

STATE OF MICHIGAN
COURT OF APPEALS

STACY ANN YOST,

Plaintiff-Appellant,

v

HOWARD RUDOLF FALKER,

Defendant-Appellee.

FOR PUBLICATION

June 18, 2013

9:05 a.m.

No. 306774

Macomb Circuit Court

LC No. 2009-004802-NI

Before: SHAPIRO, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this third-party auto negligence case, the jury concluded that plaintiff's scar adjacent to her eye did not rise to the level of a permanent, serious disfigurement, and so judgment for defendant was entered. Plaintiff moved for a new trial asserting that during trial defense counsel engaged in repeated misconduct that deprived plaintiff of a fair trial. We agree that defense counsel engaged in misconduct intended to divert the jury from the merits of the case. We affirm, however, because a note sent by the jury to the court during deliberations unequivocally demonstrated that these efforts had not succeeded and that the jury was not prejudiced against the plaintiff's claim.

During trial, defense counsel made several improper arguments and inquiries about plaintiff's decision to seek counsel and the decision to file suit. In opening statement, defense counsel argued that plaintiff's claim should be rejected because her lawsuit was filed less than one month after the accident. He stated, "On October 26, '09, she starts a lawsuit. What? Twenty-four days after this accident she's already filing a lawsuit . . ."

This theme was continued during proofs. The first witness called by the plaintiff was her husband. At the outset of cross-examination, defense counsel asked a series of questions concerning when the plaintiff first consulted an attorney, whether her husband attended the first meeting with the attorney, whether the attorney came to their home, how many times they met with the attorney and the date the complaint was filed in relation to the accident. These questions, which made up the bulk of the entire cross-examination, were clearly intended to improperly suggest, like defendant's opening statement, that prompt consultation with counsel after an auto accident was somehow improper and that the jury should find for defendant to deter the filing of lawsuits.

Defense counsel's cross-examination of plaintiff similarly focused on the timing of her consultation with, and retention of, counsel. Plaintiff was asked when she first consulted an attorney, how she selected the attorney, whether her husband was with her when she first met with the attorney, why her attorney filed suit and to confirm the date the lawsuit was filed in relation to those meetings.

This strategy reached its culmination after the parties rested. In closing argument, defense counsel told the jury that plaintiff's claim should be rejected because too many people are seeing lawyers and filing too many lawsuits:

Two weeks [after the crash] and she's in the lawyer's office. And you say to yourself . . . two weeks with a scar like that to be going in to file a lawsuit.

* * *

In steps the lawyer. I can sue. . . . I'm going to sue. And he wastes no time. He drafts it—we know that at least by 10-23 he drafts it, and it's filed with the court on the 26th.

* * *

And we've seen a lot of that in TV commercials, and every time you turn around, I'll sue, I'll sue. [Emphasis added].

Defendant's attorney repeated this assertion again later in his closing argument and went so far as to claim that the suit and the amount of compensation sought was prompted by plaintiff's counsel's greed, "[b]ecause after all is said and done, [plaintiff's counsel] does well on it. If he does well, he does well for the case."

It is well-settled that the cumulative effect of an attorney's misconduct at trial may require retrial where the misconduct sought "to prejudice the jury and divert the jurors' attention from the merits of the case." *Kern v St. Luke's Hospital Ass'n of Saginaw*, 404 Mich 339, 354; 273 NW2d 75 (1978); *Badalamenti v William Beaumont Hospital-Troy*, 237 Mich App 278, 289; 602 NW2d 854 (1999). See also, *Reetz v Kinsman Marine Transit Co*, 416 Mich 97; 330 NW2d 638 (1982); *Shemman v American Steamship Co*, 89 Mich App 656, 666; 280 NW2d 852 (1979); *Bd of Co Rd Comm'rs of Wayne Co v GLS LeasCo, Inc*, 394 Mich 126, 138; 229 NW2d 797 (1975) ("one cannot read the record without being impressed that [counsel] refused to proceed solely on the merits.") (internal quotation omitted). After a review of the entire record, we conclude that defense counsel did seek "to prejudice the jury and divert the jurors' attention from the merits of the case."

Typically, "it cannot be demonstrated what effect any particular statement has on a jury." *GLS LeasCo*, 394 Mich at 139, and for this reason the non-offending party is not required to "demonstrate affirmatively" that the statements had a prejudicial effect. *Id.* However, this case is unusual in that defendant is able to affirmatively demonstrate that the statements, though intended to prejudice the jury, did *not* have that effect. During deliberations, the jury sent a note to the trial court asking, "If we, as a jury, choose no for question number one [whether plaintiff suffered a permanent, serious disfigurement], can we still compensate her?" Reviewing this

question in the context of the entire record makes it clear that the jury did not conclude that plaintiff was unworthy of compensation or that they should deny compensation to discourage lawsuits. In light of the jury's inquiry, we are fully convinced that the jurors concluded that plaintiff's scar did not constitute a permanent, serious disfigurement based on the actual evidence, including their own view of plaintiff's scar throughout the trial.

Defense counsel's comments were improper. In the absence of the jury's written question that constituted compelling evidence of a lack of prejudice, reversal and a new trial would have been merited. However, given the jury's inquiry, we affirm.

/s/ Douglas B. Shapiro
/s/ Deborah A. Servitto
/s/ Amy Ronayne Krause