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Supreme Judicial Court of Massachusetts,
Suffolk..

Meaghan FITZPATRICK
v.
WENDY'S OLD FASHIONED HAMBURGERS
OF NEW YORK, INC., & others. [1]

SJC-12937
|
Argued November 6, 2020.
|
Decided May 21, 2021.

Practice, Civil, Argument by counsel, Mistrial, New trial.

CIVIL ACTION commenced in the Superior Court Department on August 9, 2013.

The case was tried before Heidi E. Brieger, J., and a motion for a mistrial was heard by her.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Attorneys and Law Firms

Matthew J. Fogelman, Newton, for the plaintiff.

Christopher A. Duggan, Lincoln, for Wendy's Old Fashioned Hamburgers of New York, Inc., & another.

Myles W. McDonough, Laura Meyer Gregory, & Ryan B. MacDonald, Boston, for Massachusetts Defense Lawyers Association, amicus curiae, submitted a brief.

Brendan G. Carney, Thomas R. Murphy, Salem, Kevin J. Powers, & Patrick M. Groulx, Somerville, for Massachusetts Academy of Trial Attorneys, amicus curiae, submitted a brief.

Present: Budd, C.J., Gaziano, Lowy, Cypher, & Kafker, JJ.

Opinion

GAZIANO, J.

***1** The defendants in this personal injury suit moved for a mistrial after plaintiff's counsel purportedly made improper comments during his closing argument. The judge chose to reserve decision on the motion until after the jury rendered their verdict. When the jury found for the plaintiff, the judge allowed the motion and declared a mistrial due to the plaintiff's closing argument. The plaintiff prevailed again at a second trial, but she was awarded significantly lower damages. She then appealed from the decision allowing the mistrial, on the ground that once the verdict had been returned, the motion for a mistrial became a motion for a new trial and should have been evaluated under that standard.

Our prior case law does not directly address the question whether, in a civil action, a judge may reserve decision on a motion for a mistrial until after the jury renders a verdict. We conclude that, in civil cases, a motion for a mistrial must be decided when made, and that, after a jury verdict, the appropriate vehicle to be used in seeking to have a case tried again is through a motion for a new trial. [2] As this requirement shall apply only prospectively, we conclude that, here, the judge did not abuse her discretion in allowing the motion for a mistrial.

1. Background. We recite the essential facts from the record at the first trial, supplemented where relevant with the records of the proceedings at the both trials.

a. The plaintiff's injury. In 2011, the plaintiff purchased a plain hamburger from a fast food restaurant. The hamburger meat contained a small piece of bone, less than one-eighth inch in diameter. When the plaintiff inadvertently bit down on the bone in the course of eating the hamburger, one of her upper molars split. The plaintiff was thirty-four years old at the time of the injury. Treating the injury required multiple medical procedures over the next two years, including two root canals, a gingivectomy, sinus elevation surgery, and a graft of bone from a cadaver. In 2013, the plaintiff filed a complaint in the Superior Court against Wendy's Old Fashioned Hamburgers of New York, Inc. (Wendy's), which operated the restaurant, and JBS Souderton, Inc. (JBS), which produced the hamburger patty, for breach of the implied warranty of merchantability under G. L. c. 106, § 2-314, and violations of G. L. c. 93A. [3]

b. Events at trial. A jury trial was held in 2016 on the breach of warranty issue. The four witnesses, all called by the plaintiff, were the Wendy's district manager, the plaintiff's dentist, a JBS employee who had been responsible for quality assurance, and the plaintiff herself. The defendants did not dispute that the hamburger contained two hard fragments, or that the plaintiff had broken her tooth on one of them. Rather,

the defendants argued that previous issues with the same tooth had contributed to the plaintiff's injuries. The defense also sought to establish that JBS and Wendy's had exceeded government and industry standards and had met reasonable customer expectations for hamburger meat.

***2** After testimony concluded, counsel for the defense began his closing argument by telling the jury that, "in our society we entrust our citizens to come together, evaluate the truth, evaluate what has been put before you and to speak the truth." After reviewing the evidence, he concluded by urging that the jury's "speech of the truth" be that neither defendant committed a breach of the warranty of merchantability, and that in fact "both of these fine companies did precisely what we would want all of the companies in America to adhere to."

Plaintiff's counsel then began his closing by exhorting the jury to use their commonsense knowledge of "what consumers reasonably expect." He emphasized that "[i]t's what we reasonably expect. Us, the average people, not them." He later referred to the defendants as "[o]ne of the largest fast food companies and one of the largest beef manufacture[r]s in the world," and said that "[w]hat we've heard for three days is a long list of excuses. One after another. Attempt to confuse things. That's what they do, these big companies. That's what they do." Subsequently, he said:

> "But you know what, when Wendy's and JBS sells all those burgers, they are more than happy to take our money. We pay for the burger. It goes to them. But when a burger hurts somebody, no responsibility. No accountability. Shame on them, honestly -- shame on them.
>
> "Are these important rules in our community? Are we going to enforce them? Are you going to enforce them? If the rules that we talked about here, the safety rules, if those are important you need to speak to that and your verdict needs to speak to that. Your verdict will speak volumes echoing outside of this Courthouse. If the rules are not important, if it's okay for them to serve burger with bone and someone gets hurt once in a while, and if they get injured, too bad for them. Then you know what? Give these guys a pass. Give them a pass. I don't think you can. I don't think you can give them a pass."

He then suggested a range of damages for the plaintiff's pain and suffering of between $150,000 and $250,000.[4] The plaintiff's counsel concluded with:

> "And this may be the kind of case that triggers something for you a month from now or a year from now. You might be eating a burger. Maybe you'll read an article that someone else got hurt by a food product. Or you'll be telling your wife or your husband about the case. That somebody ate a burger and they did not expect to get hurt. And that safety rules were violated and that you helped to make a wrong right. You made it right and you held them responsible and accountable."

Although defense counsel did not object during the plaintiff's closing, once the argument was finished, he immediately moved for a mistrial.[5] A sidebar discussion was held in which the plaintiff's counsel protested that he had not "crossed any lines." The judge responded, "I have not yet decided how close you were to that line but it was close. I'm going to let it go to the Jury and we'll see what happens after that. All right?" The parties accepted this manner of proceeding. Prior to the judge's final charge, only one request was made for specific instructions; this was by the plaintiff's counsel, who sought an instruction concerning aggravation of a prior dental condition.

***3** In her final charge, the judge told the jurors that "the opening statements and the closing arguments of lawyers are not evidence," and that they should disregard any "matters" argued in closing that were not introduced in evidence. She added:

> "I want to stress to you that it is not your job as a juror to send a message to anyone inside or outside of this Courtroom. Your job is not to deter any conduct or to punish any party. Your job is not to make any distinctions or hold any sympathies or prejudices based on whether a party is a big company or a small company or a buyer or a seller."

The judge also explained that the damages the plaintiff was seeking were compensatory and their "object is not to punish anybody." Neither side objected to the jury instructions or sought any modifications insofar as they touched on the closing arguments.

The jury found that both defendants had committed a breach of the warranty of merchantability and thus had caused injury to the plaintiff. They awarded $150,005.64 in damages (the low end of the range recommended by the plaintiff's counsel, plus the cost of the plaintiff's meal at Wendy's). Once the verdict was announced, counsel for the defense immediately renewed his motion for a mistrial.

After a hearing on the motion and a review of the transcripts, the judge determined that the plaintiff's counsel had made a number of improper remarks in closing that went beyond a permissible response to statements by the defense. In particular, the judge found that counsel had urged the jury to "depart from neutrality," and to decide the case based on an "us versus them" attitude with a bias against big corporations; encouraged the jury to act as the "voice of the community" and send a message by punishing the defendants; made "golden rule" arguments asking the jury to identify with the plaintiff; injected personal opinion by implying that incidents such as the one in which the plaintiff was injured were frequent; and used so-called "reptile" litigation tactics aimed at triggering in the jurors a fear of harm to their community. The judge stated that no immediate curative instructions were given, that the curative instructions included in her final charge did not address the "golden rule" argument or the injections of personal opinion, and that her instructions relative to the "us versus them" arguments had not been forceful enough. She noted that she had discretion to declare a mistrial when "emotional, inflammatory, or prejudicial elements" of a closing argument were "likely to affect the justice of the verdict." Having "review[ed] the totality of the closing argument and the evidence presented at trial," the judge concluded that "prejudicial aspects of the closing argument likely influenced the jury's verdict," and allowed the motion.

A second trial was held before the same judge; the second jury again found in the plaintiff's favor, but awarded only $10,000 in damages. The judge then ruled in favor of the defendants on the G. L. c. 93A claim, and also allowed the defendants' motion to recover costs, yielding net damages to the plaintiff of $5,964.52. The plaintiff appealed; the sole focus of her appeal was the allowance of the defendants' motion for a mistrial at the conclusion of the first trial. The Appeals Court concluded that the judge erred in applying the standard for granting a mistrial rather than for allowing a new trial when she ruled on the motion after the jury had returned their verdict. Fitzpatrick v. Wendy's Old Fashioned Hamburgers of N.Y., Inc., 96 Mass. App. Ct. 410, 427-430, 136 N.E.3d 355 (2019). Accordingly, the court vacated the order allowing the mistrial and remanded the matter for reconsideration of the motion for a mistrial under the standard applicable to a motion for a new trial. Id. at 432, 136 N.E.3d 355. We allowed the defendants' application for further appellate review.

***4** 2. Discussion. a. Mistrials in civil cases. Although we have encouraged judges to reserve motions for mistrials until after the jury verdict in criminal cases, whether decisions on such motions may be similarly reserved in civil cases appears to be a question of first impression in the Commonwealth. [6] See Commonwealth v. Brangan, 475 Mass. 143, 148, 56 N.E.3d 153 (2016) (when "[a criminal] defendant's motion for a mistrial is brought during closing arguments and presents a close question," deferral "enhances judicial efficiency and preserves valuable judicial resources"); Commonwealth v. Murchison, 392 Mass. 273, 275, 465 N.E.2d 256 (1984) ("The judge's decision to defer action on the defendant's motion for a mistrial until after the verdict was one of fairness and common sense"). We decline to extend this reasoning from a criminal context to civil trials, where the appropriate vehicle for a party to use in seeking to retry a case once the jury have reached a verdict is to file a motion for a new trial under Mass. R. Civ. P. 59, 365 Mass. 827 (1974).

In general, a mistrial is a "trial that the judge brings to an end without a determination on the merits because of a procedural error or serious misconduct occurring during the proceedings" (emphasis added). Black's Law Dictionary 1200 (11th ed. 2019). The allowance of a mistrial thus signifies that something has happened that is "likely to affect the justice of the verdict," and that there is "some circumstance indicating that justice may not be done if the trial continues." Curley v. Boston Herald-Traveler Corp., 314 Mass. 31, 31–32, 49 N.E.2d 445 (1943). These specific precipitating events can occur at any point during the trial, for instance during cross-examination of a witness, Reid v. Hathaway Bakeries, Inc., 333 Mass. 485, 487–488, 132 N.E.2d 161 (1956), or even as early as during opening statements by counsel, Shea v. D. & N. Motor Transp. Co., 316 Mass. 553, 553-554, 55 N.E.2d 950 (1944). In both civil and criminal cases, a motion for a mistrial must be made immediately after the events prompting the motion occur, or as soon as the moving party learns of them. Commonwealth v. DiPietro, 373 Mass. 369, 387, 367 N.E.2d 811 (1977). In sum, in deciding whether to allow a motion for a mistrial, a judge must make a prospective

determination, in other words, a prediction, about the impact of specific events on a verdict that has yet to be reached.

As an immediate, on-the-spot response to a specific issue so serious that it warrants breaking off a trial that has begun, and may be close to concluding, a mistrial should not be granted lightly. See Davidson v. Davidson, 19 Mass. App. Ct. 364, 377–378, 474 N.E.2d 1137 (1985) (mistrial is "[a] drastic" response to "fundamental errors"). Indeed, in a civil case, a mistrial is "generally regarded as the 'most drastic remedy and should be reserved for the most grievous error where prejudice cannot otherwise be removed.' " Pasquale v. Ohio Power Co., 187 W. Va. 292, 309, 418 S.E.2d 738 (1992), quoting Seabaugh v. Milde Farms, Inc., 816 S.W.2d 202, 208 (Mo. 1991). Counsel accordingly should not be given incentives to resort to such motions. Allowing judges to reserve decisions on motions for mistrials in civil cases creates such an incentive by removing any risk for the party bringing the motion; the party need not weigh the risk of losing the case against the cost of having to try it again. The important interest of "judicial efficiency" that we highlighted in Brangan, 475 Mass. at 148, 56 N.E.3d 153, generally is better served in a civil context by allowing a trial that already has begun to continue to a verdict. At that point, the losing party may submit a motion for a new trial pursuant to Mass. R. Civ. P. 59. [7]

***5** In contrast to a mistrial, a new trial should be granted only when "on a survey of the whole case it appears to the judge that otherwise a miscarriage of justice would result." Wojcicki v. Caragher, 447 Mass. 200, 216, 849 N.E.2d 1258 (2006), quoting Spiller v. Metropolitan Transit Auth., 348 Mass. 576, 580, 204 N.E.2d 913 (1965). See Evans v. Multicon Constr. Corp., 6 Mass. App. Ct. 291, 295, 375 N.E.2d 338 (1978). Rather than making a prediction about whether particular circumstances mean that justice may not be done if the trial continues, a judge considering a motion for a new trial is in a position (and indeed is required) to look back in time over the entire trial and to decide whether a miscarriage of justice in fact did occur. [8] While "prejudicial misconduct of counsel that is not cured by the judge's instructions to the jury" may suffice to create such a miscarriage of justice, see Gath v. M/A-COM, Inc., 440 Mass. 482, 492, 802 N.E.2d 521 (2003), the judge must evaluate the effect of this misconduct and the steps taken to cure it not in isolation, but rather "with reference to the entire case as it stood before the jury." Salter v. Leventhal, 337 Mass. 679, 698, 151 N.E.2d 275 (1958). This includes taking into account the actual verdict itself. See Gath, supra at 495, 802 N.E.2d 521.

Our position in Brangan, 475 Mass. at 148, 56 N.E.3d 153, and Murchison, 392 Mass. at 275, 465 N.E.2d 256, favoring reserving decisions on motions for mistrials until after the jury verdict, concerned, again, only criminal cases, where several decisive policy considerations are present that are absent in the context of civil litigation. In general, because the "stakes in a criminal case are likely to be higher, jail or freedom, compared with gain or loss of property in a civil case," criminal proceedings involve stronger safeguards for defendants. See Terrio v. McDonough, 16 Mass. App. Ct. 163, 170, 450 N.E.2d 190 (1983). In particular, criminal defendants are protected by the prohibition on double jeopardy found in the Fifth Amendment to the United States Constitution and Massachusetts common law. See Mahoney v. Commonwealth, 415 Mass. 278, 283, 612 N.E.2d 1175 (1993). This prohibition protects a criminal defendant's "valued right to have his trial completed by a particular tribunal." Commonwealth v. Taylor, 486 Mass. 469, 483, 159 N.E.3d 143 (2020), quoting Oregon v. Kennedy, 456 U.S. 667, 671–672, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982).

The allowance of a mistrial on a defendant's own motion removes this double jeopardy bar by consent. See Pellegrine v. Commonwealth, 446 Mass. 1004, 1005, 844 N.E.2d 608 (2006). Permitting or encouraging judges to reserve ruling on motions for mistrials thus allows criminal defendants to seek relief from serious trial errors without, by doing so, necessarily giving up their rights not to be tried twice for the same offense. It would be unfair to require criminal defendants to rely solely on the postverdict motion for a new trial, as, unlike the declaration of a mistrial, the allowance of a motion for a new trial in a criminal case may be appealed by the Commonwealth pursuant to G. L. c. 278, § 28E. See Brangan, 475 Mass. at 146, 56 N.E.3d 153. [9]

In Brangan, 475 Mass. at 148, 56 N.E.3d 153, we did cite a civil case from Florida approving of the reservation of a motion for a mistrial until after jury deliberations. See id., citing Companioni v. Tampa, 51 So. 3d 452, 455 (Fla. 2010).

Companioni itself relied on an earlier Florida case, Ed Ricke & Sons, Inc. v. Green, 468 So. 2d 908, 910 (Fla. 1985) (Ricke), in which the Florida Supreme Court stated that "the trial court has the power to wait until the jury returns its verdict before ruling on a motion for a mistrial," and that the motion so reserved "is simply a motion for a mistrial." The Ricke court explained the justifications for this rule as to "conserve judicial resources" and to forestall the tactic whereby a party whose case is going badly tries to force the other party to request a mistrial and thereby obtain a second chance to try the case. Id. For the reasons discussed, we view these justifications as unpersuasive.

***6** Moreover, Florida appears to be alone among the States in allowing reserved motions for mistrials in civil cases to be decided under the mistrial standard. See 88 C.J.S. Trial § 108 (2020) (citing Ricke as sole authority for view that trial court can wait until jury returns verdict before ruling on motion for mistrial). Other State courts to have considered this situation have concluded that, where a decision on a motion for a mistrial is reserved until after the verdict is rendered in a civil case, the motion should be treated as a motion for a new trial. See, e.g., Brigham v. Hudson Motors, Inc., 118 N.H. 590, 593, 392 A.2d 130 (1978) ("The court's order granting a mistrial after verdict was equivalent to an order setting aside the verdicts and ordering a new trial"); Smith v. Andreini, 223 W. Va. 605, 615, 678 S.E.2d 858 (2009) (order characterized as granting mistrial, in response to defense counsel's closing argument, in fact awarded plaintiff new trial); Klein v. State Farm Mut. Auto. Ins. Co., 19 Wis. 2d 507, 509–510, 120 N.W.2d 885 (1963) (treating postverdict allowance of motion for mistrial as in substance allowance of new trial). [10]

Henceforth, in civil cases, judges may not reserve a motion for a mistrial until after the jury return their verdict. Rather, the trial judge must rule on a motion for a mistrial when it is made. Any later postverdict motion for a new trial must be considered as a motion for a new trial under Mass. R. Civ. P. 59 and decided under the applicable standard, i.e., whether a consideration of the whole case suggests that a miscarriage of justice occurred. [11] This approach will best conserve judicial resources by discouraging counsel from resorting rashly to the most drastic remedy possible for trial errors.

b. Trial judge's order. Here, the judge's postverdict order that overturned the result of the first trial was, both in form and in substance, the allowance of a mistrial. It was characterized in this way both by the defendants when they submitted the motion as well as by the judge herself. In her decision, the judge focused exclusively on the plaintiff's counsel's closing argument. The decision gave at most nominal consideration to the evidence and the jury verdict before concluding that "prejudicial aspects of the closing argument likely influenced the jury's verdict." The decision did not take a retrospective view of the entire trial in order to determine whether a miscarriage of justice in fact occurred, as required for the allowance of a motion for a new trial.

Nonetheless, despite the new rule that we have set forth in this case, we do not disturb the outcome here. When a decision is "not grounded in constitutional principles," we are free to make its effect only prospective. See Eaton v. Federal Nat'l Mtge. Ass'n, 462 Mass. 569, 588, 969 N.E.2d 1118 (2012). There is particular reason to do so when, as here, "prior law is of questionable prognosticative value." Id., quoting Blood v. Edgar's, Inc., 36 Mass. App. Ct. 402, 407, 632 N.E.2d 419 (1994). Accordingly, the prohibition on reserving motions for a mistrial in civil cases will be prospective only.

Apart from the issue of the propriety of reserving the motion, we review the allowance of a mistrial by the trial judge only for abuse of discretion. Fialkow v. DeVoe Motors, Inc., 359 Mass. 569, 572, 270 N.E.2d 798 (1971). We agree with the judge that certain of the statements made by the plaintiff's counsel in closing involved an improper "appeal to the jurors' emotions, passions, prejudices, or sympathies." Mass. G. Evid. § 1113(b)(3)(C). It was reasonable for the judge, moreover, to attempt to avoid the drastic remedy of a second trial. Neither party objected at the time that the judge reserved decision. Accordingly, we cannot say that the judge abused her discretion in allowing the motion for a mistrial after the jury returned their verdict, and thus the verdict from the second trial stands.

***7** Order allowing motion for mistrial affirmed.

All Citations

--- N.E.3d ----, 2021 WL 2024453

Footnotes

1 JBS Souderton, Inc., and Willow Run Foods, Inc.

2 We acknowledge the amicus briefs submitted by the Massachusetts Defense Lawyers Association and the Massachusetts Academy of Trial Attorneys.

3 Identical claims against the distributor of the hamburger, Willow Run Foods, Inc., and claims for negligence and negligent infliction of emotional distress against all three parties were voluntarily dismissed before trial. The judge reserved decision on the G. L. c. 93A claim.

4 The plaintiff did not seek to recover her medical expenses, and all evidence relating to those amounts was excluded.

5 During a hearing on the motion for a mistrial, defense counsel explained, "I hate objecting during closing arguments for a lot of obvious reasons. Not the least of which is, if I had to object to every single improper statement in this closing argument, I would have made forty objections and it would have gotten us noplace."

6 The term "mistrial" does not appear in the Massachusetts Rules of Civil Procedure. The plaintiffs point to the Appeals Court's decision in Holder v. Gilbane Bldg. Co., 19 Mass. App. Ct. 214, 218, 473 N.E.2d 1142 (1985), for the proposition that "[t]he time for declaring a mistrial [has] gone by" once the jury have been discharged and judgment has entered. That case, however, involved a meaningfully different situation, as none of the parties made a motion for a mistrial. Rather, an "irate" judge, annoyed with counsel, declared a mistrial sua sponte, two weeks after the jury returned their verdict. Id. at 216, 473 N.E.2d 1142. Here, by contrast, the defendants initially submitted their motion for a mistrial well before the jury were charged.

7 In as much as they require the motion to be made not later than ten days after the entry of judgment, the Rules of Civil Procedure clearly intend that a motion for a new trial will be made after a jury verdict. See Mass. R. Civ. P. 59 (b).

8 Rule 59 (a) of the Massachusetts Rules of Civil Procedure states that a new trial may be granted "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the Commonwealth," thus making a determination of acceptable grounds for granting a new trial a matter of common law.

9 In a civil context, an order allowing a motion for a new trial generally is not an immediately appealable final judgment. See Boothby v. Texon, Inc., 414 Mass. 468, 469-470, 608 N.E.2d 1028 (1993).

10 We are aware of no Federal decision squarely confronting the question, although reserving motions for a mistrial in civil cases does appear to be a practice in some Federal courts. See, e.g., Waldorf v. Shuta, 3 F.3d 705, 709 (3d Cir. 1993); Burnett v. Ocean Props., Ltd., 422 F. Supp. 3d 369, 395 (D. Me. 2019).

11 Other State courts to have considered this issue, noted supra, have approved of judges reserving motions for a mistrial as long as the motion later was treated as the functional equivalent of a motion for a new trial.