OPINION ON REHEARING

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IN THE COURT OF APPEALS OF INDIANA

Randy C. Axelrod, M.D.,

Appellant-Plaintiff,

v.

Anthem, Inc. and all of its affiliates, WellPoint, Inc., and Amgen, Inc.,

Appellees-Defendants.

July 21, 2021

Court of Appeals Case No. 19A-PL-1171

Appeal from the Marion Superior Court

The Honorable Cynthia J. Ayers, Judge

Trial Court Cause No. 49D04-0710-PL-42057

Shepard, Senior Judge.

[1] In our recent opinion addressing this appeal, we held that the trial court did not misapply Indiana Trial Rule 60(B)(3), that the jury verdict against Axelrod was not unfairly procured, and that the trial court did not abuse its discretion by denying Axelrod's motion for post-trial discovery. *See Axelrod v. Anthem, Inc.*, No. 19A-PL-1171, at *12, 2021 WL 1378567 (Ind. Ct. App. April 13, 2021).

[2] Axelrod has filed a petition for rehearing, arguing that this Court "inaccurately cited" the trial court's June 27, 2017 order, which led to an "incorrect quote," and failed to address two contentions in our opinion. *See* Pet. for Reh'g, pp. 4, 7. We grant rehearing to clarify our opinion by addressing the contentions raised in Axelrod's petition. We confirm our original decision.

I. Inaccuracy[1]

[3] While addressing Axelrod's assertion that the jury verdict had been unfairly procured due to witness tampering by opposing counsel, we highlighted Axelrod's difficulty in securing the testimony of out-of-state witnesses. It was apparent to this Court and the trial court that the problems Axelrod's counsel had experienced arose from the use of *improper procedure* to attempt to secure the testimony of those out-of-state witnesses. *See Axelrod*, 2021 WL 1378567 at *4. By directly quoting the trial court's language that "the subpoenas must be

[1] The other arguments about the behavior of opposing counsel have been adequately vetted by this Court and have been addressed in our original opinion.

quashed as improper and illegal," we sought to convey what was evident to us– the referenced impropriety and illegality had to do with the failure to follow proper procedure and not with any criminal behavior or consequences.

[4] The trial court informed the parties outside the presence of the jury that the judge had drafted the order and it "was not the intent of the Court to say that the subpoenas were illegal. The process was improper. That was the point." Tr. Vol. 8, p. 217.

[5] Later, in its amended order, the trial court stated,

> The Court is advised that certain confusion exists as to the intention of the Court as to the last sentence of Paragraph 3. The term "illegal" in that sentence referred only to the illegitimacy of the process Plaintiff chose to use in his attempt to serve out-of-state subpoenas, which is fully explained above. The use of that word did not mean that the attempt to serve an out-of-state subpoena on a prospective witness was inherently illegal per se or that a prospective witness, if he or she should testify, may face business-related consequences relative to an in-force employment contract or any other civil or criminal penalty if they respected those subpoenas and complied. . . . no prospective witness will be subject to any business or employment ramifications or any civil or criminal penalty for voluntarily appearing in this court and giving testimony in [this matter].

Appellant's App. Vol. 9, p. 163.

[6] At the end of the day, we remain convinced, as was the trial court, that Axelrod has not established that the jury verdict was unfairly procured in this way and

we set forth this additional language to put the matter to rest. This more complete picture of what transpired as respects Axelrod's missteps in procedure continues to leave us convinced that a new trial is not warranted. Neither the trial court nor this Court regarded Axelrod's work in trying to subpoena the Virginia witnesses as illegal in any criminal sense, just not in compliance with the applicable trial rules and the trial court's guidance.

II. Violations of Orders in Limine

[7] Next, Axelrod complains that our original opinion did not address two instances where opposing counsel violated the trial court's orders in limine. We address them in turn. First, Axelrod says that Amgen violated the court's order through testimony suggesting that the antitrust lawsuit between Ortho-Biotech and Amgen had settled prior to Axelrod's firing. As for WellPoint, he argues that counsel violated the order by displaying his EEOC charge and offering it in evidence without total redaction of references to his Jewish faith.

[8] Regarding the settlement testimony, the court's June 13, 2016 order imposed the following pertinent limitations:

> 5. Amgen's Third Motion in Limine related to information about Amgen's settlement of a 2008 antitrust lawsuit with Ortho Biotech Products, L.P., and the substance of the testimony Plaintiff gave in that lawsuit settlement is denied. Plaintiff, while still employed at Wellpoint, testified as a fact witness in the antitrust lawsuit. He gave evidence in a deposition and later testified in a preliminary injunction hearing in June, 2006. Plaintiff's deposition testimony was subject to a protective order.

> His testimony at the preliminary injunction hearing was sealed. The Court denied the preliminary injunction. The antitrust suit continued and was subsequently settled. Amgen paid Ortho $200 million dollars to resolve the action. Plaintiff's theory of this wrongful termination lawsuit is that Plaintiff's testimony against Amgen in the antitrust lawsuit led to his firing and provided Amgen with a motive. Plaintiff will be allowed to testify about the substance of his testimony in the antitrust case to the extent he remembers what he said and also he may testify about the business relationship between Amgen and Wellpoint including his personal knowledge about that relationship. *He will not be allowed to discuss the subsequent settlement of the case.* If Defendants have access to the actual transcript, they may use it to cross examine the Plaintiff on these points.

Appellant's App. Vol. 4, pp. 71-72 (emphasis added).

[9] The timing of the settlement vis-à-vis Axelrod's firing was needed to establish Axelrod's theory of his claims. Harvey Felman was Amgen's Executive Director of National Accounts, and he testified during Axelrod's case-in-chief. On cross-examination, after Amgen's counsel asked Felman if he delayed meeting with Axelrod, he responded that the meeting was delayed until "probably the beginning of June" "when the lawsuit was settled or finalized." Tr. Vol. XIII, p. 212. Axelrod points to this testimony as a violation of the court's order.

[10] Later, on re-direct examination, Axelrod's counsel vigorously questioned Felman about the timing of the settlement, at one point stating, "You are telling me that you went through a lawsuit that you said was settled in May . . ." *Id.* at

249. Counsel for Amgen objected, but the court replied, "He testified a few minutes ago. He said the case was settled. It's in the record." *Id.* After further questioning about the exact month in which the antitrust action was settled, counsel for Axelrod asked, "It was not settled in May, was it?" to which Felman replied that he did not know. Axelrod's counsel then said, "It was settled when Amgen paid $200 million." *Id.* at 250. Counsel for Amgen objected, citing the order in limine. The court replied, "You know it does. Alright? Objection is sustained." *Id.*

[11] At a sidebar, the following discussion ensued:

> Mr. Betz: Your Honor, I request that the door has been opened as to that issue and I get to ask questions about the very negative things.
> The Court: Just because he said it was settled doesn't open the door to the terms of the settlement
> Unknown: (inaudible).
> The Court: You know it doesn't. We spent a lot of time on that motion in limine. Alright?
> Mr. Betz: Alright.

Tr. Vol. 13, p. 250-Tr. Vol. 14, p. 2.

[12] "A motion in limine is used as a protective order against prejudicial questions and statements being asked during trial." *Clausen v. State*, 622 N.E.2d 925, 927 (Ind. 1993). The ruling on a motion in limine is not final, however, as the ultimate admissibility of the evidence must be made by the court in the context of the trial itself. *Id.* Appellate courts have consistently held that to preserve

error in the overruling of a pre-trial motion in limine, the appealing party also must have objected to the admission of the evidence when it was offered. *Id.*

[13] Amgen did not want evidence of the $200 million settlement before the jury and successfully obtained an order in limine to that effect. However, during direct examination, Amgen arguably opened the door to evidence about the fact of a settlement (but not its terms) when Felman testified that he waited to contact Axelrod until the lawsuit was settled or finalized. When counsel for Axelrod made the statement about the $200 million settlement, Amgen's objection was sustained, but counsel did not request that Axelrod's statement be stricken from the record. Ultimately, the evidence Amgen sought to withhold from the jury and conversely Axelrod wanted to introduce to the jury was before it. We remain unconvinced that Amgen's violation of its own motion in limine which lead to the introduction of evidence of its settlement, which Axelrod sought to introduce, harmed Axelrod's case such that he is entitled to a new trial.

[14] Axelrod also says that counsel for WellPoint violated the court's order by displaying for the jury Axelrod's EEOC charge, introducing it into evidence without redaction of all references to Axelrod's Jewish faith. Axelrod contends that the improper use of the evidence likely (1) undermined "the jury's confidence in his argument about the basis for the termination of his employment," and (2) "could have triggered active or latent prejudices of the jurors." Pet. For Reh'g, p. 12.

[15] As for the EEOC charge, the court's order imposed the following pertinent limitations:

> The parties cannot introduce evidence solely directed at Plaintiff's Jewish religion or ethnicity. However, the parties are not precluded from introducing evidence related to Gloria McCarthy's alleged use of the phrase 'come to Jesus meeting' or Plaintiff's EEOC charge, even if such evidence otherwise encompasses his Jewish religion/ethnicity.

Appellant's App. Vol. 13, p. 53.[2]

[16] In the complaint against Anthem/WellPoint and Amgen, Axelrod had alleged that there was a conspiracy to terminate him largely due to his testimony in favor of Ortho-Biotech in its antitrust litigation against Amgen. In our original opinion, we referenced in general terms the exchanges between Gloria McCarthy and Axelrod leading to his termination. *See Axelrod*, 2021 WL 1378567 at *2. We discuss these events with more specificity to address Axelrod's contentions.

[17] On June 6, 2006, during a phone call, McCarthy told Axelrod that they needed a "come to Jesus meeting" in that conversation. Tr. Vol. 17, pp. 203-04. During cross-examination of Axelrod, counsel for WellPoint introduced

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[2] Our search of the record has not revealed the particular order referred to by the parties in the transcript, and the only restatement of the order's language appears as a purported quotation from the order in a filing by one of the parties. The parties, however, have not disputed that this was the language of the court's order, so we reproduce it here.

testimony and sought the admission of Exhibit WD-734, a copy of Axelrod's EEOC complaint based on his offense to the remark. *See id.* at 202-214; Ex. Vol. 5, pp. 53-58. The court and the parties had a thorough discussion of the scope of the order in limine and the intended and acceptable use of the EEOC charge. For example, counsel for WellPoint informed the court that the use of the EEOC complaint was not to inject prejudice into the trial, but "to show that [Axelrod] raised a separate issue of explaining his discharge that's inconsistent with this Complaint," "so it's a religious discrimination charge, and it's the fact that it's an inconsistent sworn statement by a party opponent." *Id.* at 206, 208-09.

[18] The court insisted on redaction of the EEOC charge saying, "I'm not going to let you put this up there about somebody calling him a Nazi. I'm not doing that. Okay?" *Id.* at 212. After the redaction was made, the court conferred with the parties about objections to Exhibit WD-734. Axelrod's sole objection on relevance was overruled. The redacted version still contained the language, "I am Jewish. Members of my family perished in the Holocaust." Ex. Vol. 5, p. 55. However, WellPoint's questioning about the charge did not highlight that language, but focused on whether Axelrod had sworn under oath, as alleged in paragraph 13 of his charge, that he "believe[d] that [his] employment with WellPoint was terminated in retaliation for [] having made a good faith complaint against Ms. McCarthy concerning her offensive, religiously based comment to [Axelrod] in the workplace." *Id.* at 56. This was offered to rebut

Axelrod's contention that his termination was solely the result of a corporate conspiracy against him because of his antitrust testimony.

[19] As noted above, an order in limine is a preliminary ruling on the admissibility of evidence. *See Clausen*, 622 N.E.2d at 927. Axelrod was obligated to object at the first opportunity when the evidence was offered at trial to seek the court's final ruling on its admissibility. *See id*. Here, Axelrod's objection was to relevance. We are convinced that the particular behavior does not constitute a violation of the court's order as it is represented to us, and that Axelrod has not demonstrated that he is entitled to a new trial.

Conclusion

[20] Based on the foregoing, we grant the petition for rehearing for purposes of clarification, but nonetheless affirm our original opinion.

[21] Affirmed.

Pyle, J., and Altice, J., concur.