

At a term of the Supreme Court of the State of New York, held in and for the County of Otsego, at Cooperstown, New York on November 4, 2022.

PRESENT: HON. BRIAN D. BURNS, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF OTSEGO

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LISA WILBER, et al.,

Plaintiffs,

**DECISION AND ORDER
ON MOTION**

-against-

Index # EF2018-454

ALLAN MANIKAS, et al.,

Defendants.

BEFORE: HON. BRIAN D. BURNS
Justice of the Supreme Court

APPEARANCES: For Plaintiffs
COOPER EWING & SAVAGE
By Carlo A.C. de Oliveira, Esq.

For Defendants Allan Manikas and Melissa Manikas
HAGELIN SPENCER, LLC
By Megan F. Organek, Esq.

For Defendant Jordan Manikas
PENINO & MOYNIHAN, LLP
By Edward J. Barbour, Esq.

At the conclusion of the two-week trial ending July 28, 2022, the jury rendered a verdict in favor of plaintiff. The defense has filed a motion seeking to vacate the jury verdict and requesting a new trial. Defense counsel contends that the verdict should be set aside due to

plaintiff's counsel's repeated improper conduct throughout the trial which they allege deprived the defendants of a fair trial. Defense further contends that the verdict must be set aside as being against the weight of the evidence.

Plaintiff's counsel's trial misconduct can be seen, in a microcosm, in the manner in which he responded to the defense motion. Counsel first wrote to the court asking the court to grant an exception to the Uniform Civil Rules for the Supreme and County Courts § 202.8-b, which otherwise limits reply affidavits and memorandum of law to 4,200 words for each document. Plaintiff's counsel requested permission to file a reply affidavit of 12,000 words, nearly three times the permissible limit.

The court, having determined that plaintiff's counsel's general claim that he would be prejudiced if he were required to follow the law was without merit, declined this request. Plaintiff's counsel, as he did throughout the majority of the two-week trial, continued to argue for his position after the court issued its ruling. During the trial, the court admonished plaintiff's counsel, repeatedly, both on and off the record, to cease arguing any given point once the court issued its ruling. Counsel clearly ignored the court's admonishments and now has continued his misconduct post-trial. In doing so, he has demonstrated that admonishments are meaningless to Counsel and do not have any effect on his conduct.

Having achieved no success in obtaining an exception to the rule of limiting the length of his papers, plaintiff's counsel then ignored the court's decision and the relevant law and submitted an affidavit and memorandum of law, each in excess of 6,000 words. Plaintiff's counsel, having already demonstrated that he was aware of the rule and knew its limitations, justified circumventing the court's decision and relevant rule limiting reply papers by reclassifying his reply papers as his "affidavit and memorandum of law in chief" in opposition to defendants'

motion. This is the exact type of willful misconduct which caused the court to admonish plaintiff's counsel daily, if not hourly, throughout the entirety of the trial.

The jury's verdict indicates that it found defendants Allan and Melissa Manikas negligent in supervising their adult son, Jordan Manikas, which was a substantial factor in allowing him to sexually abuse the plaintiff. Plaintiff was a minor at the time of the abuse. The jury further found that Jordan acted intentionally, maliciously, and wantonly when he raped, battered, and inflicted emotional distress upon the plaintiff.

Turning to the first point in the defense brief, plaintiff's counsel does not deny that he compared Jordan to a dangerous dog in his opening statement. The record is clear that he did so repeatedly and argued that the defendants had the legal obligation to protect the plaintiff (a 14-year-old female child at the time) to the same degree that they would be required to protect her from a dangerous dog.

The record is equally clear that Jordan is African American - the only African American involved in the trial. Plaintiff's counsel repeatedly referred to him as a dangerous animal. Plaintiff's counsel attempts to defend the indefensible by claiming that such comparison is allowed by the Pattern Jury Instructions. As society grows in the understanding of the insidious and pervasive effects of overt and implicit racial bias, what may have been allowed in the past is not proper in the present. The Pattern Jury Instructions cannot now be read to approve a comparison of an African American to an animal such as a dangerous dog, and by implication less than fully human.

Plaintiff's counsel's contention that his comments cannot be construed as improper because Jordan was not personally present during his opening statement are utterly without merit. Jordan was the first witness plaintiff called to testify. It was immediately apparent to the jury that he was

an African American. Any comparison of him to a dangerous animal under these circumstances is wholly improper. Plaintiff's counsel's comments, were, in fact, shocking.

It is difficult to capture in a bare record the level of shock plaintiff's counsel's words caused in the courtroom. The record does not reflect the audible gasps, from individuals throughout the courtroom, caused by counsel's words. The record does not reflect the acute distress on the faces of Jordan's parents as they heard an attorney, supposedly an officer of the court, call their son a dangerous animal. While the record does not reflect the effect of these words, the effects were clearly visible and audible to the jury. The lead defense attorney, Keith Miller, Esq., has appeared in this court numerous times and has uniformly conducted himself in a professional and unflappable manner. He was so startled and upset by plaintiff's counsel's choice of words that he needed a moment to collect himself before giving his opening statement. Although the court gave the jury a curative instruction regarding implicit bias, it had, at the time, and continues to have, grave concerns whether this was sufficient.

As egregious as this conduct was, plaintiff's counsel went further to taint the jury with race-based negative stereotypes of African American males. He questioned Jordan about how many children he had and the number different mothers for the children. He questioned Jordan about his employment status and failure to financially support the children. When this line of questioning was objected to, plaintiff's counsel indicated he was merely trying to establish that his parents had notice of similar sexual assaults. There was no evidence produced at any time that Jordan had fathered a child or children by sexually assaulting their mothers. The court found this response to be entirely unpersuasive and a pretext to mask counsel's true intent; that is, to play to a negative stereotype of young African American males.

Counsel also portrayed Jordan as a sexual predator. He repeatedly told the jury that multiple officials at Jordan's school had determined him to be such and that these multiple officials had notified Jordan's parents of their determination. Counsel stressed this point in his opening and closing statements. He prefaced many of his questions to Jordan's parents by referencing the multiple officials who purportedly advised them that Jordan was a sexual predator. A review of the trial testimony of the school officials, however, reveals that only a single school official had called Jordan a predator and that he did not use the adjective "sexual." When it became clear that only one official had referred to Jordan as a predator, it became incumbent on counsel to cease misdirecting the jury into believing otherwise. He did not do so, either in his questioning witnesses or in his closing statement.

Plaintiff's counsel also acted improperly in obtaining and using an affidavit he procured from Jordan's sister, Kaley. Although not specifically mentioned in the defendant's brief, the court has serious concerns regarding the propriety of the manner in which plaintiff's counsel obtained this affidavit. The record is clear that on the eve of the originally scheduled trial date, plaintiff's counsel personally spoke with Kaley. At the time, she was still a teenager and suffering from a fever, congestion, and fatigue caused by COVID. She was the sole caretaker for her three-month-old baby, who was also suffering from COVID. Nevertheless, plaintiff's counsel went to her home with a prepared affidavit and advised her that if she signed the affidavit, the case against her parents would necessarily end with a settlement.

He appeared at Kaley's door, gave her the affidavit and waited outside as she took the affidavit inside her house to read it. When she returned, the affidavit was signed. Plaintiff's counsel then notarized the affidavit, although it was impossible for him to have complied with the requirement that the affidavit be signed in his presence. Although notarizing a document

signed outside the notary's presence isn't a misdemeanor in New York (as it is in other states) it is still a serious error that counsel should not have committed.

At trial, counsel questioned Kaley at length about how he obtained the affidavit, asking questions such as "Isn't it true that I handed you the affidavit and told you to go inside and review the affidavit..." and "Isn't it true that you returned with the affidavit signed." Counsel clearly and improperly made himself a witness in the case. Had Kaley not agreed with his (improperly phrased) leading questions, counsel may well have had to testify to rebut her conflicting testimony.

Perhaps as troubling, plaintiff's counsel advised the jury that he would prove the defendants had prior knowledge of Jordan's dangerousness, in part, by providing them with Kaley's affidavit. He stated that the affidavit described three occasions when Jordan sexually assaulted her and that the defendants were aware of all three occasions. Kaley, however, testified that none of the troubling events involved a sexual assault. She further testified that her parents were unaware of one event. Her testimony was not controverted. The court ruled that this incident could not be used to show the parents had notice of their son's dangerous propensities because they were unaware of its occurrence.

Kaley testified that the third alleged event took place after the alleged sexual assault of the plaintiff. This testimony was also uncontroverted. The court ruled that plaintiff's counsel could not use evidence of an event taking place subsequent to the plaintiff's assault to prove that the parents had prior knowledge of their son's propensities to commit such acts. Accordingly, the court redacted all information about the two events from Kaley's affidavit and directed plaintiff's counsel not to speak to the jury about the two alleged incidences that were redacted from the affidavit.

Plaintiff's counsel ignored the court's directions and repeatedly referred to Kaley's statements as proof that the parents were aware of their son's predisposition to commit sexual assaults. He went so far as to argue in his closing statement that the parents were aware of their son's propensity to sexually assault girls based on Kaley's statements, a comment which he knew to be untrue. He compounded his misconduct by telling the jury that they would be given a copy of Kaley's affidavit so that they could read it for themselves. When counsel made this statement regarding the affidavit, he well knew that it had been heavily redacted, and the jury would not see a description of three separate sexual assaults. He also knew that Kaley had described the first event as non-sexual touching that occurred when she was 6 years old. The court had to admonish defense counsel for his intentionally misleading comments and strike a portion of his closing statement.

Counsel also acted improperly with respect to a witness he called to testify about the plaintiff's mental health. First, he asked the court, in front of the jury, to find that the witness was qualified to testify as an expert. Courts have long held that this is an improper attempt to invade the jury's province in determining a witness's credibility and unduly suggestive of the weight or importance the jury should to such a witness's testimony. It has been improper to make this request in front of the jury in New York for almost twenty years. There is simply no basis in law for the plaintiff to make such a request and his doing so was clearly improper. Further, and despite the court's directions limiting the witness's testimony to describing her observations of the plaintiff's mental health, counsel repeatedly solicited information about the cause of those conditions. In short, he repeatedly had his witness testify that not only was the plaintiff the victim of a sexual assault, but that Jordan was the perpetrator. She implicitly, and at times explicitly, vouched for the credibility of the plaintiff.

Throughout the trial, plaintiff's counsel repeatedly attempted to introduce non-admissible evidence. Despite the court's ruling, for example, that uncertified business records were not admissible, plaintiff's counsel attempted, over and over again, to get such information before the jury. When the court sustained objections to his request to admit hearsay or improperly certified or unauthenticated documents into the record, he would ignore the court's determination and read the documents into the record as part of a question to a witness. The court would have to repeatedly sustain objections to such questions, give the jury a limiting or curative instruction, and admonish counsel to refrain from such conduct.

In a pre-trial ruling, the court determined that evidence of Jordan's arrest shortly after the assault, and resulting criminal prosecution, was inadmissible to demonstrate he had a propensity to commit such offenses (Jordan entered a plea of guilty to a violation without admitting to any specific misconduct). In addition to being already deemed inadmissible as irrelevant, the arrest report produced at trial was not properly certified and contained significant inadmissible hearsay. Nevertheless, counsel continuously tried throughout the entire trial to place the arrest report into evidence. This resulted in numerous objections, rulings in the defense's favor, curative or limiting instructions to the jury, and admonishments to counsel. In his closing statement, plaintiff's counsel asked the jury to consider that he had tried to put all the evidence before them but had been denied the opportunity to do so. He asked the jury to consider which party was trying to show them the evidence in the case and which party was trying to withhold evidence from them. This was outrageous conduct and far, far outside the lines of zealous advocacy.

The court also notes with disapproval that plaintiff's counsel regularly violated the New York State Standards for Civility for the Legal Profession. These standards set forth principles of behavior to which the bar, the bench, and court employees should aspire. They are not intended

as rules to be enforced by sanction or disciplinary action nor are they intended to supplement the rules of professional conduct. Rather, they are a set of guidelines intended to encourage lawyers to observe principles of decorum and to confirm the legal profession's rightful status as an honorable and respected profession where civility is observed as a matter of course.

The standards clearly state "lawyers can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior. Whether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks or acrimony toward other counsel." Plaintiff's counsel repeatedly accused opposing counsel of lying and misleading the court. On each occasion, the court conducted an inquiry into the highly disparaging personal remarks counsel directed against opposing counsel. In each and every case, the court determined that the personal accusations were unfounded, and that defense counsel did not lie to or attempt to mislead the court.

Counsel's closing statement was problematic for many reasons, several discussed above. In addition, counsel improperly appealed to the jury's sympathy and argued that they must decide this case as "the conscience of the community." He further told the jury that they should "send a message to the community...and tell your community what is acceptable and what is not acceptable." Defense counsel's objection was sustained, and the court gave the jury yet another curative instruction.

Conclusions of Law

CPLR § 4404 provides the court with the authority to set aside a verdict in the interests of justice. The use of such discretionary power is warranted when the aggrieved party is deprived of substantial justice or a counsel's misconduct unduly affected the verdict (*Selzer v New York City*

Tr. Auth., 100 A.D.3d 157, 162, 952 N.Y.S.2d 26 [1st Dept. 2012]). Courts may set aside a verdict and order a new trial when the improprieties committed by an attorney go beyond isolated remarks but rather are a continual and deliberate effort to divert the juror's attention from the issues to be determined (see, *Brown v. County of Albany*, 271 A.D.2d 819, 821, 706 N.Y.S.2d 261 [3rd Dept. 2000]; *Mercurio v. Dunlop, Ltd.*, 77 A.D.2d 647, 430 N.Y.S.2d 140 [2nd Dept. 1980]). A new trial should be ordered where plaintiff's counsel's conduct goes the goes beyond the bounds of fair comment and alters the jury's perceptions of the evidence. Such conduct also includes attempting to shift the burden of proof to the defendant, placing inadmissible evidence before the jury, and misattributing witnesses' testimony (see, *Escobar v. Seatrains Lines, Inc.*, 175 A.D.2d 741, 744, 573 N.Y.S.2d 498 [1st Dept. 1991]; *Clarke v. New York City Transit Authority*, 174 A.D.2d 268, 580 N.Y.S.2d 221 [1st Dept. 1992]).

In this case, plaintiff's counsel's repeated appeal to racial stereotypes was egregious and shocking. It constituted an appeal to the worst tendencies in society, and by extension, this jury. The court could reasonably be seen to implicitly condone this conduct if it denies the motion to vacate and allows the verdict to stand. The defendants deserve a fair trial; one free from any implicit racial stereotyping or indeed reference to race at all.

Counsel's repeated attempts to mislead the jury are also unacceptable. He continuously advised the jury that there were multiple school officials who notified the defendants that Jordan was a sexual predator when the evidence was to the contrary. He repeatedly and continuously advised the jury that the defendants had notice of Jordan's propensity to commit acts of sexual assault because of three prior sexual assaults involving Jordan and his sister – when it was clear that the defendants did not have any notice of one of the events and a separate event purportedly occurred after the assault on the plaintiff. Having been prohibited by the court from questioning

the witness about these two alleged events and knowing that an affidavit describing these two events had been redacted to remove any reference to them, counsel argued in his closing statement that there were three prior events and that the jury would see an unredacted copy of the affidavit. This effort to mislead the jury was intentional and unacceptable (see, *Stewart v. Olean Med. Group, P.C.*, 17 A.D.3d 1094, 1096-1097, 795 N.Y.S.2d 420 [4th Dept. 2005]).

Counsel engaged in a serious act of misconduct when he personally notarized an affidavit that was not signed in his presence (see, *In re Land*, 299 A.D.2d 83, 85-86, 749 N.Y.S.2d 23 [1st Dept. 2002]; *In re Vignola*, 218 A.D.2d 310, 316, 639 N.Y.S.2d 315 [1st Dept. 1996]). His conduct in telling a teenager, who was ill with COVID and caring for a newborn child, also sick with COVID, that the case against her parents would essentially go away if she signed the affidavit, was highly questionable. He then improperly became a potential witness in the case by questioning the witness about his conduct in obtaining the affidavit.

Counsel attempted to invade the jury's province as the sole judge of a witness's credibility by asking the court to qualify his witness as an expert (see, *Horton v. Smith*, 419 N.Y.S.2d 246, 248, 71 A.D.2d 748 [3rd Dept. 1979]). He did likewise when he solicited answers from this witness vouching for the credibility of the plaintiff.

Counsel repeatedly and continuously argued with the court after the court made its determinations on trial motions and objections in front of the jury (see, *Kennedy v. Children's Hosp.*, 288 A.D.2d 918, 919, 732 N.Y.S.2d 326 [4th Dept. 2001]).

Counsel continuously ignored the court's rulings and attempted to place inadmissible items before the jury in an effort to distract them from the issues at hand (see, *Doody v. Gottshall*, 67 A.D.3d 1347, 891 N.Y.S.2d 216 [4th Dept. 2009]; *Kennedy*, *id.*). The Court finds that the jury's decision to apportion only 10% of the fault for the plaintiff's injuries to Jordan, whom they found

acted intentionally, maliciously, and wantonly, and 90% of the fault to his parents, whom the jury found to be merely negligent, to be proof that counsel's improper conduct had a significant impact on the jury's decision.

Counsel improperly appealed to the jury's sympathy and argued that its decision should reflect the conscience of the community. Counsel asked the jury to send a message about what is acceptable to society. (see, *Norton v. Nyugen*, 49 A.D.3d 927 [3d Dept.].)

As counsel's impermissibly long "affidavit and memorandum of law in chief" in opposition to the motion to vacate the verdict makes clear, counsel believes that he can engage in any act of misconduct that he believes will further his client's case. He acts with an utter disdain for the court's rulings and repeated admonishments. It is further clear that he believes that as long as the court issues curative instructions for each and every one his acts of misconduct, there can be no further consequence to him or his client. As he was on the majority of legal arguments he made during the trial, plaintiff's counsel is wrong.

In reviewing the totality of the record, the court finds the plaintiff's counsel's pattern of improper conduct to be so misleading, so pervasive, and at times so shocking, that despite the court's best efforts, the court cannot find that the defendant's received a fair trial. The court does not make this finding lightly and is cognizant of the impact ordering a new trial may have on the plaintiff. Nevertheless, the court cannot condone counsel's appeal to racial bias, his persistent efforts to mislead the jury, and his efforts to distract the jury from considering the issues hand by attempting to introduce irrelevant and inadmissible evidence.

In light of the foregoing, the court need not decide whether the jury's apportionment of the fault is against the weight of the evidence.

It is hereby

ORDERED, that the verdict reached on July 28, 2022, is hereby VACATED and that the matter be placed on the trial calendar for a new trial forthwith.

Dated: January 25, 2023
Cooperstown, New York

ENTER:



HON. BRIAN D. BURNS
Supreme Court Justice