

Court of Appeals No. 01CA1745
Boulder County District Court No. 99CV0374
Honorable Morris W. Sandstead, Jr., Judge

Charles E. Corry,
Plaintiff-Appellant,

v.

Theresa Rizzo,
Defendant-Appellee.

JUDGMENT AFFIRMED

Division IV
Opinion by JUDGE VOGT
Ney and Rothenberg, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
September 5, 2002

Law Office of Frederick P. Bibik, Frederick P. Bibik,
Louisville, Colorado, for Plaintiff-Appellant

Dorsey & Whitney, LLP, Stephen D. Bell, Sandra L. Potter,
Denver, Colorado, for Defendant-Appellee

Plaintiff, Charles E. Corry, appeals the judgment entered on a jury verdict in favor of defendant, Theresa Rizzo, on his claims of abuse of process, malicious prosecution, and outrageous conduct. He also appeals the trial court's dismissal of his claim for breach of fiduciary duty. We affirm.

Plaintiff's claims against defendant, his former wife, arose out of events that took place prior to and during the parties' dissolution of marriage proceedings. Plaintiff alleged that defendant had breached her fiduciary duty to him by transferring joint assets to her own name and failing to disclose financial information during those proceedings. He also asserted a claim for abuse of process based on her actions in obtaining temporary restraining orders, a claim for malicious prosecution based on criminal domestic violence charges of which he was acquitted, and an outrageous conduct claim arising out of the same events.

I.

Plaintiff first contends that, because the trial court's pretrial rulings declining to dismiss his breach of fiduciary duty claim were the law of the case, the court erred in dismissing that claim at trial. We disagree.

The law of the case doctrine, as applied to a trial court's power to reconsider its own prior rulings, is a discretionary rule of practice directing that prior relevant rulings made in

the same case generally are to be followed. However, the doctrine does not apply when an earlier ruling would result in error. People ex rel. Gallagher v. District Court, 666 P.2d 550 (Colo. 1983); Janssen v. Denver Career Service Bd., 998 P.2d 9 (Colo. App. 1999).

A trial court may, in its discretion, determine that it needs to correct its previous ruling because of a legal or factual error underlying that ruling. Janssen v. Denver Career Service Bd., supra.

The confidential relationship between spouses gives rise to an obligation to act in good faith and with due regard for the interests of the other party. This includes an obligation to make fair disclosure regarding financial matters. Violation of such obligation may give rise to a claim for breach of fiduciary duty. See In re Estate of Lopata, 641 P.2d 952 (Colo. 1982); see also Todd Holding Co. v. Super Valu Stores, Inc., 874 P.2d 402 (Colo. App. 1993).

Before trial in this case, plaintiff asked the court to rule as a matter of law that defendant owed him fiduciary duties concerning disclosure of financial information both before and after their dissolution action was filed on June 25, 1997. In support of his motion, plaintiff submitted an affidavit detailing various asserted unauthorized asset transfers and other financial improprieties by defendant, beginning April 28,

1997, and continuing into July 1997. The trial court ruled that a breach of fiduciary duty claim existed as to breaches that occurred before the dissolution action was filed, but not afterwards.

Defendant subsequently moved for summary judgment on the breach of fiduciary duty claim, asserting that plaintiff was collaterally estopped from pursuing the claim because it had been addressed and litigated in the dissolution proceeding. The trial court denied the motion. It cited Simmons v. Simmons, 773 P.2d 602 (Colo. App. 1988), for the proposition that interspousal tort claims should not be joined with dissolution of marriage proceedings, and noted that the dissolution court's retention of jurisdiction over undisclosed assets was only for the purpose of dividing such assets.

Another judge presided at trial. After hearing plaintiff's evidence regarding the circumstances surrounding the alleged improper transfer of assets, the trial court dismissed the breach of fiduciary duty claim. It concluded that the claim was "not a tort that survived the divorce action"; that the issues were currently being dealt with in another court; and that, to the extent the prior order denying summary judgment was the law of the case, "it's wrong and I'm changing it."

We conclude that the trial court did not err in dismissing the breach of fiduciary duty claim, notwithstanding the pretrial rulings concerning that claim.

Plaintiff testified that he asked defendant to leave on April 25, 1997, at which time the parties began splitting their assets. He testified that "we took a yellow legal tablet, and on about four or five pages we listed our assets and who was going to get which of these assets." Defendant's first unauthorized asset transfer was alleged to have taken place three days later, on April 28, 1997.

Plaintiff's trial testimony thus established that the transfers on which his breach of fiduciary duty claim were based were made during the course of dividing assets for purposes of the parties' dissolution of marriage. This information had not been included in the affidavit plaintiff filed before trial. Rather, it was only upon hearing plaintiff's testimony that the trial court learned that the breach of fiduciary duty claim pertained solely to actions that were the subject of ongoing litigation in the parties' dissolution proceeding.

The permanent orders in the dissolution proceeding, which were before the trial court here, provided that the court retained jurisdiction "with respect to any allegation of undisclosed intangible personal property (including cash)," and that, "if either party has, in fact, deliberately failed to

disclose any asset in an attempt to defraud the other party and this Court, that asset will almost certainly be considered a marital asset, and be awarded to the other party." The permanent orders also permitted the parties to conduct additional discovery regarding allegedly undisclosed marital assets. Proceedings in the dissolution case were ongoing as of the time of trial in this case.

In contrast to the independent tort claims at issue in Simmons v. Simmons, supra, the breach of fiduciary duty claim here was based on allegations concerning the same asserted improper asset transfers that were being litigated simultaneously in the dissolution proceeding. Although plaintiff argues that the remedies in that proceeding were insufficient to afford him complete relief, the record affords no basis for concluding that he suffered damages as a result of defendant's alleged breach of fiduciary duty for which he could not be compensated by an award of any undisclosed asset in the dissolution proceeding.

In sum, in light of the information brought out at trial, it was not inappropriate for the trial court to reconsider its earlier rulings on the breach of fiduciary duty claim. See Janssen v. Denver Career Service Bd., supra.

II.

Plaintiff raises several challenges to the trial court's evidentiary rulings. Because evidentiary rulings are committed to the sound discretion of the trial court, we apply a deferential standard of review and reverse only for abuse of discretion. Further, we are required to disregard any erroneous evidentiary ruling unless a substantial right of the complaining party has been affected. Cherry Creek School District No. 5 v. Voelker, 859 P.2d 805 (Colo. 1993); see C.A.R. 35(e); CRE 103. Applying these standards, we find no basis for reversal.

A.

Plaintiff contends the trial court erred in admitting evidence of defendant's medical condition. We disagree.

Criminal charges were filed against plaintiff after defendant alleged in June 1997 that he had engaged in acts of domestic violence against her. To prevail on his claim against defendant for malicious prosecution arising out of that criminal action, plaintiff had to establish, among other elements, the absence of probable cause for the complaint. Waskel v. Guaranty National Corp., 23 P.3d 1214 (Colo. App. 2000). To prevail on his abuse of process claim arising out of defendant's subsequent efforts to obtain restraining orders against him, plaintiff had to establish that she had an ulterior purpose in seeking such

orders. See Lauren Corp. v. Century Geophysical Corp., 953 P.2d 200 (Colo. App. 1998).

Defendant introduced evidence that she had been seen in an emergency room in June 1997 for injuries she stated had been inflicted on her by plaintiff. Because the evidence made it more probable that she had in fact been assaulted by plaintiff and that she had reason to seek a restraining order, such evidence was relevant to establish her defenses to the malicious prosecution and abuse of process claims. See CRE 401. The trial court could properly conclude that the evidence was not unfairly prejudicial. See CRE 403. Thus, it was properly admitted.

Contrary to plaintiff's contention, admission of the evidence did not violate the trial court's earlier ruling on defendant's motion in limine.

Prior to trial, defendant asked the court to exclude evidence of certain of her gynecological conditions that, under plaintiff's theory, were relevant to explain her behavior. At the beginning of trial, plaintiff's counsel confessed the motion, and the court accordingly ordered that there would be no evidence of defendant's gynecological records.

The emergency room records and the testimony regarding that visit were not the subject of the trial court's in limine ruling. Further, we reject plaintiff's contention that,

notwithstanding that ruling, he should have been allowed to offer the gynecological evidence in rebuttal to defendant's evidence. Not only does his confession of the motion in limine preclude this argument, see City of Thornton v. Clear Creek Water Users Alliance, 859 P.2d 1348 (Colo. 1993), but he does not explain how the excluded evidence would have rebutted the other medical evidence.

B.

We are similarly unpersuaded by plaintiff's related contention that the trial court should have precluded defense counsel from cross-examining him regarding a book on domestic violence that he had published on the internet. As characterized on cross-examination, the book included articles opining, among other things, that ordinary slapping of a wife should not be considered domestic violence and that men must be able to enforce sufficient discipline, including controlled violence, to be able to keep women and children safe. We conclude that it was within the trial court's discretion to permit such cross-examination as relevant to establish that defendant had a reasonable basis for fearing plaintiff and seeking restraining orders. See People v. Mandez, 997 P.2d 1254 (Colo. App. 1999) (scope of cross-examination is entrusted to trial court's discretion).

Plaintiff also contends that the trial court erred in admitting "similar transaction evidence" -- specifically, evidence that he had beaten his first wife. Plaintiff argues that the evidence was unduly prejudicial and that it was offered without prior notice to him and without a limiting instruction, thereby violating CRE 403 and 404. We are not persuaded.

To the extent the evidence supported defendant's contention that she was justifiably afraid of plaintiff, it was relevant to her defense to the abuse of process claim. Moreover, plaintiff had notice months before trial that defendant would be calling his first wife as a witness, and he in fact filed a written objection to her endorsement on the basis of CRE 404 and 405 and spousal privilege. There is nothing in the record to indicate that he sought a limiting instruction in connection with her testimony. See Miller v. Solaglas California, Inc., 870 P.2d 559 (Colo. App. 1993) (burden is on opposing counsel to request limiting instruction).

Even if we were to determine that admission of the evidence was an abuse of discretion, plaintiff would not be entitled to reversal on this basis. The credibility of the first wife was substantially undermined when she testified on cross-examination that she had accused plaintiff of wife-beating in their dissolution only to make him look bad so that she would obtain

custody of the children. In light of the first wife's entire testimony, we cannot conclude that admission of the alleged similar transaction evidence, even if error, affected plaintiff's substantial rights. See Cherry Creek School District No. 5 v. Voelker, supra.

D.

Defendant next contends that the trial court erred in allowing testimony by a witness who had not been timely endorsed. We find no reversible error.

Testimony or other evidence not disclosed in accordance with the rules of discovery is to be excluded unless the failure to disclose is either substantially justified or harmless. The failure to disclose is harmless if the opposing party is not denied an adequate opportunity to defend against the evidence. Todd v. Bear Valley Village Apartments, 980 P.2d 973 (Colo. 1999); see C.R.C.P. 37(c)(1).

Early in the trial, plaintiff asked the court to preclude testimony by a defense witness who had not been endorsed until the first day of trial. Defendant conceded that disclosure of the witness was late, but asked that he be allowed to testify to rebut plaintiff's allegation that he had seen defendant following him in her car on April 9, 1999. The court allowed the testimony. On the third trial day, the witness testified

briefly and identified an exhibit showing that defendant was at a fitness facility in another city on April 9, 1999.

We conclude that, even assuming defendant's untimely disclosure was not substantially justified, it was harmless under the facts of this case. Plaintiff's counsel conducted an effective voir dire examination and cross-examination of the witness. Further, the record affords no basis for concluding that, had plaintiff known of the witness earlier, he would have been able to discredit the witness sufficiently to have prevailed on his outrageous conduct claim. Accordingly, even if the testimony should not have been admitted, the error did not affect plaintiff's substantial rights and therefore does not warrant reversal. See C.A.R. 35(e) (appellate court shall disregard error not affecting substantial rights).

E.

Plaintiff alleges numerous errors in the trial court's admission or exclusion of evidence. As to most of the instances in which evidence was allegedly improperly admitted, plaintiff raised no objection at trial and thus is precluded from seeking relief on this basis on appeal. See CRE 103(a)(1) (error may not be predicated upon ruling admitting or excluding evidence unless a substantial right of the party is affected and, in case of ruling admitting evidence, timely objection or motion to

strike appears of record); Best-Way Concrete Co. v. Baumgartner, 908 P.2d 1194 (Colo. App. 1995).

As to the remaining alleged errors, we have reviewed the record and conclude that none of them, individually or cumulatively, affected any substantial right of plaintiff. See C.A.R. 35(e); Cherry Creek School District No. 5 v. Voelker, supra.

III.

Plaintiff also contends that the verdict form used by the trial court was erroneous.

Plaintiff did not object to use of the form at trial. Except in rare circumstances when necessary to avoid manifest error, contentions of instructional error raised for the first time on appeal in a civil case will not be considered. See Itin v. Bertrand T. Ungar, P.C., 17 P.3d 129 (Colo. 2000); Robinson v. City & County of Denver, 30 P.3d 677 (Colo. App. 2000). This contention does not present a circumstance warranting a departure from the general rule.

IV.

Plaintiff finally contends that the trial court erred in failing to sustain his objections to defense counsel's closing argument. We do not agree.

A trial court has broad discretion in ruling on objections made during closing argument. Absent a gross abuse of that

discretion, we will not reverse the trial court's rulings.

People v. Mandez, supra.

Plaintiff argues that the court should have sustained his objection to defense counsel's reference to the O.J. Simpson criminal and civil cases. While such references are generally to be avoided, the reference here was for the purpose of explaining the differing burdens of proof in civil and criminal cases, which was relevant in light of plaintiff's acquittal on criminal assault charges. Further, the trial court did not abuse its discretion in overruling plaintiff's objection to defense counsel's references to recent publicized domestic violence cases. The references were for the permissible purpose of arguing the reasonableness of defendant's fear and her resulting efforts to obtain restraining orders. The other two comments to which plaintiff objected were not so improper that failure to sustain the objections can be deemed an abuse of discretion.

The judgment is affirmed.

JUDGE NEY and JUDGE ROTHENBERG concur.