

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

DIANE MELENDEZ : IN THE SUPERIOR COURT OF
: PENNSYLVANIA

v.

GYI P. MO, M.D., ALBERT :
D'ANGELANTONIO, D.P.M., THE :
TRUSTEES OF THE UNIVERSITY OF : No. 196 EDA 2024
PENNSYLVANIA, UNIVERSITY OF :
PENNSYLVANIA HEALTH SYSTEM, :
PENN MEDICINE, CLINICAL PRACTICES :
OF THE UNIVERSITY OF :
PENNSYLVANIA, PERELMAN CENTER :
FOR ADVANCED MEDICINE, CLINICAL :
CARE ASSOCIATES OF THE :
UNIVERSITY OF PENNSYLVANIA :
HEALTH SYSTEM, INTERNAL MEDICINE :
ASSOCIATES OF DELAWARE COUNTY, :
P.C., INTERNAL MEDICINE :
ASSOCIATES OF DELAWARE COUNTY, :
HOSPITAL OF THE UNIVERSITY OF :
PENNSYLVANIA, PENN INTERNAL :
MEDICINE MEDIA, PENNCARE :
INTERNAL MEDICINE ASSOCIATES OF :
DELAWARE COUNTY, CROZER- :
KEYSTONE HEALTH SYSTEM, INC. :
D/B/A INTERNAL MEDICINE :
ASSOCIATES OF DELAWARE COUNTY :
AND/OR INTERNAL MEDICINE :
ASSOCIATES OF DELAWARE COUNTY :
AND/OR INTERNAL MEDICINE :
ASSOCIATES OF DELAWARE COUNTY, :
P.C. :

APPEAL OF: GYI P. MO, AND CLINICAL :
CARE ASSOCIATES OF THE :
UNIVERSITY OF PENN HEALTH SYSTEM :

Appeal from the Judgment Entered December 21, 2023

In the Court of Common Pleas of Philadelphia County Civil Division at
No(s): 180801939

BEFORE: LAZARUS, P.J., McLAUGHLIN, J., and SULLIVAN, J.

CONCURRING MEMORANDUM BY LAZARUS, P.J.:

FILED SEPTEMBER 11, 2026

I join the majority's thorough and well-reasoned opinion. However, I write separately to address what the trial court correctly described as Plaintiff's counsel's "deplorable" conduct throughout trial, and to explain why a mistrial would have been appropriate had a request been made properly at trial or had the issue been preserved for appeal.

As the majority recognizes, Plaintiff's counsel's misconduct at trial divides neatly along two lines: (1) referencing the termination of Melendez's employment; and (2) the "pervasive misconduct" throughout trial. Majority Opinion, at 19. The Majority is correct that, here, Appellants have waived their right to a new trial by failing to make a contemporaneous objection and motion for a mistrial when the misconduct occurred. Nevertheless, if properly sought and preserved, Plaintiff's counsel's repeated references to the termination of Melendez's employment provided grounds for a new trial.

"The grant of a new trial is an effective instrumentality for seeking and achieving justice in those instances where the original trial, because of taint, unfairness[,], or error, produces something other than a just and fair result[.]" ***Harman ex rel. Harman v. Borah***, 756 A.2d 1116, 1121 (Pa. 2000). If counsel makes prejudicial statements, it is the duty of the trial court to take

affirmative steps to cure the prejudicial harm of those statements, often in the form of a curative instruction. **See *Mirabel v. Morales***, 57 A.3d 144, 150 (Pa. Super. 2012). “Generally, in the absence of extraordinary circumstances, a prompt and effective curative instruction which is directed to the damage done will suffice to cure any prejudice suffered by the complaining party.” ***Mount Olivet Tabernacle Church v. Edwin L. Wiegand Division***, 781 A.2d 1263, 1275 (Pa. Super. 2001) (internal quotation marks omitted), *aff’d per curiam*, 811 A.2d 565 (Pa. 2002).

However, a new trial may be appropriate where:

the unavoidable effect of [counsel’s] conduct or language was to prejudice the factfinder to the extent that the factfinder was rendered incapable of fairly weighing the evidence and entering an objective verdict. If [counsel’s] misconduct contributed to the verdict, it will be deemed prejudicial and a new trial will be required.

Lewis v. Reading Hospital, 345 A.3d 257, 272 (Pa. Super. 2025) (citing ***Poust v. Hylton***, 940 A.2d 380, 385 (Pa. Super. 2007)). Further, “there are certain instances where the comments of counsel are so offensive or egregious that no curative instruction can adequately obliterate the taint.” ***Siegal v. Stefanyszyn***, 718 A.2d 1274, 1277 (Pa. Super. 1998). The harm suffered by the prejudiced party mounts as the “tenor of the comments in question grows more flagrantly improper and the frequency of similar comments increases.” ***Ferguson v. Morton***, 84 A.3d 715, 725 (Pa. Super. 2013).

Plaintiff’s counsel first referenced the termination of Plaintiff’s employment in his opening statement, stating “[y]ou will hear that they fired

her. 'They' being Penn. They simply told her you can't do your job anymore." N.T. Trial, 9/6/22 (Morning Session), at 101. A few days into trial, while questioning Dr. Peter Quinn, Plaintiff's counsel began to ask "[y]ou wouldn't have been aware that they fired her because she couldn't do her job—" when the question was objected to and the trial court sustained the objections. **Id.**, 9/9/22, at 66. Following the rest of Dr. Quinn's testimony and a lunch recess, Appellants' counsel sought a mistrial based on Plaintiff's counsel referencing Melendez having been "fired". **Id.** at 91-92. After discussing whether the references were relevant or prejudicial, the following exchange took place, wherein the trial court expressed its disapproval of Plaintiff's counsel highlighting the termination of Melendez' employment:

Attorney Bosworth: Yes—versus, as [Attorney] Young is trying to allude to, she didn't return to work and we had positions for her. So[,] her position—[] Melendez' testimony in her deposition and in other areas of the case, and what the jury will hear, is she was told—I guess the objection is to the word "fired." If you want me to use a different word, I can use terminated—but what was told to my client was you can't work here anymore because you can't get around, and they didn't offer—

The Court: That's fine. That's fine. That's all fair game. You prance around the courtroom saying fired, fired, fired—

Attorney Bosworth: I will refrain from the use of that word, "fired."

The Court: You described it for what it was—

Attorney Bosworth: I will—

The Court: —when the time comes, she was disabled because that's your case, she was disabled, here are my damages.

Attorney Bosworth: My point is not so much to use the word "fired."

The Court: It's conveying a certain message to the jury.

Attorney Bosworth: I think the jury should hear words that they should understand well, as long as they're true.

The Court: They understand she can no longer work here because she can't do the job because she's disabled.

Attorney Bosworth: I think the defense is going to try to say that's not the case.

The Court: Then it becomes an issue. They can say what they're going to say and you can say she was terminated because she was unable to do her job.

Attorney Bosworth: Obviously, I don't think I need to respond to the mistrial motion. There is no mistrial issue.

. . .

The Court: So this is what we are going to do. The motion for mistrial is denied. **Plaintiff[’s counsel] is going to refrain from using the word “fired.” And [P]laintiff[’s counsel] is going to tread very, very lightly when that issue comes in. And whether it’s cross-examination, whether it’s examination of your client, you’re going to advise [] Melendez that she’s not to use the word that she is fired. She can describe what happened, what was said to her, but tread very lightly there.**

Id. at 96-102 (emphasis added, formatting altered, and unnecessary capitalization omitted).¹

¹ The Majority claims that Attorney Bosworth, “of his own volition” agreed to use the word “terminated” instead of “fired,” that the trial court never ordered Attorney Bosworth not to use the word “fired,” and that Attorney Bosworth’s supposedly self-imposed limitation amounted to a stipulation. **See** Majority Opinion, at 32-33. Based on the foregoing testimony, we cannot agree with this characterization of events. **See** N.T., 9/9/22, at 96-102.

Plaintiff's counsel did not tread lightly when questioning Melendez regarding the separation of her employment, instead asking several redundant questions regarding how her employment ended:

Attorney Bosworth: When was this that you finally—your employment was terminated with Penn?

Melendez: It took—it took effect on October 1st of 2017.

Attorney Bosworth: And during those conversations with Ms. Corzo, did she ever offer you any alternative job in the entire health system?

Attorney Conway: Objection.

Attorney Vizza: Your Honor.

The Court: Sustained.

Attorney Bosworth: What jobs did Ms. Corzo offer you when you were having a conversation with her?

Attorney Vizza: Objection.

Attorney Conway: Objection.

The Court: Sustained. You have to rephrase that.

Attorney Bosworth: Did Ms. Corzo offer you any jobs during your conversation with her in October 2017?

Attorney Vizza: Objection.

Attorney Conway: Objection.

Melendez: No.

The Court: I'm going to allow it.

. . .

Attorney Bosworth: Okay. And did she, in fact, send you a termination letter?

Melendez: Yes.

Attorney Bosworth: And were you terminated from Penn?

Melendez: On October 1st.

. . .

Attorney Bosworth: Did they offer you the lab tech three job that you started with?

Melendez: No.

Attorney Conway: Objection.

Attorney Bosworth: Did they offer you—

The Court: Hold on. Hold on. Sustained.

Attorney Bosworth: Did they offer you a desk job?

Attorney Conway: Objection.

Attorney Vizza: Objection.

Attorney Bosworth: Did they offer you—

Attorney Vizza: Objection.

The Court: She said they didn't offer her a job, so we don't have to hear every job in the book. The jury heard the testimony no other job was offered.

Attorney Bosworth: Since you were terminated—by the way, was the word ["terminated"] used just to be clear?

Melendez: Yes.

Attorney Bosworth: It wasn't like—you saw the e-mail in court[,], we wish you the best, take care of yourself, right?

Melendez: Yes.

Attorney Bosworth: It wasn't see you soon, have you gotten any calls?

Attorney Conway: Objection.

Attorney Vizza: Objection, Your Honor.

Attorney Bosworth: Since you got—

The Court: Counsel, come on.

Attorney Bosworth: Have you gotten any calls back since from anyone in the health system?

Attorney Vizza: Objection.

Attorney Conway: Objection.

The Court: Overruled.

Attorney Bosworth: Have you gotten any calls back one single day since you went out in January 2017 saying welcome back, we have a spot here for you at Penn, you can do this job?

Attorney Vizza: Objection.

Attorney Conway: Objection.

The Court: Sustained. You were on the right track and you're going too far.

Attorney Bosworth: Your Honor, this is—

The Court: Counsel, calm down. Just ask—you're on the right track. Just stop the end of that question, and we're all fine.

Attorney Bosworth: Have you received a phone call from anybody at the University of Pennsylvania Health System in the last five years saying come on back, we have a job here for you in any way, shape[,] or form?

Attorney Vizza: Objection.

Attorney Conway: Objection.

The Court: Sustained. How about have you received any phone calls from Penn.

. . .

Attorney Bosworth: Did you see the document that I put up in this trial that told you to turn in your badge and all your stuff, turn it in? Do you remember that, Ms. Melendez?

Melendez: Yes.

Attorney Bosworth: Did you comply with that? Did you give them their property back?

Melendez: I did and my personal belongings were mailed to me.

Id., 9/16/22 (Afternoon Session), at 20-25.

After the defense rested, Appellants' counsel sought a curative statement regarding counsel's references to the separation of Melendez's employment from Penn. The trial court acknowledged that "we discussed [P]laintiff's counsel can't discussed she's fired. He can say, as you can see, she wasn't physically able to do that job and Penn agreed with her." **Id.**, 9/19/22 (Afternoon Session), at 113-14. After further discussion, the trial court explicitly accused Plaintiff's counsel of attempting to inflame the jury:

Attorney Bosworth: I want the record to be clear I didn't use the word terminated.

The Court: You said fired.

Attorney Bosworth: And then I stopped saying fired.

The Court: It doesn't matter that you stopped. You said it in front of the jury.

Attorney Bosworth: Terminated is fired.

The Court: **You did it to inflame the jury.** That's the difference. It wasn't just not only the words you used—it's how you used the words.

Attorney Bosworth: I believe I should be able to say to the jury, as it's reflected in their record, they use the words she's terminated.

The Court: I'm not arguing that you can't use that. I'm just saying you—in your style yelled that she was fired and that's what we're trying to—we don't want the jury to decide this case for a different reason. Discuss and let's see what we can come up with. Ultimately, I'll make the final decision.

Attorney Bosworth: I would say that the evidence—I will speak with them, but the evidence that she was terminated comes from their own records, so I don't think [Melendez] should be punished.

. . .

The Court: I don't have a problem with that. You threw out fired, fired, fired[,] so let's see if we can fashion something that's agreeable to both parties, or I'll come up with something.

Id. at 115-17 (formatting altered and emphasis added).

The following day, prior to closing arguments, the court and counsel discussed the jury charges, wherein Plaintiff's counsel committed to following the trial court's instructions:

Attorney Bosworth: May I be heard?

The Court: Yes.

Attorney Bosworth: I spoke with Mr. Specter about this last night because he's a lot smarter than me—

The Court: Is he a judge? Has he authored an opinion that I should read?

Attorney Bosworth: No.

The Court: I don't really care what Mr. Specter says. If you want to make an argument, make it in your own voice.

Attorney Bosworth: My argument is that the jury should not be instructed on what claims are not being presented to the jury. They should only be instructed on what claims are being presented. And I think an instruction to the jury that there is no employment claim or hostile work environment claim or Title 7 claim would only serve to confuse them and prejudice [Melendez] because everybody knows there are no such claims. We never said there were any claims.

The only argument I will make in closing within the confines of Your Honor's instructions is how her lack of employment and not having a job relates to her damages and her inability to work. I am not going to argue that Penn is liable because they terminated her or that they are liable for terminating her. I am merely going to argue that the termination and her lack of employment is relevant to the fact that she is unable to work because of her injury.

So[,] to instruct the jury on it at all, would inject confusion and inevitably prejudice [Melendez] because then the jury will get an

impression from the instruction that the fact of the termination and her inability to work is not relevant to the case when it actually is relevant to the case.

The Court: Well, I will make sure—I think the whole purpose of this instruction is to make sure there is no confusion.

Id., 9/20/22, at 18-20 (emphasis added).

Shortly after that discussion, Plaintiff's counsel referenced Melendez's separation from employment with Penn in his closing argument:

Attorney Bosworth: [Melendez] was terminated by them because she can't do any job. Did they march in one person to refute that, one witness to say that's not true, we offered her this other desk job. She can do this or that. No. Why? Because she can't. How big is Penn? If there is a job, they got it at Penn. Whether you're sitting at the desk or you're walking around, it's there. They didn't offer her anything.

Id. at 63-64.

Finally, at the end of his closing rebuttal, Plaintiff's counsel yet again referenced the termination of Melendez's employment in direct contravention of the trial court's directive and his own representation, made that same day, that he would refer to it only in a limited fashion:

Attorney Bosworth: And now [] Melendez[,] who is here, she's not here, she's here, her life is ruined. They don't dispute that. Oh, we feel so bad. You feel so bad? **Give us—turn your property in, turn in your badge. They kicked her to the curb and now they dragged her through the mud. Don't let them do it anymore.**

Id. at 123 (emphasis added).

Once the jury exited the courtroom, Appellants' counsel requested a curative instruction, which the trial court denied. *Id.* at 124-26. Upon the

parties' return from a lunch recess, the trial court reconsidered its stance on Plaintiff's counsel's rebuttal statement:

The Court: First of all, my apologies. You are absolutely correct. I had a chance to think about what you said over lunch, what we called lunch today. You're right. I'm going to give a curative instruction when I give the jury charge. I'm going to make it very specific.

I just don't understand you, Mr. Bosworth. You get an inch and you take 10 yards. We had a—don't look at him. You know what you did. You did this several times during the course of the trial. We talked about it before. You were lucky enough to get an agreed-upon jury charge which didn't really call into account some of your behavior in this trial. But now, because you just couldn't help yourself, I have to now instruct the jury specifically, and I'm going to instruct them specifically they're to ignore those comments.

Attorney Bosworth: Which comments?

The Court: The comments how they kicked her to the curb, they fired her.

Attorney Bosworth: They did fire her.

The Court: It's not relevant other than if the defense is asserting that she could work. And I don't know that I really heard that testimony or argument where the defense came out and said she could work.

You're trying to inflame the jury. I'm not dumb. It's not my first trial. We had the conversation before and you did a terrific job on your closing and your rebuttal. You couldn't help yourself. It's almost like you think the rules don't apply to you. Sometimes you shoot yourself in the foot. **You went and threw that out there to the inflame the jury and I have to fix it.**

So[,] you can put your objection on the record, but you know your behavior during good portions of this trial has been deplorable. And I'm the one who has to try to fix it so we don't have a mistrial or have issues on appeal so that all the parties here can get some finality in this dispute.

So[,] put whatever you want on the record.

Attorney Bosworth: I just wanted to clarify, I don't want to get in the way of whatever instruction you're going to give, but I think it's true now, as it was then, that her being terminated is relevant to the fact that she can't work. So[,] I would hope Your Honor wouldn't undo that.

The Court: I'm not going to undo that. In fact, I will reinforce that that's the only thing they are to consider it for.

Attorney Bosworth: I apologize—

The Court: I'm tired of your apologies. I heard them during trial. You seem to keep going, I'm sorry, I'm sorry, I'm sorry. You're good for a little while and then you go off. You knew better than to say that before the jury. I get you're fired up. I get you're intense. I watched you for three weeks. You don't need to do that stuff. The problem is you put the Judge in a bad situation every time you do that because I have to try to figure out how to fix that. And you're not doing your client any service and you're not doing yourself any service when you do that.

So[,] I will give the appropriate instructions. I apologize to [Attorney] Conway. I was a little snippy with her. She didn't deserve it. She was absolutely right. So[,] accept my apologies.

Id. at 126-29 (emphasis added).

I find it apparent, as did the trial court, that Plaintiff's counsel thought there was something to be gained through repeated reference to Melendez's termination from Penn, so much so that he chose to refer to it with his final words to the jury. This line of argument was improper, and I agree with the Honorable Craig R. Levin's accusation that Plaintiff's counsel referenced Melendez's termination specifically to inflame the jury. **See** N.T. Trial, 9/19/22 (Afternoon Session), at 115; ***id.***, 9/20/22, at 127-28. After referring to it throughout trial, Plaintiff's counsel's final reference was an egregious and brazen appeal to the "passion and prejudice" of the jury. ***Young v. Washington Hosp.***, 761 A.2d 559, 563 (Pa. Super. 2000) ("a verdict

obtained by incorrect statements or unfair argument or by an appeal to passion or prejudice stands on but little higher ground than one obtained by false testimony"). While Attorney Bosworth may not have used the word "fired" again, we consider that a semantic distinction without a difference. Attorney Bosworth represented to the trial court that he would not refer to the termination of Melendez' employment in a prejudicial fashion, and the trial court explicitly requested that he avoid doing so. **See** N.T., 9/9/22, at 96-102; **see also id.** at 9/19/22 (Afternoon Session), at 113-14; **id.** at 9/20/22, at 18-20. Therefore, if Appellants' counsel had timely requested a mistrial and properly preserved the issue for our consideration on appeal, a new trial would have been appropriate.

Beyond the inflammatory references to the termination of Melendez's employment, Plaintiff's counsel's general conduct throughout trial was similarly reprehensible, earning him repeated admonishments from the trial court. **See** N.T. Jury Trial, 9/6/22 (Afternoon Session), at 26 (trial court instructing Plaintiff's counsel to "[k]eep it without the theatrics"); **id.** at 31 (trial court instructing Plaintiff's counsel to "ask the question without comment"); **id.** at 81 (trial court stating "I don't know if that was a question or argument. Make it a question."); **id.**, 9/12/22 (Afternoon Session), at 122 (trial court instructing Plaintiff's counsel to refer to opposing counsel as "[c]ounsel, describe her as counsel, please" after Plaintiff's counsel referred to opposing counsel as "she"); **id.**, 9/16/22 (Afternoon Session), at 16-17 (Plaintiff's counsel requesting, during questioning, that Melendez "tell the

members of the jury and all of the defense lawyers the names of your neighbors so they can drag them into court to see if you're making it up").

By only the second witness on the second day of trial, the trial court had to admonish Plaintiff's counsel at sidebar: "Try your case. I'm getting tired of your commentary. Ask your question, get your answers. Stop with the comments. Are we clear? All right. Next time I will do it in front of the jury. You got it?". *Id.*, 9/7/22 (Morning Session), at 18-19. Toward the end of trial, Plaintiff's counsel, undeterred, again interjected his commentary during the cross-examination of a defense expert. *Id.*, 9/19/22 (Morning Session), at 99 ("Let's look then. I didn't think we would have to do this—"). In response, after excusing the jury for lunch, the trial court lambasted Plaintiff's counsel:

The Court: Okay, Counsel, why are you begging me to admonish you in front of the jury? Tell me why because I'm trying my hardest not to admonish you in front of the jury. I don't want to do anything that the jury can take any clues from me to decide this case. I want this case decided on evidence. So[,] tell me why you're having trouble following my directions. I get it you're excited. I get it you can be frustrated. You need to get that under control. Because the next time it's going to be in front of that jury and it's not going to be on me. It's going to be on you. Do we understand each other?

Attorney Bosworth: Yes.

The Court: Ask your questions. Make your points. Do not make comments. I'm not going to tell you again.

And you're not doing your client any favors if I have to admonish you in front of the jury. You're hurting yourself.

Attorney Bosworth: May I respond?

The Court: You may respond.

Attorney Bosworth: I have sat here—because I don’t object needlessly as trial lawyer—I have sat here while there have been remarks made by the defense lawyers such as the jury has heard such and such from Dr. Noble and we heard a lot—

The Court: We are done. We are done.

The thing is you have done it a lot more than they have. I’m trying to be fair to everybody. I have asked you to stop. And if you want to raise an objection when they do that, I will do the same to them. But they sat here for a very long period of time. You have been making comments left and right, just ten minutes ago I told you to stop and you continue to do it.

So[,] I don’t want to hear about what the defendants do or don’t do. When I tell you to stop, you stop; otherwise, I admonish you in front of the jury and then you lose your credibility in front of the jury.

So[,] you have to decide. You can take the lunch hour, take a deep breath, do your job. Stay away from the comments. I’m not going to tell you again. All right?

Attorney Bosworth: Okay.

Id. at 100-02.

The foregoing are just a few examples of Plaintiff’s counsel’s misconduct at trial and the trial court’s exasperation with it.² The record is replete with similar instances. Admittedly, as the majority concluded, this sort of

² The Majority states that “Appellants’ counsel does not have clean hands” and “also engaged in misconduct[.]” Majority Opinion, at 21-22. While Appellants’ counsel may not have conducted themselves perfectly, the comparison is apples to oranges. The record speaks for itself, as did Judge Levin, when he called Attorney Bosworth’s conduct “deplorable[,]” asked Attorney Bosworth why he was begging to be admonished in front of the jury, accused him multiple times of trying to inflame the jury, and, when Attorney Bosworth attempted to point to Appellants’ counsel’s misconduct, stated that Attorney Bosworth was acting out “a lot more than” Appellants’ counsel. **See** N.T., 9/19/22 (Morning Session), at 100-01; ***id.***, 9/19/22 (Afternoon Session), at 115; ***id.***, 9/20/22, at 127-28.

misconduct does not rise to the level required to grant a new trial. Nonetheless, these excerpts portray a shocking lack of respect for the trial court, opposing counsel, the jury, and our Rules of Evidence and Procedure. The excerpted conduct, as well as those instances which we did not include, also violated our Rules of Professional Conduct and Code of Civility, which, respectively, prohibit counsel from “asserting[ing their] personal opinion as to the justness of a cause [or] to the credibility of a witness,” “engag[ing] in conduct intended to disrupt a tribunal[,]” and “engag[ing] in any conduct that diminishes the dignity or decorum of the courtroom.” Rules of Prof. Conduct, 3.4 and 3.5; 204 Pa. Code. § 99.3. Accordingly, while I agree in full with much of the Majority opinion, I write separately to express my great disappointment with Appellee’s counsel’s conduct at trial, which, most importantly, imperiled his client’s case and reflected poorly on our justice system.

McLaughlin, J., Joins this Concurring Memorandum.