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FALLSCHASE DEVELOPMENT CORPORATION, a Florida Corporation, Appellant/Cross–Appellee,

v.

Jackson A. SHEARD and Oxford–America Corporation, a Florida Corporation, Appellees/Cross–Appellants.

No. 97–3789.

District Court of Appeal of Florida, First District.

Jan. 29, 1999.

An appeal from the Circuit Court for Leon County. George Reynolds, III, Judge.

Steven R. Andrews and Erika L. Esan of The Law Offices of Steven R. Andrews, P.A., Tallahassee, for Appellant/Cross–Appellee.

Jackson A. Sheard, pro se, Tallahassee; no appearance for Appellee/Cross–Appellant Oxford–America Corporation.

PER CURIAM.

We affirm the two issues raised on cross-appeal, but reverse on the issue raised on direct appeal, because the legal sufficiency of the third amended complaint had previously been determined when the court ruled on the 1989 motion to dismiss for failure to state a cause of action.

AFFIRMED in part, REVERSED in part and REMANDED for further proceedings.

ERVIN, MINER and BROWNING, JJ., concur.

2

OWENS–CORNING FIBERGLAS CORPORATION, Appellant,

v.

Charles McKENNA, et al., Appellees.

No. 98–652

District Court of Appeal of Florida, Third District.

Feb. 3, 1999.

Pipefitter brought products liability action against asbestos manufacturer, alleging negligent failure to warn and strict liability. The Circuit Court, Dade County, Harold Solomon, J., entered final judgment on jury verdict for pipefitter. Manufacturer appealed. The District Court of Appeal, Jorgenson, J., held that: (1) pipefitter's counsel's comment that asbestos manufacturer's opening argument was "unethical" did not merit new trial; (2) manufacturer could not have its expert testify regarding examination of pipefitter after failing to produce report of examination; and (3) award of $1 million for past pain and suffering and $4 million for future pain and suffering was not abusively high.

Affirmed.

1. Trial ⚿124, 129, 133.2

Pipefitter's counsel's comment, while objecting to asbestos manufacturer's opening argument in asbestos products liability litigation, that it was "the most unethical opening statement" he had ever heard did not merit new trial, as it was manufacturer's counsel who repeatedly denigrated asbestos litigation and lawyers who tried asbestos cases, pipefitter's counsel was simply defending himself and his client's case against barrage of blatant improprieties by opponent, and his comment was an accurate description of defense counsel's tirade.

2. Pretrial Procedure ⚿434

Asbestos manufacturer was not entitled to have its expert medical witness testify in asbestos products liability litigation regarding his examination of pipefitter, where expert examined pipefitter three days before

trial and manufacturer failed to comply with court's order requiring production of expert's report before trial.

3. Damages ⚿132(1)

Award of $1 million for past pain and suffering and $4 million for future pain and suffering to pipefitter in asbestos products liability litigation was not abusively high; pipefitter had asbestosis and suffered from shortness of breath and "clubbing" of his fingers, a condition resulting from asbestosis that caused fingers and fingernails to become deformed and discolored, by time of trial pipefitter's breathing was only 62% of normal and was decreasing, pipefitter was expected to live only another ten years, and over those ten years would experience a slow and painful death.

Gibson, Dunn & Crutcher, LLP, and Larry L. Simms, Miguel A. Estrada and Mark A. Perry, for appellant.

Ferraro & Associates, P.A., and James L. Ferraro; Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., and Joel S. Perwin, for appellees.

Before JORGENSON, LEVY and GREEN, JJ.

JORGENSON, Judge.

Owens–Corning Fiberglas Corp. appeals from a final judgment entered on a jury verdict. We affirm.

Charles McKenna, the plaintiff below, was exposed to asbestos while working as a pipefitter apprentice, foreman, and superintendent at a construction company between 1955 and 1972. The Owens–Corning products to which he was exposed were Kaylo pipe covering and Kaylo block, pipe insulation materials that contained asbestos as a strengthening and binding agent. He was diagnosed with asbestosis in 1993 and suffered from shortness of breath and "clubbing" of his fingers, a condition resulting from asbestosis that causes fingers and fingernails to become deformed and discolored. By the time of trial, plaintiff's breathing was only 62% of normal and was decreasing. He was expected to live only another ten years, and over those ten years, would experience a slow and painful death.

McKenna sued Owens–Corning for negligent failure to warn and strict liability. The jury found Owens–Corning liable on both the strict liability and the negligence counts; assessed one million dollars for past pain and suffering, and four million dollars for future pain and suffering. The trial court entered judgment in accordance with the verdict and denied Owens Corning's post trial motions. We find no error in the trial court's rulings, and affirm.

Opening Argument

[1] The comment made by plaintiff's counsel in opening argument does not require reversal and a new trial. During opening argument, counsel for Owens–Corning made various disparaging remarks about asbestos litigation, including the following:

> The people started to get sick and there was a rash of litigation. You will hear that there was a whole industry built on the litigation. Doctors and lawyers became dependent on . . . this litigation for their living.
>
> . . . .
>
> In Mr. McKenna's case, litigation generated the disease. Let's think about that.
>
> . . . .
>
> If you have any doubts as you listen to the evidence, listen to the evidence carefully whether you believe the disease generated the litigation or the litigation generated the disease.
>
> . . . .
>
> You will hear testimony from Dr. Mezey in this case who is the only doctor that plaintiffs will bring you. You will hear that Dr. Mezey has been testifying for plaintiff's lawyers for approximately 10 years, plaintiff's lawyers like Mr. Ferraro and others. You will hear that for ten years he has been seeing approximately two asbestos plaintiffs a week at the cost of $1,500 a visit, that if you add that up, that comes up to almost $1 million.

Plaintiff's counsel repeatedly objected to these comments; the trial court overruled his objections and denied his motions for cura-

tive instructions. At one point during his objections, plaintiff's counsel stated "Just for the record, I think this is the most unethical opening statement I have ever heard."

Owens–Corning argues on appeal that this last comment by plaintiff's counsel was so prejudicial and inflammatory that this court must reverse and remand for a new trial. We disagree. Even assuming that the issue was preserved for appellate review, plaintiff's counsel's characterization of defendant's comments in opening argument does not merit a new trial. *See Owens–Corning Fiberglas Corp. v. Crane,* 683 So.2d 552, 555 (Fla. 3d DCA 1996) ("While it is perfectly permissible for trial attorneys to point out perceived discrepancies in the evidence introduced at trial and opposing counsel's characterization of the same, it is never acceptable for one attorney to effectively impugn the integrity or credibility of opposing counsel before the jury in the process."); *Owens Corning Fiberglas Corp. v. Morse,* 653 So.2d 409, 411 (Fla. 3d DCA) (holding that comments accusing opposing counsel of "trickery" and "hiding the ball" deprived plaintiff of fair trial), *rev. denied,* 662 So.2d 932 (Fla.1995). However, in this case, it was Owens–Corning's counsel who repeatedly denigrated asbestos litigation and lawyers who tried asbestos cases. By calling the defendant's argument "unethical," plaintiff's lawyer was simply defending himself and his client's case against a barrage of blatant improprieties by his opponent. His comment was an accurate description of defense counsel's tirade. In fact, had the jury found for Owens–Corning instead of reaching a verdict for the plaintiff, Owens–Corning's comments would have laid the foundation for a reversal based upon the very cases that it relies upon in its brief.

Exclusion of Owens–Corning's Expert Witness

[2] The trial court did not abuse its discretion in excluding the testimony of defendant's expert medical witness, Dr. Howard. Three days before trial, Dr. Howard had not yet examined Mr. McKenna. On December 5, Dr. Howard conducted the examination. The court ordered Owens–Corning to produce Dr. Howard's written report by 5 p.m. on Saturday, December 6, two days before trial; Owens–Corning agreed to comply. Owens–Corning did not comply with that court order. The trial court gave Owens–Corning one last opportunity to produce its expert's written report before trial began. On the morning of the first day of trial, before jury selection commenced, the court ordered Owens–Corning to produce the written medical report by noon. Owens–Corning neither complied with the court's order nor requested a continuance. Plaintiff's counsel moved to exclude any testimony from Dr. Howard or any other evidence about his medical examination of Mr. McKenna. The court granted plaintiff's motion, and in so doing, acted well within its broad grant of discretion. Had the court allowed Dr. Howard to testify without affording the plaintiff time before trial to read and analyze the report, the admission of that testimony would have been inherently prejudicial.

> Clearly, except under extraordinary circumstances which do not exist here, the lawyers have a right to expect that once a trial commences, discovery and examinations must cease. The lawyers who make the opening statement must have a reasonably firm idea of what the evidence will show. Liberal rules of discovery assure this. Once the trial starts the lawyers are engaged in the unfolding of the evidence they have already collected. That is why there are discovery cutoffs. All the discovery rules and the extensive efforts of parties to discover the other party's case would be for naught if one side were able to wait until after the trial started to establish key pieces of evidence such as what occurred in this case.

Grau v. Branham, 626 So.2d 1059, 1061 (Fla. 4th DCA 1993). *See also Office Depot, Inc. v. Miller,* 584 So.2d 587, 589 (Fla. 4th DCA 1991) (holding that trial judge has broad discretion in deciding whether to permit or exclude witness' testimony; discovery rules should be construed and utilized to avoid "trial by ambush").

The Jury's Award of Damages

[3] The trial court properly denied Owens–Corning's motions for a new trial or a remittitur. There is competent substantial

evidence to support the jury's award of damages. "Under our system, it is ordinarily, indeed almost invariably, the *jury* which is entrusted with the function of determining how much is enough and how much is too little or too much for the damages that have been demonstrated and described in the courtroom." *Oakes v. Pittsburgh Corning Corp.,* 546 So.2d 427, 429 (Fla. 3d DCA 1989) (emphasis in original). In this case, as in *Oakes,* "it is perfectly plain that the injuries and damages to the plaintiff's well-being, to his right to freedom from physical and mental pain, and to the enjoyment of the remainder of his life were utterly devastating." *Id.* at 429. Although the jury verdict was admittedly large in this case, the trial court acted well within its discretion in denying the post-trial motions.

AFFIRMED.

NATIONSBANK, N.A., Appellant,

v.

Saul L. ZINER and Mark A. Berezin, Appellees.

No. 98–1049

District Court of Appeal of Florida, Fourth District.

Feb. 3, 1999.

Rehearing Denied March 19, 1999.

Bank sued guarantors of payment. The Circuit Court, Palm Beach County, Richard I. Wennet, J., dismissed suit. Bank appealed. The District Court of Appeal held that: (1) guarantor could not be dropped as a party for failure to effect proper service upon him within 120 days, and (2) provisions of rule allowing dismissal for lack of record activity were not self-actuating.

Reversed and remanded.

1. Parties ⇐65(1)

Trial court abused its discretion in dropping defendant as a party for failure to effect proper service upon him within 120 days, although serving defendant with summons and complaint by mail was improper service of process, as defendant received summons and complaint and by dismissing complaint trial court effectively adjudicated complaint on its merits since statute of limitations had long expired. West's F.S.A. RCP Rule 1.070(j).

2. Motions ⇐39

Trial court has inherent authority to reconsider any of its interlocutory rulings prior to final judgment.

3. Judges ⇐32

Successor judge has the same authority to vacate or vary an interlocutory order as the original judge.

4. Motions ⇐39

Fact that defendant did not appeal the initial denial of his motion to strike plaintiff's motion for summary judgment for failure to effect proper service on him within 120 days did not preclude the court from later reconsidering its order, as nothing in the appellate rules mandated that defendant either appeal from that interlocutory order or suffer waiver of his objection. West's F.S.A. RCP Rule 1.070(j).

5. Parties ⇐65(1)

Propriety of the trial court's dropping defendant as a party under rule requiring defendant to be served within 120 days must be assessed according to the abuse of discretion standard. West's F.S.A. RCP Rule 1.070(j).

6. Process ⇐63

Purpose of rule requiring plaintiff to effect service on defendant within 120 days is to prevent a plaintiff from filing a suit and then taking no action whatsoever to proceed on the claim. West's F.S.A. RCP Rule 1.070(j).