MICHAEL MECCA, Plaintiff-Appellant/Cross-Respondent,

v.

ANTHONY SUAREZ, Defendant-Respondent/Cross-Appellant.

No. A-4472-08T2.

Superior Court of New Jersey, Appellate Division.

Submitted March 1, 2011.
Decided July 28, 2011.

Law Offices of Ronald J. Wronko, LLC, attorneys for appellant/cross-respondent (Ronald J. Wronko, on the brief).

Methfessel & **Werbel**, attorneys for respondent/cross-appellant (Eric L. Harrison, of counsel and on the brief; Jennifer M. Herrmann and Adam S. Weiss, on the brief).

Before Judges Carchman, Graves and Messano.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

PER CURIAM.

Plaintiff Michael Mecca appeals following an adverse jury verdict in his malicious prosecution suit against defendant Anthony Suarez, an attorney and the mayor of Ridgefield. The underlying basis of plaintiff's complaint was Suarez's earlier unsuccessful defamation action against Mecca (the defamation action).[1]

On appeal, Mecca asserts error regarding: 1) pretrial rulings barring evidence of another defamation action Suarez filed against a political opponent (the Trifari suit); 2) admission of hearsay statements at trial; 3) admission of testimony regarding the counsel fees Suarez was incurring in defense of the suit; 4) references by Suarez and defense counsel to the denial of a summary judgment motion in the defamation action; and 5) rulings by the trial judge barring evidence as to Suarez's and Ridgefield's relationship with a certain law firm.

On cross appeal, Suarez argues that the trial court erred by denying his motion for involuntary dismissal at the close of plaintiff's case.

We have considered the arguments in light of the record and applicable legal standards. We affirm. As a result, we dismiss defendant's cross-appeal as moot.

I.

Mecca was a lifelong resident of Ridgefield and had known Suarez from the time they were both in grade school. Marc Ramundo, the Ridgefield municipal prosecutor appointed by Suarez, was also a lifelong Ridgefield resident. Mecca retained Ramundo as his personal attorney and to perform some legal work for his family business, Mecca & Sons Trucking.

In 2005, Ridgefield held a contested election for two seats on the municipal council. At the time, all six council members were Democrats, as were Suarez and Mecca. Issues of public concern in Ridgefield included illegal apartments, a 40% tax increase, redevelopment of a large commercial area, and construction of new homes and new retail uses. At a heated public meeting of the mayor and council, Mecca and other members of the audience were unable to speak during the public session. Frustrated, they began to shout questions at the public officials.

Mecca had also become familiar with a blog that reported news on a variety of issues and allowed interested persons to post comments for discussion. The site had various forums and sub-forums, one of which dealt specifically with Ridgefield. Mecca

participated in some discussions about issues of public concern in the municipality.

In July 2005, Mecca received a call from Ramundo who was very upset. Ramundo told him that at 6:00 a.m., Suarez, a councilman and two police officers came to his home, which he occupied with his brother and pregnant sister-in-law, to inspect for an illegal apartment. Ramundo was a Republican and wondered aloud whether the raid had been politically motivated.

Adopting the first person point of view, Mecca posted the following statement about the incident on the blog:

> I couldn't believe it! On Tuesday morning I received a loud continuous knock on my door at 6 am. I hurried to the door and I was confronted by police officers, Councilman Fucci and the Mayor. They told me that they were investigating an anonymous tip that I had an illegal apartment. After talking to them and showing credentials they told me they had made a mistake and were sorry. I understand that they should inevestigate [sic] all leads, but I am adamant that they should have gone about it another way. I also had a problem, that Fucci and the Mayor was [sic] there!! Kind of thinking that this was politically motivated! Has anyone else been confronted with this issue??

Mecca later discovered that the police report of the incident did not mention the mayor's presence at the scene, and Ramundo was not present at the time of the inspection. Instead, Ramundo only relayed his brother's version of the events to Mecca. Although the blog had a mechanism to delete inaccurate postings, Mecca never took any steps to delete the posting.

Between July 22 and August 3, 2005, utilizing other internet user names, Mecca posted other entries on the blog, essentially confirming the original posting and urging other internet users to confirm the incident with the police officers involved. In one posting made in July 2005, Mecca wrote a comment on the Ramundo incident: "Wow, it reminds me of the Gestapo."

The two Republican challengers won the November election. On November 9, 2005, Suarez filed suit against the website, the two internet user names, and Mecca, alleging the blog posts were defamatory. Mecca's attorney served a frivolous litigation notice pursuant to Rule 1:4-8, but neither Suarez nor his attorney responded. After ensuing discovery, the defamation action was dismissed on summary judgment on July 31, 2007. Suarez appealed and we affirmed. Suarez v. NJ.Com, et al., No. A-0229-07 (App. Div. June 27, 2009). In total, Mecca spent $103,331.89 in defending the defamation action.

On October 9, 2007, Mecca filed this complaint alleging the malicious use of process by Suarez. Among the specific factual allegations was the assertion that Suarez waged a "continuing campaign as a public figure to silence his political critics and to chill the free speech of concerned citizens who disagree[d] with [him]." Mecca cited the Trifari suit as an example of this "continuing campaign."

At trial, Mecca testified that the defamation action was motivated by malice because Suarez could have removed the website postings himself or could have contacted plaintiff to discuss the problem. Noting Suarez was "a certified trial attorney," Mecca claimed that Suarez pursued the defamation action "just to beat me, emotionally, financially whip me. And that's what he did. He knew the law."

Mecca believed intimidation was defendant's "M.O." "He (Suarez) intimidates people to form his core group to run the town, and if you have a different view and a different opinion, he tries to squash you like a bug." As a result of the defamation action, Mecca curtailed his civic activities:

> I wouldn't attend mayor and council meetings. I wouldn't go to public events, whether it was — in the park or fireworks in the park or DARE day and things that the community has for the children as well as adults, I was . . . beat — I was humiliated by . . . this malicious intent to harm me.

Some residents involved in public issues attempted to have Mecca take a more active role, urging him to join the Republican Party or sit on a municipal board. Mecca declined, explaining that he "couldn't get involved" out of fear of further retaliatory litigation by Suarez.

Mecca also testified that he posted information on the internet with much less frequency as a result of the defamation action. He admitted, however, that in April 2007, he posted an article from The Bergen Record on the web. That article concerned a Ridgefield councilman who had a "falling out" with Suarez and the local Democratic Party and was considering running as an independent. The article quoted the councilman: "`If you go against . . . Suarez, he takes you to court[.]. . . He's a bully. If they are so confident they'll win, why don't they just let me run. Why are they so scared[?]'"

Three Republican residents, Angus Todd, and two successful council candidates, Thomas Blackley and Robert Avery, testified that Mecca had become "a different man . . . . He did not want to be involved. He avoided us."

Mecca's fear of retribution was fueled by other events. Rental property he owned in town was inspected on two occasions for illegal apartments. Mecca's real estate taxes were adjusted to reflect the grant of a variance he obtained. Mecca claimed Suarez took pictures of him with his cell phone during a public meeting. Mecca suffered anxiety, "mood swings . . . states of depression . . . [and] unbearable migraine headaches" as a result of the defamation litigation.

Suarez testified that he was a partner in a small law firm. In addition to his private clients, he was the town attorney for Saddle Brook. Suarez had never handled a defamation case before but was generally aware from his law school education that the standard for proving defamation of a public official was very high. Nevertheless, Suarez believed the defamation action had merit because Mecca knew the posting regarding the Ramundo incident was false. Suarez pursued the defamation action because he "was being accused of something that [he] never did and [he] wanted to clear [his] name."

Suarez believed he could have lost Saddle Brook as a client as a result of the posting, although he acknowledged that he produced no proof of any monetary loss during discovery in the defamation action. In deposition testimony that was read to the jury, Suarez admitted spending less than $5000 to pursue the defamation action because the matter was being handled pursuant to a contingent fee agreement.

The jury's verdict was reflected in answers to specific interrogatories posed by the court. The jury found that the defamation action "was brought . . . by Suarez without reasonable or probable cause." However, the jury also found that the defamation action was not "actuated by malice." Accordingly, the judge entered final judgment in favor of Suarez, and this appeal ensued.

II.

Before turning to consideration of the specific claims, we briefly state some general principles that inform our review.

"In reviewing a trial court's evidential ruling, an appellate court is limited to examining the decision for abuse of discretion." Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008). We therefore "grant[] substantial deference to the evidentiary rulings of a trial judge." Fitzgerald v. Stanley Roberts, Inc., 186 N.J. 286, 319 (2006); Benevenga v. Digregorio, 325 N.J. Super. 27, 32 (App. Div. 1999), certif. denied, 163 N.J. 79 (2000). "[I]n making relevance and admissibility determinations," the trial judge's exercise of his "broad discretion" "will not [be] disturb[ed], absent a manifest denial of justice." Lancos v. Silverman, 400 N.J. Super. 258, 275 (App. Div.), certif. denied sub nom., Lydon v. Silverman, 196 N.J. 466 (2008). However, we accord no such deference to a ruling that is "inconsistent with applicable law." Pressler & Verniero, Current N.J. Court Rules, comment 4.6 on R. 2:10-2 (2011).

We also must consider whether the judge's "mistaken exercise prejudiced the substantial rights of a party." Pressler & Verniero, supra, comment 4 on R. 2:10-2; see also Gillman v. Bally Mfg. Corp., 286 N.J. Super. 523, 528 (App. Div.), certif. denied, 144 N.J. 174 (1996). "The error must have been of sufficient magnitude to raise a reasonable doubt as to whether it led the jury to a result it would otherwise not have reached." Pressler & Verniero, supra, comment 2.1 to Rule 2:10-2; Fitzgerald, supra, 186 N.J. at 318.

(a)

In Points I and V, plaintiff challenges two pretrial rulings barring certain evidence.

Suarez moved in limine to bar any evidence regarding the Trifari suit in which he sued a resident of Ridgefield, Jeff Trifari, for defamation. The suit was filed in 2006, while the defamation action against Mecca was pending, and centered on the following letter Trifari wrote to The Bergen Record critical of Suarez:

> Suddenly after a six-year hiatus, senior housing in Ridgefield is back on the table. Residents should ask "[w]hy now?"
>
> The answer comes from the fact that the owner of the property where the borough wants to build its senior housing donated $100,000 to Mayor Anthony Suarez. Following the donation, the borough approved a zone change affecting the property owner's land. At a public meeting, Suarez said he had given the money back.

> Isn't this another pay-to-play?

Defense counsel explained that the Trifari suit ended in a confidential settlement involving no exchange of funds, under which Suarez was permitted to say the following if asked about the litigation: "`The case has been settled, and Trifari admitted that he should have stated that the money was donated to the library and not to Suarez and Trifari has agreed not to disparage Suarez in the future.'"

In opposing the in limine motion, Mecca argued the Trifari suit was proof of "a pattern of conduct" by Suarez. Citing N.J.R.E. 404(b), Mecca contended the evidence was highly "relevant to the question of malice" and lack of "probable cause."

Characterizing the proffer as evidence of Suarez's habit of "repeatedly filing lawsuits for defamation with no good cause," the judge noted that N.J.R.E. 406 "necessitates some comparison of the number of instances in which any such conduct occurs with the number in which no such conduct took place." Noting only "potentially two instances" of the alleged conduct, the judge concluded the evidence was insufficient to prove habit, and was "unduly prejudicial under Rule 403." The judge also noted the disparity between the procedural history and outcomes of the Trifari suit and the defamation action such that any evidence regarding the Trifari suit would lack relevance, confuse the jury and result in prejudice to Suarez.

Before us, Mecca argues evidence of the Trifari suit was admissible pursuant to N.J.R.E. 404(b) to prove defendant's intent to silence political dissent through misuse of judicial process." We disagree.

Rule 404(b) provides:

> Other crimes, wrongs, or acts. . . . evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

Although implicated with much greater frequency in criminal cases, the rule applies to civil cases as well. Weissbard & Zegas, Current N.J. Rules of Evidence, comment 7 on N.J.R.E. 404 (2011); and see Showalter v. Barilari, Inc., 312 N.J. Super. 494, 511-12 (App. Div. 1998). Also, "the rule applies to `other wrongs evidence' that are not crimes." Weissbard & Zegas, supra, comment 7 on N.J.R.E. 404.

In State v. Cofield, 127 N.J. 328, 338 (1992), the Court adopted a four-part test to determine the admissibility of such evidence.

The Cofield test requires that:

> 1. The evidence of the other [bad act] must be admissible as relevant to a material issue;
>
> 2. It must be similar in kind and reasonably close in time to the offense charged;
>
> 3. The evidence of the other [bad act] must be clear and convincing; and
>
> 4. The probative value of the evidence must not be outweighed by its apparent prejudice.
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> [State v. Williams, 190 N.J. 114, 122 (2007) (quoting Cofield, supra, 127 N.J. at 338).] Further, even if relevant under N.J.R.E. 404(b), such evidence must nevertheless survive the crucible for all relevant evidence: `relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence.
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> [State v. Lykes, 192 N.J. 519, 534-35 (2007) (quoting N.J.R.E. 403).]

We give "great deference to the decision of the trial [judge]" regarding the admissibility of Rule 404(b) evidence. State v. Barden, 195 N.J. 375, 390-91 (2008) (citing Lykes, supra, 192 N.J. at 534). "However, when a trial court does not analyze the admissibility of other-crimes evidence under Cofield, we may conduct a plenary review to determine its admissibility." Id. at 391 (citing Lykes, supra, 192 N.J. at 534). Here, the judge never expressly applied the Cofield analysis, although she alluded to some of the factors. We choose to review the issue de novo.

Mecca argues that evidence of the Trifari suit was relevant to prove that the defamation action lacked probable cause and that

Suarez acted with malice in filing the complaint. Mecca indeed needed to prove both malice and lack of probable cause in order prevail on his claim for malicious use of process. See LoBiondo v. Schwartz, 199 N.J. 62, 90 (2009) (defining the elements of the tort). The first prong of the Cofield test, therefore, requires us to consider whether evidence of the Trifari suit was "relevant to [these] material issue[s]," Williams, supra, 190 N.J. at 122, that is, whether it "ha[d] a tendency in reason to prove or disprove," Suarez acted with malice and without probable cause when he filed the defamation action against Mecca. N.J.R.E. 401.

In a malicious use of process claim, determining if probable cause existed for the prior suit devolves to an inquiry "whether . . . the facts supported the actor's honest belief in the allegations. In this context, honest belief means . . . a reasonable belief that there was a good or sound chance of establishing the claim to the satisfaction of the court or the jury." LoBiondo, supra, 199 N.J. at 93 (citation and quotation omitted). "Malice, which has been described as a related element of the cause of action, is defined as the intentional doing of a wrongful act without just cause or excuse." Id. at 93-94 (quotation omitted). "[W]e have permitted malice to be inferred from a finding that a defendant has neither probable cause nor a reasonable belief in probable cause." Id. at 94 (citation omitted).

That Suarez filed the Trifari litigation, in and of itself, was not relevant to prove he acted with malice or that he lacked probable cause in filing the defamation action against Mecca. Arguably, if the Trifari litigation itself lacked probable cause and was actuated by malice, the evidence might be relevant to prove Suarez's "motive" or "plan" in filing the defamation action, i.e., to sue his political opponents for defamation regardless of the merits of such claims. In other words, whether evidence of the Trifari suit was relevant depended upon the similarity of Suarez's conduct, i.e., the second Cofield prong.

The Trifari suit resulted in a settlement. The terms of the settlement were undisputed. Suarez was permitted to publicly state that Trifari corrected the statement he published, essentially admitting his claim that Suarez was paid $100,000 as a quid pro quo for development approvals, was false. Trifari also agreed not to disparage Suarez in the future. In short, that rebuts any inference that Suarez was actuated by malice and lacked probable cause when he filed the Trifari suit. As such, the evidence was properly excluded because it lacked any relevancy to Mecca's claims in this case.

Additionally, we believe the evidence was properly excluded because any minimal probative value it may have had was clearly outweighed by potential prejudice and the likelihood of jury confusion and delay. N.J.R.E. 403.

Mecca also argues that the trial court erred in not allowing him to present evidence regarding the contingency fee retainer agreement between Suarez and the law firm that handled the defamation action, which evidence Mecca asserts would have demonstrated Suarez's malice. Mecca argues that Suarez was emboldened to pursue a meritless claim because he did not have to pay his attorney.

The trial judge addressed this issue emphatically during the pretrial conference. She concluded the evidence had "nothing to do with the . . . elements [of] a malicious prosecution action," was "completely collateral [and] irrelevant," and would "confus[e] . . . th[e] jury and . . . [distract] them from the elements of this case." We agree.

Moreover, Mecca took advantage of opportunities in cross-examination and argument to advance his theory that Suarez's "free ride" on counsel fees enabled him to pursue frivolous claims. Specifically, Suarez conceded that he paid no attorneys fees, and less than $5000 in costs, because the defamation action was handled on a contingency fee basis. Mecca's counsel impugned that explanation by noting that the defamation action was unlikely to yield any monetary damages upon which a contingent fee would have been based. The exclusion of any further evidence in this regard was entirely appropriate.

(b)

In Points II, III, and IV, Mecca raises three arguments regarding evidence rulings made during trial. Applying the appropriate standard of review to these claims, we find no basis for reversal.

Mecca argues that Suarez's trial testimony was rife with hearsay statements and the trial court's failure to issue limiting instructions to the jury as to the proper use of "state of mind" testimony warrants a new trial. This testimony included references to the mayor of Saddle Brook threatening Suarez with the loss of his position as town attorney, Suarez's law partners' concerns about losing firm business, another lawyer's characterization of Mecca as "dangerous," and advice from another attorney about reporting an alleged tax problem regarding Mecca's property. Mecca claims further error when the judge permitted Suarez to

read from a certification by Saddle Brook's mayor as to his impression of the Ramundo posting.

Suarez counters by arguing that all of the testimony was properly admitted for the non-hearsay purpose of proving Suarez's own state of mind in pursuing his defamation action.

We agree that most of the testimony was not admitted for the purpose of proving the truth of the matters asserted. See N.J.R.E. 801(c) ("`Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). Suarez's state of mind was relevant to whether he acted with malice in filing the defamation case. Therefore, the perception of the posting by others, and how that might affect Suarez professionally, were relevant to that issue.

Evidence of another person's belief that Mecca was "dangerous," and the mayor's actual interpretation of the posting as conveyed in his certification, were not admissible for this purpose and should have been excluded. However, we are firmly convinced that any error in this regard was harmless beyond a reasonable doubt and does not require reversal. R. 2:10-2. Mecca cannot complain as to the lack of a limiting instruction since none was ever requested.

Mecca also argues that the judge erred in permitting Suarez to offer testimony regarding the fees he was accruing in defending the suit. We agree that the evidence was irrelevant. However, the judge gave an appropriate curative instruction. The argument lacks sufficient merit to warrant any further discussion. R. 2:11-3(e)(1)(E).

Lastly, Mecca argues that reversal is required because Suarez and defense counsel repeatedly introduced evidence that the initial summary judgment motion Mecca brought in the defamation action was denied. Here is how the issue arose at trial.

Suarez was asked to read a handwritten notation on the order denying the motion. Suarez read: "It says denied DED has not run. Statement appears false and declarant knew some of it was false when he reported it in the first person." The judge explained that "DED" meant "discovery end date." Suarez then started to explain that the order led him to believe he had a reasonable basis for the defamation action because "the judge [wa]s indicating that the false statement was —"

The trial judge immediately sustained Mecca's counsel's objection and added:

> Ladies and gentlemen, there's been a final ruling by Judge Wilson — I should explain this so there's no confusion — which is in evidence, where he found as a matter of law that there was no defamation. I'm not going to go into all of the opinions he had. You will have that in evidence. The case was then taken to the Appellate Division by Mr. Suarez, who affirmed what Judge Wilson said. The fact that Judge Wilson denied it the first time around is a very typical thing that happens. You are not to give that any weight or consideration.
>
> As stated in the order, the discovery end date was not over. Many times judges feel that — or, you know, it could have been that the case just needed some more workup before the judge could make a ruling, but that's not for you to entertain in your deliberations. All you need to focus on is what is in evidence, the fact that the case was dismissed, and the fact that the Appellate Division affirmed Judge Wilson.

To the extent Suarez's counsel attempted to revisit the issue in his summation, his comments provoked an immediate objection, which the judge sustained. She then issued a stern curative instruction similar to the one quoted above before permitting counsel to complete his summation.

Although the testimony and summation comments were improper, they do not compel reversal in light of the judge's curative instructions which we assume were followed by the jury.

Affirmed. In light of our holding, defendant's cross-appeal is dismissed as moot.

[1] To avoid confusion, we will on occasion throughout the opinion utilize the names of the parties instead of the generic "plaintiff" and "defendant."