

Improper Remarks During Closing Argument Reverse Defense Verdict

Healthcare Alert | 4 min read

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Issue

Can comments intended to inflame the passions of the jury, even if directed at a non-party, result in error?

Michael Konewko v. Advocate Health and Hospitals Corporation d/b/a Advocate Good Samaritan Hospital 2020 IL App (2d) 190684

Case Summary

Michael Konewko, then age 57, underwent a laminectomy and removal of a synovial cyst at Advocate in October 2010. Following surgery he experienced increased leg weakness. While still an inpatient, he was assisted by Nurse Begler to the commode which involved an uncontrolled descent, after which his leg weakness increased to the point of feeling “dead.” Konewko later underwent two additional surgeries, suffered a DVT and infection, underwent rehabilitation, but eventually regained 4+ out of 5 strength in the leg. Plaintiff filed suit against Advocate on the theory that its agent, Nurse Begler, was negligent in assisting with the transfer to the commode. Advocate defended the case in part on the theory that the surgery, and not the transfer, caused the patient’s symptoms of leg weakness. Pre-trial rulings prohibited any reference to the relative wealth or poverty of any party, or to ask the jury to put itself in the position of any party.

During closing argument, plaintiff’s counsel explained to the jury “[Y]our verdict must not be based on speculation, prejudice, or sympathy. The concept of empathy, on the other hand, is a little different, and the concept of empathy and understanding what somebody has gone through can certainly play a role in this case.” Counsel for plaintiff also accused Nurse Begler of lying about plaintiff’s use of a walker since she had not documented it and stated “Careful and meticulous, question mark. Doubt it, exclamation point.” Plaintiff asked the jury for \$762,591, for medical bills, pain and suffering, and loss of a normal life.

During the hospital's closing argument, defense counsel made the following statements:

- “Nurse Begler’s reputation as a nurse, the dedication that she does in and out, going back decades . . . [w]e take it seriously. [Begler] takes it seriously . . . That’s why we’re here.”
- “So you were asked to award . . . almost \$800,000. And the first thing that popped into my mind was how many shifts, how many years, a nurse and a physical therapist in their life would have to work to earn \$800,000[Plaintiff’s Counsel Objected]”
- “Put yourself in Lisa Begler’s—[Plaintiff’s Counsel Objected]”
- “I would submit to you that exploiting people’s lack of memory and having them on the stand for hours, and basically mocking them—[Plaintiff’s Counsel Objected]”
- “And then asking with all the experts that have made all this money in this case, then asking to award a sum of money that would take years for nurses and physical therapists—[Plaintiff’s Counsel Objected]”

The jury returned a verdict for the defendant hospital and returned an answer of “no” to the following special interrogatory: “Before and at the time of the commode incident was the nursing and/or physical therapy staff of Defendant Advocate Good Samaritan Hospital negligent?” As a result, the court denied plaintiff’s post-trial motion and an appeal followed.

On appeal, the *Konewko* Court began its analysis of the closing argument by identifying numerous instances in which statements made during closing argument improperly attempted to appeal to the jury’s sympathy and/or inject improper elements into the case, such as: asking the jury to put itself in the position of a plaintiff or a defendant, referring to a party’s financial position, directing a jury’s attention to the effect of an adverse verdict upon a defendant’s professional reputation, and suggesting that a defendant will be personally responsible for the satisfaction of a money judgment. The appellate court also reviewed prior decisions establishing that, while the trial court can cure an improper comment by sustaining the objection and instructing the jury to disregard the comment, when the comment was repeated or made in violation of prior court orders, sustaining the objection may be insufficient. The appellate court also noted that in cases where the evidence is close, such that a jury might reasonably return a verdict for either party, the attorney’s improper comments might warrant a reversal.

The appellate court concluded that counsel’s comment about the reputation of the nurse was improper and injected an improper element into the case by inviting the jury to consider whether Nurse Begler, a sympathetic witness and a dedicated nurse, deserved a mark against her reputation. The court further reasoned that counsel’s comments about the nurse’s salary was improper because 1) it suggested that Nurse Begler would be personally responsible for a money judgment, 2) that it referred to her financial position, and 3) that it assumed facts not in evidence because Nurse Begler never testified to her salary or her net worth. The appellate court also found that counsel’s comments about the amount of money the plaintiff’s experts had made in the case raised the inference that plaintiff and his attorney had the resources to hire expert witnesses and that plaintiff had greater means to bear a loss. The court also factored into its analysis how closely contested the case was. Ultimately, the court reversed the verdict and remanded because the attorney made between four or five improper comments (as opposed to one or two that were sufficient to produce the same result in other cases), the repeated nature of the comments showed an intent to appeal to the sympathy of the jury, and the comments violated the *in limine* order

of the trial court. The court also rejected defendant's argument that the comments, since made about an agent of the party and not the party itself, did not require reversal.

Takeaways

Appealing to the jury's emotions and injecting extraneous issues during closing argument risks undermining a favorable jury verdict and should be avoided. Both parties in this case made objectionable statements during closing argument, but this ruling reaffirms the old adage that retaliation is often punished more harshly than the original offense.

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