from referring to matters outside the record, including implying the existence of other medical records that would "show x, y, or z about the Plaintiff," but "we just don't know because the Plaintiff did not give them to us." Notwithstanding this order, during direct examination, Dr. Kowalski opined as to what he believed certain medical records of Bowers would show as to the nature of chiropractic treatment Bowers received prior to the motor vehicle collision at issue. These medical records were not offered into evidence by either party. Dr. Kowalski's comments were unsupported by the evidence and made in violation of an order in limine. If believed by the jury,

these comments would improperly bolster Dr. Kowalski's opinion that Bowers' current complaints were based on a preexisting condition. The trial court correctly concluded that Dr. Kowalski's testimony violated its order in limine.[1] The court sustained Bowers' objection, and instructed the jury to disregard such testimony. Bowers' ensuing motion for mistrial was denied.

The second event arises from misconduct by defense counsel, Dale Gobel. Before discussing that event, it is appropriate to observe that the first trial in this cause ended in a mistrial based on the trial court's determination that, as a result of the conduct of counsel for both the plaintiff and the defense, a fair trial would not occur. Specifically, in its order granting a mistrial, the trial court wrote:

> This Court has been concerned over the conduct and demeanor of lead trial counsel (Jeffrey Byrd and Dale Gobel) during trial—I have observed jurors snickering at both lead counsel over courtroom demeanor. I am concerned that a fair trial for both plaintiff and defendant has been compromised with prejudice. Lead counsel have been rude to each other both before the jury and outside the presence of the jury and somewhat rude to this Court. . . .
>
> The accumulation of prejudice, including five motions for mistrial already made on the first day of

[1] We recognize that trial counsel has the responsibility to advise witnesses of the existence of orders in limine and to otherwise take reasonable measures to ensure that orders in limine are complied with. We cannot ascertain from the record whether defense counsel took those measures in this instance.

> trial, lead this Court to the conclusion that in the interests of fairness to both plaintiff and defendant, a mistrial should be declared. . . .
>
> The Fourth District Court of Appeal has held that the courtroom is neither a football field, nor a wrestling ring, and attitudes appropriate for professional sport are not appropriate for the courtroom.

Notwithstanding the admonition of the trial judge who presided over the first trial (a different judge presided over the second trial), the record reflects that the same attorneys continued their overly contentious ways.

More distressing is the other event that gave support to Bowers' motion for new trial. This event resulted in attorney Gobel being able to have the jury view a certain hearsay statement contained within a medical record that should not have been included in a voluminous composite exhibit.

Immediately prior to the defense resting its case and the commencement of closing arguments, the defense moved into evidence a composite exhibit of approximately 140 pages. The exhibit consisted primarily of medical records and/or medical expenses related to the purported bodily injuries for which Bowers was making a claim. However, unbeknownst to Bowers' counsel, the exhibit also included a single document from Bowers' urologist. Although Bowers had initially made a

claim for gastric/abdominal issues allegedly caused by the motor vehicle collision at issue, she had withdrawn such claim approximately six months prior to trial. Additionally, the trial court entered an order in limine prohibiting either party from referencing Bowers' gastric/abdominal issues.

The insertion of the single document from Bowers' urologist was not inadvertent. Indeed, Gobel included the document in a Power Point presentation he made as part of his closing argument. Furthermore, Gobel highlighted one line in the document for the jury's benefit. That line read: "lawyer referred to chiropractor." Prior to this point, there had been no evidence to support Gobel's subsequent assertion that Bowers had been referred to her chiropractor by her attorney. Bowers' counsel promptly objected and a bench conference followed.[2]

At the bench conference, Bowers' counsel initially argued that the document was not in evidence. When Gobel pointed out that the document had, in fact, been included in the defense's composite exhibit, Bowers' counsel argued that the document had been "buried in with other chiropractor records" and that the urologist's records were to be excluded. Gobel responded that he had been careful to ensure that the displayed

[2] Despite the objection, Gobel did not remove the document from the jurors' view, until the trial judge subsequently ordered him to "shut down the video."

document did not include references to Bowers' gastrointestinal or urological complaints. The trial court properly directed that the document be removed from evidence and that counsel make no further comment on the matter. The trial court further instructed the jury to disregard the document and any comments about it.

On appeal, Appellees argue that Bowers' counsel had the opportunity to review the composite exhibit on the morning of the final day of trial and should have objected to the document. While the parties dispute whether Bowers' counsel had a reasonable opportunity to fully review the exhibit (something that cannot be determined from the trial transcript), it was acknowledged, during oral argument before this court, that Gobel did not call opposing counsel's attention to the fact that he had inserted a document from Bowers' urologist into the composite exhibit. The defense further argues that Gobel did not violate the express language of the order in limine. While this may be so, it was clear from the record that had the matter been brought to the trial court's attention at the time the defense sought to admit the composite exhibit into evidence, the trial court would have denied its admission.

In *Andreaus v. Impact Pest Management, Inc.*, 157 So. 3d 442 (Fla. 2d DCA 2015), our sister court addressed a similar situation. There, in

accordance with prior evidentiary rulings by the trial court, certain redactions were to be made to the plaintiff's medical records which were to be submitted into evidence. Plaintiff's counsel reviewed approximately 1500 pages of medical records and made redactions consistent with the trial court's rulings. However, two references in the records that should have been redacted were missed. During closing argument, defense counsel, outside the hearing of the jurors, requested permission from the trial court to discuss the medical records "as redacted." Plaintiff's counsel then became aware of the mistake and explained to the court that the incomplete redaction was a clerical error. Plaintiff's counsel objected to defense counsel commenting on these items that should have been redacted and requested permission to further redact the medical records before they were published to the jury. Defense counsel responded that the documents were already in evidence and he should be permitted to comment on them. The trial court agreed with defense counsel.

On appeal, our sister court found the trial court's decision to be "inexplicable," reversed the final judgment entered in favor of the defendants, and remanded for a new trial. With regard to defense counsel's conduct, the court wrote:

> The failure to redact these references was a clerical error that could have easily been corrected

> before the jury's mind was tainted by the inadmissible references. But instead of drawing the court's attention to the error so that it could be corrected, [defense counsel] capitalized on the error and compounded it by commenting on it and allowing the incomplete redaction to go to the jury. The trial court should not have rewarded this "gotcha" tactic, and we will not do so here.

Id. at 445 (citations omitted). The court also observed that lawyers, as officers of the court, have a special duty "to avoid conduct that undermines the integrity of the adjudicative process." *Id.* at 446 n.1. We wholeheartedly agree with our sister court's observations. Here, attorney Gobel's conduct was arguably worse than the defense counsel's conduct in *Andreaus* because he chose not to bring the matter to the trial court's attention prior to his attempt to "taint the jurors' minds" with inadmissible evidence.

Lastly, Bowers contends that, in denying her motion for new trial, the trial court erred in ruling that it would not consider trial court orders from other cases in which trial courts had granted new trials after finding that Gobel had engaged in misconduct. Bowers argues that Gobel's conduct reflects a pattern of intentional use of improper trial tactics for the purpose of causing a mistrial. In response, the trial court took the position that the Florida Bar would be a more appropriate forum to determine whether an attorney has engaged in a pattern of misconduct. Here, we conclude that the trial court did not err in refusing to consider trial court orders from other

cases. The primary issue to be resolved on Bowers' motion for new trial was whether defense counsel's misconduct and the improper (but stricken) testimony of Dr. Kowalski was so prejudicial as to deprive Bowers of a fair trial. Whether Gobel had engaged in misconduct in other cases would have been of little probative value in making this determination.

The trial transcript reflects that the trial judge exercised great patience and conscientiousness in presiding over this highly contentious trial. While the misconduct of defense counsel and the improper testimony of a defense expert may well have supported a decision to grant a new trial, the record reflects, as appropriately argued by defense counsel below and to this court, several reasons why the granting of a new trial was not warranted. Furthermore, we recognize that the trial judge is in the best position to determine the potential impact of improper conduct and/or improper testimony. After thoroughly reviewing the record, we conclude that the trial court did not abuse its discretion in denying Bowers' motion for new trial.

AFFIRMED.

NARDELLA, J., concurs.
COHEN, J., concurs and concurs specially, with opinion.

COHEN, J., concurring specially.

We have the most unusual circumstance of having two cases[1] involving the same trial lawyers in the same oral argument session with an overlapping theme—the lack of professionalism by the lawyers involved. Despite that overlapping theme, consolidation was not appropriate due to their procedural postures and differing substantive issues, both of which were distinct from the professionalism concerns. However, the lawyers' conduct merits discussion, and as such, I write to address what has occurred in both cases.

The two lawyers at the heart of these matters are Jeffrey Byrd and Dale Gobel. It is clear from these cases as well as others we have reviewed in the past, that when on opposite sides of the same case, they are nothing short of a nightmare for presiding judges.

In my view, the instant cases establish a continuing pattern of conduct by Mr. Gobel designed to provoke the granting of mistrials. Mr. Gobel has occasioned more mistrials in these two cases alone than most lawyers will have in an entire career. That does not include additional mistrials Mr. Gobel

[1] In addition to this case, see Cemoni v. Ratner, No. 5D19-3629 (Fla. 5th DCA June 18, 2021).

has obtained in other cases referenced in attachments to the records on appeal.

Mr. Byrd's message at oral argument was that whatever a court allows will continue to occur. He is correct. But the irony in that message is not lost on this Court, considering we have repeatedly criticized Mr. Byrd's own unprofessional conduct in prior cases, particularly as it relates to his closing arguments. See Vickers v Thomas, 237 So. 3d 412, 415 (Fla. 5th DCA 2017); Rasinski v. McCoy, 227 So. 3d 201, 202 n.1 (Fla. 5th DCA 2017); see also, Beekie v. Morgan, 751 So. 2d 694, 695-96 (Fla. 5th DCA 2000) (noting that Mr. Byrd's antics could be characterized as 'Beavis–and–Butthead' like, or to put it in milder terms, uncivilized.").

Unfortunately, our affirmance in these two cases may be viewed as enabling the very conduct denounced by the trial judges involved and set out in the majority opinions.[2] But affirmance should not be seen as approval. See Rasinski, 227 So. 3d at 202 n.1 ("We emphasize that our affirmance on this issue should not be interpreted as condoning plaintiff's counsel's conduct . . . .").

[2] In one case, the trial court described Mr. Gobel's tactics as unprofessional mischaracterizations of the evidence. In the other, the trial court expressed concern over the conduct, demeanor, and lack of professionalism of both lawyers and noted that each had violated pretrial orders "in numerous ways."

The difficulty from the perspective of an appellate court is our standard of review. A trial court's decision on whether to impose sanctions against a lawyer based on trial misconduct is reviewed for an abuse of discretion. See Boca Burger, Inc. v. Forum, 912 So. 2d 561, 573 (Fla. 2005). And as all appellate practitioners know, that is a highly deferential standard. Had the trial court imposed sanctions against Mr. Gobel for his conduct in causing mistrials in each of these cases, that same appellate standard would be utilized.

We reject Mr. Gobel's proffered explanation that his conduct is nothing more than zealous representation on behalf of his clients. The bar is full of lawyers zealously representing their clients who do not resort to the types of behavior and tactics employed by Mr. Gobel. "Zealous advocacy cannot be translated to mean win at all costs, and although the line may be difficult to establish, standards of good taste and professionalism must be maintained while we support and defend the role of counsel in proper advocacy." Fla. Bar v. Buckle, 771 So. 2d 1131, 1134 (Fla. 2000).

Despite our affirmance of the trial courts' decisions not to impose sanctions against Mr. Gobel, it is time that such behavior stops. The publishing of these opinions should serve notice on lawyers and trial courts that such conduct will not, and must not, be condoned. If the imposition of

sanctions is what it will take, so be it. See e.g., Moakley v. Smallwood, 826 So. 2d 221, 226–27 (Fla. 2002) (holding that trial courts have inherent authority to impose attorney's fees against lawyer for bad faith conduct even in absence of specific rule or statute authorizing imposition of such fees, where bad faith conduct has caused opposing party to unnecessarily incur attorney's fees and/or costs); Robinson v. Ward, 203 So. 3d 984, 989–90 (Fla. 2d DCA 2016) (affirming trial court's imposition of sanctions against defense counsel where counsel repeatedly violated court's directions and exposed jury to inadmissible evidence, resulting in trial court having to grant new trial).