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Verdict in securities fraud case vacated over evidentiary ruling

Defendant should have been able to cross-examine plaintiff about collateral matter

■ ERIC T. BERKMAN

The 1st U.S. Circuit Court of Appeals has ruled that the defendant in a securities fraud case should have been permitted to impeach the credibility of the plaintiff by cross-examining him about conduct that led a state medical board to determine that he misrepresented his credentials.

Plaintiff Boris Bergus sued defendant Agustin Florian, a fellow physician and onetime colleague, under the Massachusetts Uniform Securities Act, alleging that Florian made material omissions and misrepresentations in inducing him to invest $375,000 in a Peruvian business endeavor run by Florian's brother-in-law.

Competing testimony of Bergus, Florian and Florian's brother-in-law, Edgardo Baca, constituted nearly all the evidence at trial.

Florian sought to cross-examine Bergus about apparent misstatements of his medical credentials on his practice's website, in his CV, and in his communications to the Rhode Island Board of Medical Licensure and Discipline. The board had issued a consent order in 2013 under which Bergus agreed to a reprimand and two years' probation.

A U.S. District Court judge barred such cross-examination about a collateral matter as unfairly prejudicial, and Bergus obtained a jury verdict that totaled $750,000 including attorneys' fees.

But the 1st Circuit vacated in part, granting a new trial on the portion of the verdict that stemmed from Bergus' initial investment, but leaving in place the portion that arose from a second round.

"With regard to whether cross-examination about prior conduct should be permitted, the ultimate question under both rules is the same: Is the conduct probative enough, relative to 'the potential dangers and costs of the evidence,' that the conduct is worth delving into at trial?" Judge Julie Rikelman wrote for the panel. "Based on an independent analysis, we agree with Florian that it was an abuse of discretion to prohibit all cross-examination about the conduct underlying the 2013 Consent Order as unfairly prejudicial to Bergus."

The 30-page decision is *Bergus v. Florian*, Lawyers Weekly No. 01-230-24.

'BETWEEN SCYLLA AND CHARYBDIS'

Plaintiff's counsel Richard A. Goren of Newton declined to comment, and Boston attorney T. Christopher Donnelly, who represented the defendant, did not respond to an interview request.

But Thomas H. Curran, a civil litigator in Boston, said he agreed with the decision.

Thomas H. Curran

"Cases like this, when you have so little documentary proof, are so highly dependent on the believability of the witness. And that's when the witness's character for truthfulness or untruthfulness becomes much more acute," he said.

Richard W. Paterniti of Boston said a number of case-specific factors impacted the decision.

For example, he noted that the trial judge did not clearly explain his ruling precluding the evidence. Additionally, Paterniti said, it was a "he said/she said" dispute that boiled down to the parties' credibility. Plus, the evidence to be used on cross-examination was limited to admitted misrepresentations made by Bergus relating to prior conduct.

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Still, Paterniti said, the decision will be helpful in future cases when seeking to use prior conduct to attack credibility.

"This case will support allowing evidence of prior conduct that is likely to have occurred and that is similar to the conduct at issue," he said. "It also will support allowing evidence of prior, deceptive business practices to show untruthfulness."

Boston attorney John A. Mangones said the 1st Circuit's reversal under an abuse of discretion standard was surprising, since Rule 608(b) of the Federal Rules of Evidence generally prohibits extrinsic evidence to prove character for untruthfulness, and only as an exception states that a court may allow such evidence under cross-examination.

Here, Mangones said, the 1st Circuit treated the District Court's discretionary call to allow such evidence under Rule 608(b) for impeachment purposes the same as a Rule 403 analysis, which states that a court may exclude relevant evidence if its probative value outweighs its prejudice.

The 1st Circuit noted that that was how the parties treated the analysis but did not cite to any precedent for equating 608(b) with 403, Mangones said.

"Because the 1st Circuit started from a presumption that such extrinsic evidence should be allowed unless a good reason exists to exclude it, the reversal is more understandable," he said. "In a more document-heavy case, where credibility was less central to determining liability, such an error may be deemed harmless."

Eric Magnuson of Boston said the ruling underscores that there is nothing inherently off-limits about cross-examining a witness about extrinsic conduct that is probative of their character for untruthfulness.

Still, he said, invoking Homer's "The Odyssey," the examining lawyer "must avoid the Charybdis of inquiry that's too collateral under Rule 608(b) and the Scylla of inquiry that's unfairly prejudicial under Rule 608(b) or Rule 403."

Bergus v. Florian

THE ISSUE: Should the defendant in a securities fraud case have been permitted to impeach the credibility of the plaintiff by cross-examining him about prior conduct that led a state medical board to determine that he misrepresented his credentials?

DECISION: Yes (1st U.S. Circuit Court of Appeals)

LAWYERS: Richard A. Goren of Newton (plaintiff)
T. Christopher Donnelly of Donnelly, Conroy & Gelhaar, Boston (defense)

BAD INVESTMENT

In 2009, Baca, who operated a company in Peru, started a project to develop water and sewage treatment plants to serve the city of Juliaca.

His plan was to sell the plants at some point in the future and generate millions of dollars of profit.

The company soon secured the necessary contract with the city, but in 2011, a new Juliaca mayor demanded a $4 million bribe to ratify it. Baca refused to pay and the company was unable to move forward with the project.

That same year, Florian began working at Bergus' medical practice in Norwood and the two became friends.

In 2012, Bergus and Florian discussed the possibility of Bergus investing in the Peruvian

company, in which Florian held a 20-percent stake.

On Sept. 24, 2012, Bergus signed a contract via email with Baca to invest $125,000 for a 2.5-percent stake and wired the money the next day.

The three met in person in April 2014 to discuss Bergus' further investment. A month later, Bergus invested an additional $250,000, giving him 9 percent of the company's stock.

The parties offer competing narratives on the circumstances surrounding Bergus' investments.

Bergus claims Florian solicited his investment in 2012, promising a 10-percent return within 90 days, and claimed the project was near completion and only needed additional funding to get the paperwork in order. He also claims that, in 2014, Florian approached him for an additional investment, claiming it was necessary to sustain the project's growth.

Bergus further claims he was unaware of the mayor's bribe as late as April 2014.

Florian, however, claims he never solicited any investment from Bergus, never represented that the project was near completion or sale, and that he simply served as a translator between Bergus and Baca. He also claims he informed Bergus about the mayor's bribe in April 2012 and that Bergus wanted to invest anyway.

Florian resigned from Bergus' practice in October 2015.

Two years later, Bergus sued Florian in U.S. District Court, alleging he violated the Massachusetts Uniform Securities Act by making omissions and misrepresentations in connection with Bergus' two investments in Baca's company.

Before trial, Bergus moved to preclude Florian from impeaching him on collateral matters concerning his medical practice or offering extrinsic evidence to impeach his conduct.

Specifically, he was concerned Florian would provide the jury with the 2013 consent order, which he sought to have excluded as improper extrinsic evidence. He also asserted that Florian should not be able to cross-examine him about the facts underlying the order because it concerned collateral matters and would unfairly prejudice him.

U.S. District Court Judge Douglas P. Woodlock ultimately ruled in Bergus' favor, limiting the scope of Florian's proposed cross-examination to non-collateral matters.

After a January 2023 trial, the jury issued a verdict in Bergus' favor, and Florian was ordered to pay $202,500 in damages and $548,700 in attorneys' fees and costs.

Florian appealed.

ABUSE OF DISCRETION

In determining that Woodlock abused his discretion by precluding the proposed cross-examination, the 1st Circuit panel found that the potential of prejudice to Bergus did not clearly outweigh the probative value of such a cross-examination.

For one thing, Rikelman said, Bergus never showed that such a line of cross-examination would serve only to evoke an improper emotional response, nor did he explain how the danger of any prejudice substantially outweighed the evidence's probative value.

Additionally, the error in precluding such cross-examination was not harmless, Rikelman said.

Bergus had the burden of proof and his case rested on his own testimony that he did not know of the bribe before he invested, Rikelman said.

"This is not a document-heavy case, and there was no other witness who corroborated Bergus's side of the story," she wrote. "Bergus's success at trial was therefore dependent on the jury's finding that he was a more credible witness than Florian. ... [W]e cannot say that it was 'highly probable that' the court's limitation on Florian's ability to cross-examine Bergus 'did not affect the outcome of the case.'"