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Trials&TRIBULATIONS

When can counsel's comments result in the reversal of a verdict?

In a recent case, the Appellate Division, First Department, struggled with this issue and ultimately, in a three-two decision, the court affirmed the trial verdict and concluded that plaintiff's counsel's comments were improper, but did not rise to the level of depriving defendant of a fair trial.

In *Gregware v. City of New York and Burtis Construction Co.*, 2015 N.Y. Slip Op. 06408 (1st Dept. Aug. 4, 2015), which involved a multi-vehicle collision, the city and Burtis Construction were found negligent in the manner in which they maintained a lane closure on the West Side Highway, in the City of New York, which was the scene of the accident. Their negligence was a substantial factor in plaintiff's significant injuries.

The jury awarded over \$7 million in damages and concluded that the city was 65 percent negligent and Burtis Construction was 35 percent negligent.

Both the majority and dissenting opinions devoted considerable time to discussing plaintiff's counsel's comments, which were contained in a 125-page summation. These improper comments included the following:

- He referred to Police Officer Pagano, who testified on behalf of the city, as being one of "New York City's worst" and that he was "fed information by his attorneys" and he told "less than the truth under oath."
- He referred to the city's expert, Dr. Sadeigh, as "phoney baloney"
- He referred to the city's defense counsel, George S. Wang of Simpson Thacher & Bartlett LLP, as "Wang and his gang."
- He also vouched for his own credibility and that of his own witnesses.

Although the majority opinion found counsel's questioning of the credibility of the city's witnesses and claiming they were

liars "highly improper," they concluded that it was not sufficient to deprive the city of a fair trial.

However, presiding Justice Tom, and associate Justice Sweeney concluded otherwise. In a dissent authored by Justice Sweeney, they stated the following:



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Here, the summation "had as its continuing theme, personal attacks on defense counsel, charges that defense witnesses outright lied, allusions of subordination of perjury by counsel and assertions of personal knowledge and personal opinion as to the case the credibility of witnesses."

As a result, they concluded a reversal was in order.

The dissent further argued that the improper comments were not isolated, and were designed to "create an inflammatory and prejudicial atmosphere against the defendants." Although the dissent acknowledged the fact that counsel is given "wide latitude" in their summations, it noted that it is not without its limitations.

The dissent also pointed to a number of Appellate Division cases in the First Department, which reversed verdicts for similar comments by counsel in their summations, see *Valenzuela v. City of New York*, 59 AD3d 40 (1st Dept. 2008) and *Berkowitz v. Marriott Corp.*, 163 AD2d 52 (1st Dept. 1990).

In reviewing other Appellate Division, First Department cases, it is evident that there is no bright line. Simply referring to an expert witness as a hired gun can be characterized as improper, but it will not result in an unfair trial or a reversal, see *Wilson v. City of New York*, 65 AD3d 906 (2009). It also appears that an isolated comment regarding a witness' credibility will not result in a reversal.

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Is there a bright line in the Appellate Division, Fourth Department, when an improper comment by counsel will be viewed as depriving the adversary of a fair trial?

In reviewing the Fourth Department cases, it is noteworthy that the vast majority of civil cases in which reversals for improper comments in summations occurred are from the Eighth Judicial District, and in particular, Erie County. The only civil case in the past 15 years from the Seventh Judicial District that resulted in a reversal was in a case being handled by an attorney from Buffalo.

What would have happened had the Gregware case been before the Appellate Division, Fourth Department?

In analyzing that issue, it is difficult to compare a series of improper statements by counsel without having the benefit of reviewing the entire record. Such a review would be beyond the scope of this article. However, in reviewing the half a dozen cases from the Fourth Department that resulted in reversals on the grounds of improper comments by counsel, one can surmise as to what the Fourth Department would have done in Gregware. In my view, they would have joined with the dissent and reversed the \$7 million verdict for plaintiff.

Among the cases that I reviewed which resulted in reversals were the following:

1. *Kennedy v. Children's Hospital of Buffalo*, 288 AD2d 918 (4th Dept. 2001)

The Appellate Division reversed the decision below, reinstated the complaint and directed a new trial. The trial below had resulted in a jury verdict for the defense. The court concluded, "the misconduct of defendant's attorney throughout the trial and particularly during summations deprived plaintiff of a fair trial, and thus we reverse the judgment in the interest of justice, reinstate the complaint and grant a new trial."

Although the Appellate Division decision is very brief, it appears the defense attorney, whose name does not appear in the opinion, engaged in the following conduct:

- Refused to abide by Supreme Court rulings;
- Continued to object and argue in court after the rulings were made;
- Badgered plaintiff's attorney and constantly interrupted witnesses, by not allowing them to complete their responses to his questions;
- Interrupted the summation of plaintiff's attorney more than 30 times to make groundless objections; and
- Commented in the presence of the jury that the arguments

of the plaintiff's attorney were preposterous and absolutely objectionable.

2. *Stewart v. Olean Medical Group*, 17 AD3d 1094 (4th Dep't 2005)

In *Stewart*, the jury returned a verdict for plaintiff of \$2.5 million in damages. The court reversed it and a new trial was granted. Although there were other errors that occurred, the court also concluded that the misconduct of plaintiff's counsel throughout the trial, and particularly during the summation, deprived defendants of a fair trial.

The court highlighted the following conduct of plaintiff's counsel during the summation:

- Plaintiff's counsel referred to evidence that had been ruled inadmissible;
- Suggested that the jury was being prevented from hearing relevant testimony; and
- Made repeated prejudicial appeals to the jury's passion and sympathy.

The court concluded that the misconduct was not an isolated remark but rather was a continual and deliberate effort to divert the jurors' and the court's attention from the issues to be determined.

3. *Doody v. Gottshall*, 67 AD3d 1347 (4th Dep't 2009)

In *Doody*, the trial court set aside the verdict and ordered a new trial on its own initiative in the interest of justice based upon the misconduct of defendant's counsel.

According to the Appellate Division opinion, defendant's counsel, among other things, did the following:

- Failed to abide by the court's rulings;
- Made inflammatory remarks concerning plaintiff's counsel and expert witnesses;
- Repeatedly expressed personal opinions regarding the cause or severity of plaintiff's injuries; and
- Made arguments to the jury on summation that were not supported by the evidence.

Not only did the court set aside the verdict in defendant's favor, but it also initially disqualified defendant's attorney and his firm from representing defendant at the retrial. However, the Appellate Division modified that order and permitted the same firm to represent defendant at the second trial.

Conclusion

Based upon a review of the appellate court decisions from both the First and Fourth departments, it is difficult to point to a bright line that separates the cases in which an appellate court

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might affirm the decision below as compared to when it reverses the verdict and remands the case for a new trial based on the improper conduct of counsel.

It is somewhat comparable to Justice Potter Stewart's famous quote from the Supreme Court case of *Jacobellis v. Ohio* (1964), when he characterized his perception of pornography when he stated, "I know it when I see it." However, one can attempt to derive from these cases the factors that will influence the decision including the following:

- A persistent pattern of misconduct is required, and an isolated remark will not likely result in a reversal.
- Making repeated references to items that have been ruled inadmissible will support a reversal.

- Vouching for one's witnesses and for oneself throughout the trial and in summations will often tip the balance in favor of reversal.
- Ignoring the court's rulings and being disrespectful to the court also crosses the line.
- Insulting the adversary and his witnesses can be seen as depriving a litigant of a fair trial and can result in a reversal.

In the last analysis, counsel should simply avoid any of this conduct in order to make certain the line has not been crossed.

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