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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

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Allstate Insurance Company

v.

Kaitlin N. Ogletree

Appeal from Jefferson Circuit Court
(CV-17-901316)

PER CURIAM.

This case arises from a dispute between Allstate Insurance Company ("Allstate") and its insured, Kaitlin N. Ogletree, over the extent of

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damages incurred in an automobile accident that Ogletree had with an underinsured motorist. During closing arguments, Ogletree's counsel made inaccurate statements unsupported by the evidence presented at trial. The jury returned a verdict for Ogletree, and Allstate appealed on account of the allegedly improper closing argument. We reverse and remand for a new trial.

Facts and Procedural History

On the night of April 4, 2015, Ogletree was traveling down Interstate 65 in an automobile driven by her husband. At the same time, an intoxicated driver, Justin Bice, was also driving down the interstate -- not far behind the Ogletrees. Because of his slowed reaction time, Bice failed to appreciate the quickly closing gap between his automobile and the Ogletrees' vehicle. His vehicle struck theirs from behind, damaging both automobiles and injuring Ogletree. Immediately after the impact, Bice exited his vehicle and ran across the interstate, where he was struck by oncoming traffic and killed.

Ogletree sought to recover the costs of her injuries from Bice. To do so, an estate had to be opened in Bice's name because he had died without

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a will. She eventually reached a settlement with Bice's estate for \$50,000, the limit of Bice's automobile-liability policy.¹

To recover her remaining costs, Ogletree filed a claim for underinsured-motorist ("UIM") benefits with her insurer, Allstate. Her policy included \$50,000 worth of "stacked" UIM coverage and \$1,000 worth of medical-payments coverage. Allstate offered Ogletree \$2,500, which she rejected. Ogletree then sued Allstate in the Jefferson Circuit Court to recover the alleged remaining costs of her injuries. Allstate offered another settlement -- this time for \$5,000 -- which Ogletree also rejected.

The parties proceeded to a jury trial. The sole issue before the jury was the extent of Ogletree's damages from the accident with Bice. During closing argument, Ogletree's attorney discussed the damages she sought -- which included a request for punitive damages. In his closing argument, Allstate's attorney responded by noting that the purpose of punitive damages would not be served in this case because Bice -- the actual

¹Ogletree's insurer, Allstate, approved her settlement with Bice's estate.

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wrongdoer -- was dead. "An award of punitive damages is not going to punish [Bice]," Allstate's counsel argued. "[T]here's nothing anyone on this planet could do to punish him because he is no longer alive. So an award of punitive damages would not serve that purpose."

Ogletree's attorney sought to counter this argument in rebuttal by asserting that Allstate could get compensation from Bice's estate for the punitive-damages award. Allstate objected to this line of argument as improper, but the objection was overruled. Ogletree's attorney then continued:

"If you award those damages, Allstate Insurance Company has a provision in their policy that they know about. This is not a surprise to them. They know this. And that provision says, 'When we pay any' -- and this is in here'When we pay any person under this coverage, we're entitled to repayment of the amount that we paid by us and related collection expenses out of the proceeds of any settlement or judgment that person recovers from any responsible party or insurer. All rights of recovery against a responsible party or insurer must be maintained and preserved for our benefit.' ... Here's what that means. If you award punitive damages today, Allstate has the right to make her help them go get it from Justin Bice's estate that is open in this county. That's the law, and it's the promise they made in their policy, and they tried to not let you know that. That is the law. ... And under their policy provision that they wrote and that they are familiar with, they can go collect every nickel, every penny of it from Justin Bice's estate."

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(Emphasis added.) Allstate again objected, but the objection was overruled.

After closing arguments, Allstate moved for a mistrial based on Ogletree's punitive-damages argument. Allstate contested Ogletree's assertion that Allstate could recover the amount of any punitive damages awarded from Bice's estate because, Allstate said, such recovery was impossible -- Ogletree had already settled with Bice's estate. Allstate's motion was denied.

The jury returned a verdict for Ogletree, awarding her \$80,000 in compensatory damages and \$60,000 in punitive damages. When entering the judgment, the trial court applied a \$50,000 setoff for the settlement reached between Ogletree and Bice's estate and reduced the amount of the judgment accordingly.

Allstate timely moved for a new trial based on Ogletree's punitive-damages remarks in closing arguments. In the alternative, Allstate requested a remittitur of the award down to Ogletree's UIM policy limit of \$50,000. Ogletree opposed the new-trial motion, but she requested that

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the award be reduced to \$51,000 to include her medical-payments coverage. The trial court agreed and entered an order remitting the judgment to \$51,000. Allstate now appeals.

Standard of Review

In reviewing claims of improper attorney argument, "we will not reverse unless substantial prejudice has resulted, and there is a presumption in favor of the trial court's ruling." Seaboard Coast Line Ry. Co. v. Moore, 479 So. 2d 1131, 1136 (Ala. 1985). Although the trial court has wide latitude in ruling on such claims, its discretion is not boundless. See Hayden v. Elam, 739 So. 2d 1088, 1093 (Ala. 1999). We may "reverse the trial court's denial of a [motion for a] mistrial based on improper statements [if] it appears from the record that the statements were probably prejudicial to the complaining party." Precise Eng'g, Inc. v. LaCombe, 624 So. 2d 1339, 1342 (Ala. 1993). In that vein, "where the improper argument is prejudicial and is based on facts not in evidence, the erroneous overruling of objection to the argument by the trial court would be cause for reversal." Southern Ry. Co. v. Jarvis, 266 Ala. 440, 446, 97 So. 2d 549, 554 (1957).

Analysis

Allstate argues that it was entitled to a new trial because, it says, the argument made to the jury by Ogletree's counsel about reimbursement of punitive damages was incorrect and prejudicial. We agree. Because the improper argument merits a new trial, it is unnecessary to discuss whether the damages award should have been remitted further.

A. Plaintiff Counsel's Punitive-Damages Argument Was Inaccurate and Was a Ground for Reversal

Allstate's primary argument on appeal is that statements in Ogletree's rebuttal closing argument were incorrect and prejudicial and merit reversal of the judgment. Specifically, Allstate challenges the statements made about its ability to obtain reimbursement of an award of punitive damages. Ogletree's attorney argued to the jury that if it awarded punitive damages to Ogletree, Allstate could later recover that money from Bice's estate. That argument was inaccurate.²

²Ogletree concedes this in her brief to this Court. Ogletree's brief at 17 ("[I]t has become apparent that the undersigned's rebuttal argument suggesting that Allstate could subrogate against the Estate of Justin Bice was legally incorrect.").

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In theory, Allstate's recovery from Bice's estate would come by way of subrogation, which allows an insurer to "step into the shoes" of its insured and assume the insured's right to collect from a third party. See Star Freight, Inc. v. Sheffield, 587 So. 2d 946, 958 n.5 (Ala. 1991). This process was explained to the jury by Ogletree's attorney in his rebuttal closing argument, when he referred directly to Allstate's policy. But Allstate had already consented to Ogletree's settlement with Bice's estate. That settlement released Bice's estate from any further claims by Ogletree. Thus, by stepping into Ogletree's shoes, Allstate could recover nothing from Bice's estate because there was nothing left to recover.

This Court tackled a similar issue in Robins Engineering, Inc. v. Cockrell, 354 So. 2d 1, 4 (Ala. 1977). In that case, the plaintiff's counsel argued in closing that the defendant contractor would be indemnified by a subcontractor for a judgment rendered against it. Id. at 2. The plaintiff's attorney said that the "'contract . . . provides that anything that Robins had to pay [the subcontractor has] got to pay [Robins] back. Consider that. Consider that.'" Id. (emphasis omitted). For various reasons, however, such indemnity from the subcontractor was impossible.

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Id. at 4. Accordingly, this Court reversed the judgment for the plaintiff because it found prejudicial error in the mistaken repeated references to the defendant's right to indemnity. Id.

A party's underlying protection through contractual indemnity and a party's ability to recover through subrogation are distinct concepts, but they operate in a functionally similar way. "The theory of indemnity holds [a] defendant liable for the whole damage ... flowing from contract. ... [It] seeks to transfer the entire loss of one tortfeasor to another who, in equity and justice[,] should bear it." Sherman Concrete Pipe Mach., Inc. v. Gadsden Concrete & Metal Pipe Co., 335 So. 2d 125, 126-27 (Ala. 1976). In a similar manner, subrogation allows an insurer to recover its payout to its insured from the wrongdoer. See Star Freight, 587 So. 2d at 958 n.5. At their core, both shift losses to another responsible entity.

The similarity between subrogation and indemnity is akin to the similarity this Court recognized in Robins Engineering, when it compared reimbursement under contractual indemnity to reimbursement from insurance. See Robins Eng'g, 354 So. 2d at 2. The Robins Engineering Court noted that "[t]he terms of the 'indemnity agreement' make it plain

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that it serves a similar, if not identical, function to liability insurance." Id. at 3 (internal citation omitted). That function involves "'security against anticipated loss ... to which one party may be subjected by contingent or future events.'" Id. (quoting 42 C.J.S. Indemnity § 3, p. 566). The similarity between subrogation and contractual indemnity here is just as strong as the similarity between contractual indemnity and insurance, because subrogation provides security for the insurer to recoup its loss. Put simply, the common feature of all of these concepts is that another person or entity that is not a part to the action may ultimately pick up the tab for any damages awarded.

Based on what Ogletree's counsel argued to the jury, Allstate would be able to recover any punitive-damages award against it from another entity: Bice's estate. But that is exactly the type of "no-harm/no-foul" argument we have held to be unduly prejudicial to defendants -- particularly when the availability of recovery was, in fact, nonexistent. See Robins Eng'g, 354 So. 2d at 4. And while we ordinarily defer to a trial court's rulings on what is allowed in closing arguments, it is clear that substantial prejudice resulted from the erroneous statements of Ogletree's

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counsel. See Seaboard, 479 So. 2d at 1136. The jury awarded Ogletree \$60,000 in punitive damages after hearing the misleading proposition that Allstate could recover from the estate of the actual wrongdoer, Bice. Moreover, the "fact" of recovery from Bice's estate was not in evidence. See Jarvis, 266 Ala. at 446, 97 So. 2d at 554; Ex parte Washington, 507 So. 2d 1360, 1361 (Ala. 1986) ("[Counsel] may not argue as a fact that which is not supported by the evidence."). In fact, the first time the jury heard that Allstate could recover from Bice's estate was during Ogletree's closing argument -- which is not evidence. See Whitt v. State, 370 So. 2d 736, 739 (Ala. 1979). And the prejudicial effects of the incorrect statements were exacerbated by the fact that they occurred during Ogletree's rebuttal closing argument, denying Allstate the opportunity to correct them. Because the inaccurate reference to Allstate's right to subrogation was "probably prejudicial to the complaining party," Precise Eng'g, 624 So. 2d at 1342, we hold that the error of allowing that argument merits reversal.

B. Allstate's Objection to the Improper Statements in Ogletree's Rebuttal Closing Argument Was Properly Preserved

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Ogletree contends that whether it was reversible error for the trial court to allow her counsel to argue to the jury that Allstate could recover from another party the amount of a punitive damages awarded was not an issue preserved for review. We disagree.

Ogletree's counsel asserted in the rebuttal closing argument that Allstate could seek from Bice's estate compensation for any punitive damages the jury might award against Allstate. Initially, counsel began by referencing that Bice could be punished for his actions and that "he has an estate." Allstate objected. However, the explanation of the objection was given in a bench conference that was apparently either not recorded or not made part of the trial transcript. The trial court overruled the objection. Ogletree's counsel continued the argument and stated to the jury that if it awarded punitive damages, Allstate had the right to "go get it from Justin Bice's estate." Allstate's counsel then renewed the prior objection, stating: "I renew my objection. That's not correct."

After the jury was dismissed for deliberation, but apparently before the trial exhibits had been delivered to it, Allstate's counsel orally moved for a mistrial, stating:

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"Allstate waived any subrogation rights and consented to [Ogletree's] settlement with the tortfeasor. ... She's already released him. [W]hat [Ogletree's counsel] told the jury was just -- it's blatantly untrue, and it's definitely misleading, and it leads them to conclude that there is an opportunity for Allstate to pick up the -- any punitive damages that they have to pay out from him or his estate. And that's just legally not correct. It's not possible."

The trial court acknowledged that such an objection had been previously made, indicated that it had been concerned about the issue, and explained why it previously had denied the objection:

"THE COURT: Okay. As you were taking us down that road, I was a little worried just because it was something new. I think the best way to handle that and what I decided in the spur of the moment is that if there is an award of punitive damages, obviously [Allstate] would have the opportunity in a postjudgment motion for new trial. I can't decide the issue now because I just don't know. I know you want just to preserve the record --

"[Allstate's counsel:] Correct.

"THE COURT: -- and there may be an issue there. I just don't know. But I think the best vehicle to handle that would be a postjudgment motion under Rule 59[, Ala, R. Civ. P.,] for a new trial. That way I have full opportunity to fully digest, take a look at the provision and the law and what not."

(Emphasis added.)

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Generally, a specific objection is required to preserve an issue for appellate review; this ensures that the trial court has sufficient notice of the alleged error and an opportunity to correct it. Ex parte Works, 640 So. 2d 1056, 1058 (Ala. 1994). The discussion quoted above explains the nature of the objection Allstate made during Ogletree's rebuttal closing argument and that the trial court understood it at the time it was made. Under these circumstances, the record shows that the issue was preserved for appellate review.

C. The Statements of Ogletree's Attorney in Rebuttal Closing Argument Were Not Permissible Under the Reply-In-Kind Doctrine

Ogletree argues that the statements of her attorney are excusable as a "reply in kind" to statements from Allstate's counsel. We disagree because the condition necessary to trigger the reply-in-kind doctrine did not exist.

The reply-in-kind doctrine is designed to restore an equal playing field in the courtroom when one party violates the rules. Under the doctrine, "[w]here counsel for one party permits counsel for the opposing party to make impermissible remarks to the jury without interposing an

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objection, the law implicitly reserves to the former the right to reply in kind, albeit equally impermissible, to the argument of the latter." Ex parte Rutledge, 482 So. 2d 1262, 1264 (Ala. 1984). The reason for this is simple: "[A]n objection to an illegal argument, although sustainable, is ineffective to eradicate the harm done. Counsel, as a matter of trial strategy, may elect in such cases not to interpose an objection, wait his turn, and reply in kind, thus commenting upon matters that otherwise he could not argue." Id. The key, however, is that the right of counsel to fight fire with fire materializes only when the other side breaks the rules first.³

The remarks of Allstate's counsel in closing argument about punitive damages were not "impermissible remarks." Rather, Allstate's counsel argued that awarding punitive damages in this case would not serve the

³This is distinct from the curative-admissibility doctrine. That doctrine "holds that if one party introduces illegal evidence, his opponent has an unconditional right to rebut such evidence." American Fire & Cas. Ins. Co. v. Bryan, 379 So. 2d 605, 609 (Ala. Civ. App. 1979) (emphasis added). The curative-admissibility doctrine does not apply here because the objectionable conduct occurred during closing argument, and closing arguments are not evidence. See Whitt, 370 So. 2d at 739.

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goal of that remedy. Indeed, this Court has held that "the purpose of punitive damages is not to compensate the plaintiff but to punish the wrongdoer and to deter the wrongdoer and others from committing similar wrongs in the future." Green Oil Co. v. Hornsby, 539 So. 2d 218, 222 (Ala. 1989). In that vein, Allstate argued that, because Bice had died, no amount of punitive damages could effectively punish or deter him. This was a permissible appeal to the jury about the purpose of punitive damages, and Ogletree was not entitled to combat that argument with the statements made in the rebuttal closing argument.

Conclusion

The incorrect statements made by Ogletree's counsel in closing argument asserting that Allstate could recover the amount of any punitive-damages award from Bice's estate were prejudicial and adequate grounds for a new trial. Allstate's objection to the argument was properly preserved, and those statements were not provoked by an improper statement from Allstate's counsel. We therefore reverse the trial court's judgment and remand the case for a new trial.

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REVERSED AND REMANDED.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Mendheim, Stewart,
and Mitchell, J.J., concur.

Sellers, J., concurs in the result.