SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1561-21

LENNY RODRIGUEZ,

Plaintiff-Appellant,

v.

EDGAR CANO and
STEPHANIE CANO,

Defendants-Respondents.

———————————————————

Submitted January 25, 2023 – Decided October 12, 2023

Before Judges Accurso and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-4195-18.

Wishnic & Jerushalmy, LLC, attorneys for appellant (Eugene S. Wishnic, of counsel and on the briefs; Randi S. Greenberg, on the briefs).

Hoagland Longo Moran Dunst & Doukas, LLP, attorneys for respondent Stephanie Cano (Juliann M. Alicino, of counsel and on the brief; Julio Navarro, on the brief).

The opinion of the court was delivered by

ACCURSO, P.J.A.D.

This is plaintiff Lenny Rodriguez's appeal from a no-cause verdict in a damages-only auto negligence case in favor of the driver, defendant Stephanie Cano. Here are the first ten questions defendant's counsel put to plaintiff's treating physician on cross-examination:

> Now there's currently a lawsuit against you by GEICO, alleging that you performed fraudulent medical services. Correct?
>
> And the amount they're suing you for is $3.3 million dollars in fraudulent services. Right?
>
> And you're not the only party in that lawsuit. Right?
>
> So your practice . . . is also a defendant in that lawsuit?
>
> And your anesthesia practice . . . is also a defendant?
>
> And Dr. . . . , plaintiff's chiropractor in this case, and now your business partner, he's also a defendant in that case as well. Right?
>
> And Dr. . . . , who performed the EMG/NCV on Mr. Rodriguez is also a defendant in that case. Right?
>
> And in that pending lawsuit against you, GEICO alleges that the services you performed under insurance, and billed to them, were not medically necessary. Correct?

> So, then you're also aware that the first example of the alleged fraudulent medical services and billing, set forth in Geico's complaint against you, references your treatment of Lenny Rodriguez, the plaintiff we're here for today.
>
> Do you want me to show [the complaint] to you?

Plaintiff's counsel immediately objected to the line of questioning on hearing the first question. Defense counsel argued the questions did "not only go[] to credibility," but also to "the truth of the reasonableness of the treatment to this patient. Because he's actually listed in the complaint as one of the examples." The judge overruled the objection.

At the end of defense counsel's cross-examination, over forty-five minutes later, however, the judge realized his error, determining defense counsel's attack on plaintiff's physician, as well as plaintiff's chiropractor, his neurologist, and plaintiff himself, was improper. The judge candidly said to counsel, "I don't know how I let it in or be — even be mentioned."

Plaintiff's counsel moved for a mistrial, asserting the questions had been inflammatory and prejudicial. He argued to the judge that defense counsel had not only accused the doctor he was relying on to prove damages of insurance fraud but told the jury plaintiff was "part of the lawsuit. I mean, where do I go? Like, how do I explain that?" The judge responded, "Well, I think we

give the curative instruction, and we see what happens." The judge denied plaintiff's motion for mistrial, determined to issue a curative instruction, allow plaintiff's counsel to re-direct to permit the doctor to address the suit and to prohibit further reference to the GEICO allegations thereafter. "I think that's what we have to do."

The judge gave the following curative instruction:

> At the very beginning of Dr. . . .'s cross-examination, there was reference to a lawsuit by GEICO against Dr. . . . , his two businesses, and Dr. . . . , who you're going to hear from shortly. You are to disregard the existence of that lawsuit.
>
> The lawsuit is simply allegations being made. Nothing's been proved. So, the information regarding that lawsuit should be completely disregarded in your deliberations. You are not to consider them. As I told you in the prior instructions, when I say something is inadmissible, that means it cannot be considered by you. The information regarding that lawsuit is inadmissible.
>
> What I am going to do though, in order for — I think it was unfair if you heard about it, even though I'm telling you to disregard it, I still think that Dr. . . . should get a chance to . . . give an explanation as to those allegations. So, the only other thing you're going to hear about that lawsuit is Dr. . . .'s explanation. And then after that, you could disregard that information. These are allegations. It's a lawsuit. People bring lawsuits. They win, they lose. They're just allegations. So that is my — the instruction I'm giving you, to disregard that information.

Plaintiff's counsel's attempt on re-direct to elicit the doctor's side of the story went badly, to say the least. The doctor testified GEICO, is "one of the biggest car insurance [sic] in the state of New York and New Jersey" and "[t]hey're a bully." He claimed the company had been negotiating with him for a year before it filed suit. According to the doctor, the company told him to give only one injection per patient, "so I can save them money," but he refused saying "no way, no how; it's unethical and I do not do that." The doctor testified he told one of GEICO's "main attorney[s] in New York," that "my practice, it is hundred percent kosher. And he looked to me and told me, 'Dr. . . . , that's why you [sic] are sitting with you.'"

The doctor, who had immigrated to this country as an adult, became increasingly upset and continued to try to discuss his negotiations with GEICO. The judge sustained defense counsel's hearsay objection, leading to chaotic and disjointed testimony in which the witness defended himself and denied GEICO's allegations:

> THE WITNESS: I have to explain myself. You don't —
>
> THE COURT: I —
>
> THE WITNESS: You don't book my name in the (phonetic) — in the same —

THE COURT: Doctor. Doctor.

THE WITNESS: — and don't mix blame to it.

THE COURT: Doctor.

PLAINTIFF'S COUNSEL: Oh, yeah.

THE COURT: Doctor, let's just stick to — Counsel, could you —

PLAINTIFF'S COUNSEL: Yeah.

THE COURT: — do some of the questioning? Just let's deal with — just a straightforward statement —

PLAINTIFF'S COUNSEL: Yeah.

THE COURT: — that the doctor denies any and all allegations against him.

PLAINTIFF'S COUNSEL: Right. Do you deny —

THE WITNESS: Right. And —

PLAINTIFF'S COUNSEL: No, wait. Just let me. I'll question you, Doctor. You deny these allegations.

THE WITNESS: There is no doubt, I deny [it]. Actually, I can certainly send an email. They want to settle with me. I told them, "I'm not going to settle with you."

PLAINTIFF'S COUNSEL: I'll go with that.

THE COURT: Doctor.

THE WITNESS: You can go F yourself.

PLAINTIFF'S COUNSEL: Okay.

THE COURT: Doctor. Doctor. Calm down. I understand that you — you feel offended by this — these claims against you. But all I — all we're doing for right now is —

THE WITNESS: Your Honor, because I'm the busiest practice in New Jersey. I'm doing the best. They have a book.

PLAINTIFF'S COUNSEL: Do you want to go off? I've heard that. Let's go off.

THE WITNESS: On Amazon. They have a book on Amazon, How can they milk —

THE COURT: Jury, we're going to take a break for a minute.

Out of the jury's presence defendant continued his answer accusing GEICO of having a book "[h]ow they can milk a provider. It's — It's unacceptable what GEICO's doing."

Plaintiff's counsel renewed his motion for a mistrial, arguing the damage to plaintiff's case could not be cured. The judge responded, saying "No. I mean, I think the jury could understand. I mean, some would get him — If anything, I think it's kind of — reinforces the idea that he believes these are false allegations. I mean, some — someone accused of fraud — it's reasonable he would act in a . . . ."

The jury no-caused the case in a 5-1 vote. Plaintiff moved for a new trial with counsel arguing the "highly prejudicial" questions to plaintiff's treating doctor went to the heart of his case. Specifically, he noted that because defendant stipulated to liability, the only issue was whether plaintiff could vault the verbal threshold, which could only be proved "through objective, credible medical evidence."

Counsel contended "the introduction of this lawsuit for fraud undermine[d] all the treatment" rendered to plaintiff,[1] and "cemented a theme throughout the trial . . . that this was essentially a scheme" of unnecessary medical treatment and fraudulent billing. Plaintiff's counsel reminded the court that defense counsel had argued that questions about the fraud suit went not only to the doctor's credibility but to the "reasonableness of the treatment, as [plaintiff] was named in the complaint." Plaintiff's counsel contended the questions bore "so directly on the ultimate issue," a curative instruction could not undo the prejudice of defendant having smeared "every single medical provider and . . . plaintiff himself" by asserting they were part of a scheme to

[1] Besides chiropractic treatment for four months, plaintiff received epidural steroid and facet joint injections to different parts of his spine once a month for seven months in the year after the accident.

defraud the insurance company of over three million dollars by providing unnecessary treatment to patients, including plaintiff Rodriguez.

Defense counsel continued to maintain "defendant's position that the disputed testimony was admissible." Counsel advised the court, however, that she did not intend "to delve into that because . . . it's [not] really relevant to the motion," which she contended "was more based on the curative instruction." Defense counsel argued the curative instruction was appropriate and effective, the doctor was allowed to respond to the allegations, and any error was harmless.

In explaining his reasons for denying plaintiff's motion for a new trial, the judge began by noting it was "somewhat important" that the fraud suit was brought by an insurance company, not by a county prosecutor, the Attorney General's Office or the U.S. Attorney, that is, not an entity with "the gravitas of the State." More important, the judge stated he several times instructed the jurors to disregard the line of questions and "just believe[d] that they did." He noted the curative instruction was given "right away" and the doctor "gave his side of the story, in a very animated and at one point profane monologue."

Most important, the judge explained, was that the jury didn't come "back in five minutes," instead deliberating for ninety-two minutes, "support[ing]

[his] idea that the jury did listen to [him]." The judge reasoned that had the jury "concluded that Dr. . . . and Dr. . . . were criminals, they were fraudsters, they . . . did treatments on Mr. Rodriguez that were not required; they would have been back in five minutes." Instead, "[t]hey were out for an hour and a half. They were obviously weighing the actual evidence. And they didn't consider the evidence that I told them . . . to disregard."

Finally, the judge concluded that any error was harmless, as "the evidence here, for objective injury, was . . . not very strong." Although acknowledging that plaintiff "gave very good testimony," the judge noted it was subjective, and more telling were the doctor's notes about the injury having resolved and plaintiff not treating for four years. The judge stated:

> In some ways, it's surprising that it was 5-1. Or, I think that's one place where maybe a juror didn't listen to me. But I don't think . . . it's just a coincidence that the only juror that voted with Mr. Rodriguez was a young man about his age. . . . That he was the one vote in his favor. So maybe he . . . disregarded a little bit, my sympathy instruction.

We think it plain from what we've recounted that this verdict cannot stand. Defense counsel's questions in this civil case were patently improper under N.J.R.E. 608, which prohibits the use of specific instances of conduct through cross-examination or extrinsic evidence — defense counsel used both

— to attack a witness's "character for truthfulness." See State v. Scott, 229 N.J. 469, 481 (2017) (noting N.J.R.E. 608 interdicts the use of specific instances of conduct to attack credibility or prove a character trait); State v. Guenther, 181 N.J. 129, 141-42 (2004) (explaining the "two essential reasons" underlying "the common law rule barring the use of specific conduct evidence to challenge a witness's credibility for truthfulness," now embodied in N.J.R.E. 608 as "prevent[ing] unfairness to the witness" and "avoid[ing] confusion of the issues before the jury"); Reinhart v. E.I. Dupont de Nemours, 147 N.J. 156, 166 (1996) (holding judge of compensation erred in using transcript of petitioner's testimony in a prior proceeding, "not admissible to prove a specific instance of bad character" under N.J.R.E. 608 "to buttress his conclusion that petitioner had been untruthful on more than one prior occasion and that she had the tendency to be untruthful"); Serrano v. Underground Utils. Corp., 407 N.J. Super. 253, 276 (App. Div. 2009) (observing that unlike its federal counterpart, N.J.R.E. 608 prohibits "cross-examination about specific instances of allegedly untruthful prior conduct . . . to attack a witness's character for truthfulness"); Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 1 on N.J.R.E. 608 (2023-2024) (noting that "[a]lthough this Rule had initially followed the form of Fed. R. Evid. 608 when adopted in 1992, it had

retained the limiting principles of 1967 rule 22(c) and (d) and New Jersey common law," and "[t]hus the Rule . . . absolutely prohibited the use of specific instances of conduct, through cross-examination or extrinsic evidence" attacking a witness's character for truthfulness "unless it qualified for admission under N.J.R.E. 609," allowing impeachment by evidence of a criminal conviction).

Defendant's counsel offered no authority to the trial court for her use of GEICO's insurance fraud complaint to demonstrate plaintiff's treating physician, and indeed all plaintiff's treating doctors, had a general character for dishonesty. She simply asserted it went to the doctor's credibility and "the truth of the reasonableness of the treatment to [plaintiff]. Because he's actually listed in the complaint as one of the examples." Even on appeal, although asserting "the defense has not conceded the evidence was erroneously admitted," defendant has not cited a single rule or any case to support her counsel's cross-examination of the doctor based on the fraud complaint.[2] The

[2] Defendant does cite two cases, neither on point, she contends support that the evidence of "the existence of the pending GEICO lawsuit against" plaintiff's treating physician was not prejudicial, and that its admission was harmless in any event.

reason is apparent — there is no rule or any case that would support the improper tactic defense counsel employed here.

We commend the trial judge for having realized his error and his effort to forthrightly correct course. Indeed, we're confident had defense counsel sought permission in limine to use the GEICO complaint to cross-examine

---

For the first proposition, defendant relies on State v. Parsons, 341 N.J. Super. 448, 452-3 (App. Div. 2001), from which she quotes our observation that "the pendency of charges or an investigation relating to a prosecution witness is an appropriate topic for cross-examination." Parsons is a criminal case where the State concealed from defendant that the detective who found drugs and weapons in the defendant's apartment was under investigation, and subsequently indicted, for being in league with drug dealers. It's a Brady case, which obviously provides no justification for defense counsel having cross-examined plaintiff's doctor in violation of N.J.R.E. 608. Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding it is a due process violation for the prosecution to withhold exculpatory evidence from the accused).

For the second, she relies on an unpublished case involving a law firm's suit for fees against a former matrimonial client and his cross-claim alleging malpractice. The defendant alleged error in the plaintiff's counsel cross-examining him on his having been sued by his condominium association for unpaid fees and counsel's reference to the defendant's malpractice expert having also been sued for malpractice in a matrimonial matter. We found the reference to the condominium action improper under N.J.R.E. 607 and the scope of cross-examination of experts to rest in the discretion of the trial court, and that neither ruling warranted a new trial. That case, although also addressing, in part, a N.J.R.E. 608 violation, is not analogous to this one. Advising the jury in a fee action that the defendant had also failed to pay his condominium fees is not akin to telling a jury in an auto negligence action that all the treating doctors are being sued for insurance fraud of over $3 million, with plaintiff having been singled out in the complaint as an example of overtreatment and excessive billing.

plaintiff's treating doctor, as she undoubtedly should have, the judge would have denied her motion. We are convinced, however, that defense counsel's ambush of plaintiff's treating doctor — and plaintiff's counsel — struck a mortal blow to plaintiff's case, and the judge's attempt to salvage the suit by permitting the doctor to respond to GEICO's fraud allegations, although well intentioned, was misguided.

First, that effort, as the transcript makes abundantly clear, was nothing short of a disaster. Instead of achieving the goal of putting the fraud allegations against plaintiff's doctors out of the jurors' minds, the doctor having lost control of himself before the jury — to the point of relaying that he'd told a GEICO lawyer attempting to talk settlement that "You can go F yourself" — made the court's attempt to cure the error the most dramatic moments of the trial.

In addition, the judge's explanation to the jurors as to why they would hear from the doctor about the GEICO fraud lawsuit the judge had just directed them to disregard, resulted in the jurors receiving muddled advice as to whether or how they were to consider the doctor's testimony on re-direct. After delivering his curative instruction, the judge told the jury:

> even though I'm telling you to disregard it, I still think that Dr. . . . should get a chance to ex — give an

> explanation as to those allegations. So, the only other thing you're going to hear about that lawsuit is Dr. . . .'s explanation. And then after that, you could disregard that information. These are allegations. It's a lawsuit. People bring lawsuits. They win, they lose. They're just allegations. So that is my — the instruction I'm giving you, to disregard that information.

Leave aside the obvious problem of a judge instructing a jury to disregard the testimony they were about to hear from plaintiff's key witness. It simply makes no sense to instruct jurors to disregard information they received improperly, then tell them they will hear other testimony to allow them to put the improperly received testimony in perspective, thus directing them to evaluate both the improperly received testimony and the rebuttal, and then tell them they may not consider any of it.

We presume juries follow instructions. State v. Loftin, 146 N.J. 295, 390 (1996). We also acknowledge there are situations in which jurors will find it difficult or impossible to heed an instruction by the trial judge. State v. Herbert, 457 N.J. Super. 490, 503-04 (App. Div. 2019). To be effective, a curative instruction should be clear and specific and be delivered immediately. See State v. Vallejo, 198 N.J. 122, 135 (2009). This one unfortunately was neither.

We've already addressed the substantive problems with the charge. But the timing of its delivery was also problematic. Because the judge initially overruled plaintiff's objection to defendant's use of the GEICO complaint at the beginning of her cross-examination, the jurors listened to defense counsel's entire cross of the doctor with the understanding that he had been sued for insurance fraud for providing unnecessary treatment to patients, including plaintiff Rodriguez, in a sum in excess of $3 million.

We've instructed elsewhere that where "the sole issue is credibility, the trial judge must be sensitive to those matters which may ultimately impact on the critical issue before the jury." Diakamopoulos v. Monmouth Med. Ctr., 312 N.J. Super. 20, 30 (App. Div. 1998). Because defendant had already stipulated to liability, the only issue in this case was whether plaintiff could establish permanent injury and damages, which rested entirely on the jury believing the testimony of plaintiff's treating doctor.

By improperly questioning the doctor about, and confronting him with the GEICO complaint, defendant's counsel intended the jury to draw the impermissible inference that the doctor was committing insurance fraud by billing GEICO for unnecessary treatments including the extensive treatment the doctor provided to plaintiff, without the ability or intention of proving it.

Defendant's counsel argued her questions to the doctor went to "the truth of the reasonableness of the treatment to [plaintiff]. Because he's actually listed in the complaint as one of the examples."

The prejudice to plaintiff, especially after the doctor's rebuttal, cannot be overstated. By that point, if not before, the case was simply not salvageable. See Greenberg v. Stanley, 30 N.J. 485, 504 (1959) (acknowledging there are cases where "the prejudicial effect of the misconduct is so damaging that no instruction of the court can counteract its effect"). The judge thus misapplied his discretion in denying plaintiff's motion for mistrial. See Ibid. (explaining the abuse of discretion standard really means "that such matters depend very largely on the 'feel' of the case which the trial judge has at the time and his first-hand judgment in denying such a motion will not be reversed by a reviewing tribunal on a cold record . . . unless it so clearly appears from the printed page alone that the happening on which the motion was based was so striking that because of it one of the parties could not thereafter have a fair trial").

We likewise find the trial court erred in failing to grant plaintiff's new trial motion following the jury's verdict. We respect the trial court's view that because the jury "didn't come back in five minutes," as the court deemed it

would have had it found the doctors were "criminals" or "fraudsters," and that the jury was out for over an hour-and-a-half meant the jurors "were obviously weighing the actual evidence" and "didn't consider the evidence that [the court] told them . . . to disregard," and it "just believe[d] that they did." We also respect its view that the one juror, "a young man near plaintiff's age," who found plaintiff suffered a permanent injury, "maybe . . . disregarded a little bit, [the court's] sympathy instruction because although" plaintiff "gave very good testimony," the evidence of "objective injury, was . . . not very strong."

We are, however, also mindful of the counsel of Judge Jayne that

> [a] general verdict is doubtless the merger of a variety of ideas, reflections and sentiments; a compound in which only the omniscient could identify the component parts and accurately ascribe to each its relative influence in generating the ultimate product. No one but the jurors can tell what was put into it and the jurors are not permitted to say.[3]
>
> [Pulitzer v. Martin S. Ribsam & Sons Co., 19 N.J. Misc. 233, 234 (Sup. Ct. 1941).]

---

[3] The usual approach to a new trial motion requires the judge to carefully canvass the record, weighing the evidence to determine whether it is sufficient to support the verdict and to articulate and factually support its assessment of the credibility of the witnesses, their demeanor, and any other intangible contributing to its "feel of the case," as well as tangible factors such as the plausibility and consistency of the testimony in ascertaining whether there was a clear miscarriage of justice. State v. Brown, 118 N.J. 595, 604 (1990).

Here, we are convinced for the same reasons we believe the court should have granted plaintiff's mistrial motion, that plaintiff was denied a fair trial by defense counsel's improper use of the GEICO suit to establish in the minds of the jurors that plaintiff's treating doctors were engaged in insurance fraud by providing patients, including plaintiff, excessive and unnecessary treatment, resulting in a miscarriage of justice. R. 2:10-1; Liberty Ins. Corp. v. Techdan, LLC, 253 N.J. 87, 103 (2003).

"[O]ur jurisprudence has long ago set boundaries for advocacy, and unequivocally defined conduct that, by its potential to cause injustice, will not be tolerated." Geler v. Akawie, 358 N.J. Super. 437, 463 (App. Div. 2003). Plaintiff's treating doctor testified the MRI of plaintiff's spine two months after the accident revealed characteristics, including a herniation and nerve irritation, not normal for a nineteen-year-old, leaving plaintiff with a permanent injury. The defense expert claimed the same MRI revealed only disc bulging consistent with normal degeneration, and that plaintiff had not suffered a permanent injury but only cervical and lumbar sprains.

Instead of challenging the treating doctor's opinion within accepted bounds of trial advocacy, defendant's counsel cross examined the doctor with the GEICO complaint, which alleged the doctor had defrauded the insurance

company, including in the treatment provided to plaintiff. In doing so, counsel sought to establish the doctor's character for dishonesty through the specific instances of conduct alleged in the complaint in violation of N.J.R.E. 608, made worse because she had no evidence to prove any of it. Our courts view an attack by counsel on a witness's "character or morals, when they are not in issue, [as] a particularly reprehensible type of impropriety," Paxton v. Misiuk, 54 N.J. Super. 15, 22 (App. Div. 1959), because of the potential for such comments to cause injustice by instilling "'in the minds of the jury impressions not founded upon the evidence,'" Geler, 358 N.J. Super. at 467 (quoting Botta v. Bruner, 26 N.J. 82, 98 (1958)). We conclude defendant's counsel's cross-examination of plaintiff's treating doctor resulted in such an injustice here. To the extent we have failed to address any particular argument, it is because we've deemed it without sufficient merit to warrant discussion here. R. 2:11-3(e)(1)(E).

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.