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Working with juries: Can you go too far?

Appellate court sets some boundaries for closing argument

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When does an attorney's behavior exceed the bounds of reasonable closing argument made to a jury? In a recent unpublished decision in *Salazar v. Patel* (2007) WL 2019803, the Fifth Appellate District concluded that a defense attorney had gone too far in addressing the jury during closing arguments.

Plaintiff Doralisa Salazar appealed from a judgment awarding her less than $1,500 for injuries she sustained in a vehicle accident. She challenged the award on the grounds of juror misconduct, attorney misconduct, and inadequate damages.

Ms. Salazar was involved in a vehicle accident in November 1999 when the defendant, Vaishali Patel, ran a red light at an intersection and hit Salazar's vehicle as she was making a left turn. The front-end impact was *tremendous* and spun Ms. Salazar's car around, causing her to hit another vehicle. She suffered pain and was treated over a six-year period.
Ms. Salazar received 62 chiropractic treatments over an 11-month period and continued to treat various symptoms to alleviate her complaints of chest, hip and back pain. By the time of trial, she had been advised she would always experience pain and long-term symptoms. The defendant admitted liability, but the defense experts disputed causation and opined that her condition was caused by arthritis.

During trial, plaintiff's attorney, Rodney Haron, asked for $21,874 for past medical expenses, $574,118 for future medical care, and $279,377.28 for pain and suffering. The amount ultimately awarded by the jury – $1,495.67 – was little more than the $905.61 she had sustained in damages before consulting an attorney.

During the defense's closing argument, given by Manuel Garcia of Brown & Peel, he demanded to see a Post-it note given to Ms. Salazar by her attorney, stating, "I think the jury would like to see what you've been showing your client." (Slip Op., pg. 8.) Mr. Haron asked to approach the bench, but the court refused and requested that Mr. Garcia continue with his argument. Mr. Garcia read the contents of the note, which said, "Stretch, twist in 15 seconds." (*Ibid.*) Mr. Haron's motion to strike was granted, and the court admonished Mr. Garcia, "Counsel, don't cross the line. Make your argument. He can communicate with his client. Let's roll along here." (*Ibid.*)

Apparently, Mr. Garcia just could not give up and apologized that the *plaintiff* had wasted the jury's time. He accused the plaintiff of engaging in a "setup." (Slip Op., pg. 9.) The very thought of it made Mr. Garcia "sick." (*Ibid.*)

Any attorney could only wonder what was going on in Mr. Haron's mind as he tried to repair the damage, insisting that there was "absolutely no evidence of anything." (*Ibid.*) He reminded the jury that the judge had stricken the comments, and based on Mr. Garcia's decision not to waste the jury's time, defense had not even made a closing argument. He concluded, "I'm not going to dignify them by addressing them. There's no closing argument other than mine." (*Ibid.*)

The trial court agreed to allow plaintiff to make a motion for mistrial based on attorney misconduct after the verdict came in. The verdict awarded plaintiff $905.67 in economic damages and $290 for lost wages for a total award of $1,195.67. The court advised the jury it must award some amount for non-economic damages and ordered the jury to return to deliberate.

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The jury added another $300 for non-economic damages of $1,495.67. (Slip Op., pg. 10.)

The court denied the motion for mistrial, believing it had properly admonished the jury at the time the misconduct occurred. The jury was also instructed that an attorney's argument is not evidence. Plaintiff filed a motion for new trial, arguing the jury committed misconduct by considering Mr. Garcia's statements as evidence, which formed the basis of the attorney misconduct argument, and inadequate damages. In a declaration submitted by one of the jurors, he admitted the jury discussed Mr. Garcia's statements and noted that "remarks were also made to the effect that Mr. Garcia's closing argument was the most exciting thing that had happened all week." (Slip Op., pg. 11.)

Plaintiff argued that Mr. Garcia committed misconduct when he disclosed an attorney-client communication. She claimed Mr. Garcia leaned over to look at the note and then told the jury of its contents.

The defense opposed the motion, claiming they were "simply attempt[ing] to take reasonable remedial measures to disclose the fraud to both the judge and the jury." Mr. Garcia *blamed* plaintiff's attorney because as he was speaking to the jury, he observed Mr. Haron tapping on the table in a possible attempt to get "someone's attention." (Slip Op., pg. 12.) Mr. Garcia claimed he thought Mr. Haron was trying to show him a document when he read the Post-it note. Then he observed plaintiff read the note, and then stretch and twist with a look of pain on her face.

Mr. Haron denied giving his client instructions to act as if she were in pain. Even so, he argued, Mr. Garcia had no right to observe the note or interpret its contents.

The reviewing court acknowledged that "[a]ttorneys have wide latitude to discuss the case in closing arguments," citing *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 795. (Slip Op. pg. 15.) The attorney can also discuss his views as to what the evidence shows and what conclusions can be fairly drawn from the evidence. "The adverse party cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the consideration of the jury." (*Ibid.*) "Only the most persuasive reasons justify handcuffing attorneys in the exercise of their advocacy within the bounds of propriety." (*Ibid.*)

When an attorney exceeds those boundaries, the court in *Salazar* held the attorney has committed misconduct. The attorney may not assume facts not in evidence or ask the jury to speculate as to unsupported inferences. Personal insults and derogatory remarks concerning opposing counsel also constitute misconduct. The reviewing court found Mr. Garcia had violated these rules, including intentionally disclosing an attorney-client communication. It found there was no evidence that plaintiff had committed fraud, and Mr. Garcia failed to seek a ruling on the privilege before divulging the contents of the Post-it note. "Instead, he took it upon himself to inform the jury about what *he* thought the note meant." (Slip. Op., pg. 18.)

The reviewing court suggested it might have reached a different conclusion if Mr. Garcia had limited his argument to comments on plaintiff's demeanor, i.e., by twisting and showing pain during his closing argument. (*Ibid.)* The court also noted that if defendant truly believed the plaintiff was engaging in fraudulent conduct, the remedy was to bring it to the court's attention outside the jury's presence. (*Id.* at p. 19.)

The appellate court was also critical of the trial court's conduct in minimizing the impact of the attorney's misconduct. It admonished the attorney once and ordered the comments stricken, but it did not directly address the jury or remind it that the note was not part of the record. Mr. Garcia continued to engage in misconduct after this admonition. The trial court also failed to remind the jury *when the comments were made* that they did not constitute evidence. (Slip Op., pp. 20-21.) In reversing the judgment, the court found "the court's instructions failed to ameliorate the serious damage Patel's attorney wrought." (*Id.* at p. 21.)

This case is instructive for several reasons: First, it demonstrates what behavior may be observed by a jury and enter into its deliberations. What would have been the result if the jury had simply observed the attorney passing the note to his client and then she stood up and stretched with a look of pain on her face? The appellate court indicated the defense attorney might have properly commented upon such actions; however, the attorney crossed the line by disclosing attorney-client communications and insulting the plaintiff and her attorney.

While judicial misconduct was not raised as a ground on appeal, and none of the other grounds was considered, this case also demonstrates that if such misconduct does occur, a simple instruction, granting a motion to strike without more of an explanation, failing to talk directly to the jury, or failing to admonish the misbehaving attorney *only once* may not be enough.

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