[Cite as *Howell v. Consol. Rail Corp.*, 2019-Ohio-2434.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

KEVIN E. HOWELL, :

Plaintiff-Appellee, :

No. 107245

v. :

CONSOLIDATED RAIL CORPORATION, ET AL., :

Defendants-Appellants. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 20, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-15-846529

Appearances:

Doran & Murphy, P.L.L.C., Michael L. Torcello, Christopher M. Murphy, and Colleen M. Blinkoff; McDermott & Hickey, L.L.C., and Kevin E. McDermott; and Gavin Law Firm, L.L.C., and William P. Gavin, *for appellee*.

Burns White, L.L.C., Kevin C. Alexandersen, and Holly Olarczuk-Smith; and Mayer Brown, L.L.P., and Dan Himmelfarb, *for appellants*.

RAYMOND C. HEADEN, J.:

{¶ 1} Defendant-appellant Consolidated Rail Corporation ("Conrail") appeals from a judgment on the jury verdict and the order granting plaintiff-appellee Kevin E. Howell's ("Howell") motion for a protective order and excluding trial testimony of a witness. For the reasons that follow, we affirm.

Procedural and Substantive History

{¶ 2} Howell worked for Conrail from 1975 until his retirement in 2013. Howell initially worked in track maintenance and later transferred to the signal department, where he worked as a signal maintainer. Howell's job involved repairing and maintaining railroad signals and signal boxes alongside railroad tracks throughout Northern and Central Ohio. Asbestos boards, also called transite boards, were used inside many of the signal boxes. Howell routinely worked with and around these boards, drilling holes in the boards and breathing in the dust that had been released into the air. Howell also worked alongside tracks where diesel equipment worked in a way that disturbed silica-containing rock, called ballast, along the road beds. As such, Howell was exposed to silica dust and diesel exhaust. Howell's work environment lacked proper respiratory protection, dust control measures, or warnings about these dangerous conditions.

{¶ 3} Howell began smoking when he was 17. For most of his adult life, he smoked at least one pack of cigarettes a day. Howell quit smoking in February 2018.

{¶ 4} In April 2015, Howell was diagnosed with lung cancer and lung disease. On June 3, 2015, Howell filed a complaint against Conrail,[1] alleging that his condition was the result of his exposure to asbestos, asbestos dust, and toxic silica and diesel fumes and dust over the course of his employment.

{¶ 5} Howell sued Conrail under the Federal Employers Liability Act ("FELA"), 45 U.S.C. 51-60, which imposes liability on a railroad for injuries to an employee resulting from the railroad's negligence. Conrail moved for an administrative dismissal, arguing that Howell had not complied with R.C. 2307.92(C), the Ohio asbestos statute. R.C. 2307.92(C) requires a plaintiff in an asbestos action based upon lung cancer who is a smoker to make a prima facie showing that his or her exposure to asbestos is a substantial contributing factor to the medical condition. The trial court denied Conrail's motion, and this court affirmed the denial of Conrail's motion to dismiss. *Howell v. Conrail*, 2017-Ohio-6881, 94 N.E.3d 1127 (8th Dist.).

{¶ 6} An eight-day jury trial was held. Howell called six witnesses: a former coworker, an industrial hygienist, an occupational medicine physician, Howell's treating physician, Howell's wife, and Howell himself. Conrail called no witnesses at trial. At the conclusion of the trial, Conrail moved for a mistrial. The trial court

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[1] The June 3, 2015 complaint was filed against Conrail and American Premier Underwriters, Inc. ("APU"). On October 27, 2015, Howell filed an amended complaint adding CSX Transportation, Inc. ("CSX") as a defendant. On April 11, 2018, pursuant to an agreement with Howell, CSX was dismissed from the case without prejudice. On July 26, 2018, the case against APU was settled and dismissed with prejudice.

denied this motion. The jury returned a verdict in favor of Howell, finding that Conrail was 60 percent responsible for Howell's cancer and Howell was 40 percent responsible. The jury awarded Howell damages in the amount of $4,508,488.40. The trial court reduced the award to $2,705,093.04 due to Howell's comparative fault. By stipulation and upon Conrail's motion for remittitur, the verdict was amended to $2,334,139.81.

{¶ 7} Conrail appeals, presenting the following assignments of error for our review:

> I. The trial court erred in denying the motion for a directed verdict made by Conrail, because the evidence that any accidental exposure to asbestos or other toxic substance was a factual cause of the lung cancer of plaintiff-appellee Howell, a lifelong smoker, was insufficient as a matter of law.
>
> II. The trial court erred in precluding Conrail from calling a former employee, Gary Blum, who would have testified that Howell spent little time working around asbestos.
>
> III. The trial court erred in permitting Howell to offer irrelevant and inflammatory evidence of asbestos-related violations of regulations issued by the Occupational Safety and Health Administration ("OSHA") at a Conrail facility in Delaware, where Howell never worked.
>
> IV. The trial court erred in permitted Robert Exten, Howell's treating physician and a witness who had no training or experience in the subject, to offer an expert opinion that Howell's lung cancer was caused by exposure to asbestos, silica, and diesel exhaust.
>
> V. The trial court erred in failing to prevent or remedy Howell's counsel's arguments during rebuttal summation that Conrail had not called any witnesses and that its lawyers were not telling the truth and should not be believed.

VI. Conrail is entitled to a new trial because of the cumulative effect of the foregoing trial errors.

Law and Analysis

{¶ 8} In its first assignment of error, Conrail asserts that the trial court erred in denying its motion for a directed verdict because there was insufficient evidence that Howell's exposure to asbestos was a factual cause of his lung cancer. Specifically, Conrail argues that Howell offered no evidence that any employment-related exposure to asbestos, silica, or diesel exhaust was a necessary or sufficient cause of his lung cancer. Instead, Howell presented evidence that this exposure contributed to his lung cancer and interacted synergistically with his smoking to cause his lung cancer.

{¶ 9} In the alternative to the argument in its first assignment of error, Conrail argues that the trial court made four critical errors — presented as his second, third, fourth, and fifth assignments of error — that, alone and in combination, deprived it of a fair trial.

I. Motion for a Directed Verdict

{¶ 10} Because a trial court's decision to grant or deny a motion for a directed verdict involves a question of law, appellate courts conduct a de novo review. *White v. Leimbach*, 131 Ohio St.3d 21, 2011-Ohio-6238, 959 N.E.2d 1033, ¶ 22, citing *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, ¶ 4. Pursuant to Civ.R. 50(A)(4), a trial court will grant a motion for a directed verdict if it, "after construing the evidence most

strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party." A motion for a directed verdict involves a determination of the legal sufficiency of the evidence, and therefore, "[t]he court does not weigh the evidence or evaluate the credibility of the witnesses," but instead solely considers whether the plaintiff presented sufficient material evidence at trial to create a factual question for the jury. *Lang v. Beachwood Pointe Care Ctr.*, 2017-Ohio-1550, 90 N.E.3d 102, ¶ 14 (8th Dist.), citing *Ridley v. Fed. Express*, 8th Dist. Cuyahoga No. 82904, 2004-Ohio-2543, ¶ 82.

{¶ 11} Conrail argues that it was entitled to a directed verdict because Howell failed to establish but for causation. Specifically, Conrail asserts that Howell failed to present evidence that his cancer would not have occurred but for the railroad's negligent conduct.

{¶ 12} Howell sued Conrail under FELA, which provides that "[e]very common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * * or such injury or death resulting in whole or in part from the negligence of" the carrier. 45 U.S.C. 51. In light of the humanitarian and remedial goals of FELA, the causation language in the statute "is as broad as could be framed." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 691, 131 S.Ct. 2630, 180 L.Ed.2d 637 (2011), quoting *Urie v. Thompson*, 337 U.S. 163, 181, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949). The United States Supreme Court has consistently held that the relaxed causation standard of FELA is as follows: "'Under

[FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" *CSX, Inc.* at 691, quoting *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 506, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957). In affirming the relaxed standard laid out above, the Supreme Court also explicitly rejected the standard advocated by Conrail in this case, declining to adopt a standard wherein a plaintiff "must show that 'the injury would not have occurred but for the negligence' of his employer, and that 'the test of whether there is a causal connection is that, absent the negligent act the injury would not have occurred.'" *Rogers*, quoting *Rogers v. Thompson*, 284 S.W.2d 467, 471 (Mo.1955).

{¶ 13} At trial, Howell presented evidence of causation from two different witnesses. First, Dr. Christine Oliver ("Dr. Oliver") testified in her capacity as an expert in internal occupational medicine. Dr. Oliver testified that both Howell's history of smoking and the frequency, intensity, and duration of Howell's exposure to silica, asbestos, and diesel exhaust were significant contributing factors in his development of lung cancer. Dr. Oliver also testified as to the synergism between cigarette smoke and both asbestos and silica. Howell's oncologist, Dr. Robert Exten ("Dr. Exten"), also testified that Howell's exposure to asbestos, silica, and diesel exhaust in the course of his employment were significant contributing factors to his development of lung cancer. Dr. Exten also testified that cancer is a multifactorial disease, meaning there is not one single cause for any cancer. Like Dr. Oliver, Dr.

Exten also testified regarding synergism, explaining that asbestos and smoking together multiply each other's ability to cause cancer. Further, Dr. Exten's expert report stated that "because of the synergistic effect of asbestos and cigarette smoke, but for these exposures his cancer would probably not have occurred." This evidence was not contradicted by Conrail at trial. Viewing this evidence in the light most favorable to Howell, we conclude the evidence was sufficient to create a jury question as to whether Conrail's negligence played "any part, even the slightest" in Howell's development of lung cancer. Therefore, we overrule Conrail's first assignment of error.

{¶ 14} Conrail argues that, even if it was not error for the trial court to deny its motion for a directed verdict, it is entitled to a new trial on the basis of multiple evidentiary rulings, alone or in light of their cumulative effect.

II. Blum's Testimony

{¶ 15} In Conrail's second assignment of error, it asserts that the trial court erred in precluding its witness from testifying. Gary Blum ("Blum") is a retired railroad employee who worked with Howell at various points throughout his 34-year career. Blum has been involved in two separate asbestos lawsuits independent from the instant case, and one of the firms representing Howell in the instant case represented Blum in both of these suits. In Blum's first action, he sued Conrail under FELA and alleged injuries from asbestos exposure during his employment in Conrail's signal department. This action was stayed by Ohio's asbestos reform statute. Pursuant to R.C. 2307.93(C), the action was resolved with an agreement

that Blum could pursue a claim against Conrail in the future if he developed cancer, along with a claim against asbestos manufacturers and distributors. Blum subsequently filed a second lawsuit against asbestos manufacturers. In the second lawsuit, Blum is represented by Howell's counsel in the instant case, and various defendants in that lawsuit are represented by Conrail's counsel in the instant case.

{¶ 16} On April 18, 2016, Conrail filed its witness list, and Blum was included on this list. On March 26, 2018, Conrail subpoenaed Blum for a deposition. On March 27, 2018, Howell filed a motion asserting that contacting and interviewing Blum violated Prof.Cond.R. 4.2, which provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer *knows* to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

The trial court did not find that Conrail's counsel intentionally violated Prof.Cond.R. 4.2, but in ruling on Howell's motion, it concluded that allowing Blum to testify at trial would have resulted in Blum's lawyers in another case cross-examining him in the instant case. The trial court therefore ordered that Blum's testimony be precluded in part to avoid damaging the attorney-client relationship between Blum and his counsel in a separate lawsuit.

{¶ 17} A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *Ramadan v. MetroHealth Med. Ctr.*, 8th Dist. Cuyahoga No. 93981, 2011-Ohio-67, ¶ 12, citing *State v. Lyles*, 42 Ohio St.3d 98, 99, 537 N.E.2d 221 (1989). The term "abuse of discretion" connotes more than an error of law or

judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 18} The trial court here found that the contact with Blum was improper but not a willful violation of Ohio's rules of professional conduct. Because it determined that the violation was not willful, it exercised its discretion and ordered that Blum be precluded from testifying. The trial court declined to disqualify Conrail's counsel, which would have been a severe sanction. Instead, it exercised its authority to regulate the proceedings by excluding Blum as a trial witness.

{¶ 19} Conrail argues that the exclusion of Blum was a drastic remedy that was not warranted in the absence of a willful violation of Prof.Cond.R. 4.2. Further, Conrail asserts that an appropriate solution to the issue would have been to require one of Howell's attorneys, who had no attorney-client relationship with Blum, to cross-examine Blum. Although such a solution may have been feasible in this case, it ignores the other part of the "dual conflict" identified by the trial court; namely, that various defendants in Blum's case are represented by Conrail's counsel in the instant case. The trial court avoided the most severe remedy to the dual conflict presented by the unique conflict presented by Blum. We are mindful that Conrail was not obligated to demonstrate that Blum was in any way a critical witness or that he would have provided unique testimony. The absence of any such argument by Conrail before the trial court, however, makes it difficult for us to conclude that anything about the trial court's decision to exclude Blum, in light of the obvious

predicament he created, was unreasonable, arbitrary, or unconscionable. In light of this, the trial court was within its discretion to preclude Blum from testifying.

III. OSHA Violations

{¶ 20} In Conrail's third assignment of error, it argues that the trial court erred in allowing Howell to present evidence of multiple asbestos-related Occupational Safety and Health Administration ("OSHA") violations in violation of Evid.R. 404(B). This evidence was presented in two separate forms at trial. First, Howell called Leonard Vance ("Vance"), an industrial hygienist, to testify as an expert witness and explain OSHA violations generally and the circumstances of Conrail's OSHA violations specifically. In addition to Vance's testimony, the trial court also admitted into evidence various OSHA and Conrail documents relating to the violations.

{¶ 21} Vance testified that Conrail was cited by OSHA for five willful violations in the state of Delaware, and he went on to explain that a willful violation means that Conrail either knowingly failed to comply with a legal requirement from OSHA or acted with plain indifference to employee safety. Immediately prior to this testimony, the trial court issued the following limiting instruction to the jury:

> First of all, this is in the State of Delaware, not the State of Ohio, so what may have gone on in Delaware doesn't necessarily equate with what was going on in Ohio. You'll have the evidence before you of what the [witness] has testified to as to the conditions in Ohio, and that will be the basis of your verdict. And, secondly, the fact that there may have been a violation is not to be taken by you as any indication that they are wrong here in this lawsuit.

In addition to this limiting instruction, the court instructed the jury after closing arguments as follows:

> You also heard some evidence about an OSHA violation discovered in the Delaware railroad yards. That is not evidence of any negligence on the part of the railroad in the Ohio yards that Mr. Howell was working. It was allowed into evidence for other reasons that have been commented on. But the fact that there was a violation in Delaware is not evidence of any impropriety in the workplace of Mr. Howell.

Conrail argues that the trial court erred because Howell could have proven the same facts he claimed to have been seeking to prove without this evidence, the evidence was inflammatory, and the court never told the jury what permissible use could be made of the evidence. In response, Howell argues that Conrail waived its Evid.R. 404(B) argument, but even if it had not, the evidence was admissible. Howell argues that the evidence was permissible to show that Conrail had both knowledge in 1989 of the risks of asbestos and an awareness of what it should have been doing to protect workers in Ohio.

{¶ 22} As an initial matter, we disagree with Howell that Conrail waived this argument on appeal. The record shows that Conrail repeatedly objected to the OSHA evidence on the grounds that it was irrelevant and prejudicial. Although Conrail may not have cited specifically to Evid.R. 404(B), it was nevertheless clear from the context of its objections the specific ground on which it based the objections, in accordance with Evid.R. 103.

{¶ 23} "Whether specific evidence will be admitted is a matter left to the considerable, if not unlimited, discretion of the trial court." *State v. Morris*, 132

Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 19. As such, we will review this assignment of error for abuse of discretion.

{¶ 24} In analyzing the admissibility of other-acts evidence, courts must consider (1) whether the evidence is relevant under Evid.R. 401, i.e., whether it tends to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence; (2) whether the evidence is presented to prove the defendant's character to show conduct in conformity therewith, or whether it is presented for a legitimate other purpose; and (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice under Evid.R. 403. *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 20.

{¶ 25} The OSHA evidence at issue is clearly relevant. Foreseeability is one of the common law elements of negligence a plaintiff must prove to prevail on a FELA claim. *Vance v. Consol. Rail Corp.*, 73 Ohio St.3d 222, 230, 1995-Ohio-134, 652 N.E.2d 776. Specifically, a railroad will not be found liable for an employee's injury if it had no reasonable way of knowing about the hazard that caused the injury. *Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108, 117, 83 S.Ct. 659, 9 L.Ed.2d 618 (1963). Evidence of OSHA violations helped to establish that Conrail had knowledge that its signal boxes contained asbestos and that the boards were therefore hazardous. Similarly, the evidence was introduced in service of this other legitimate purpose — establishing foreseeability, a necessary element of Howell's FELA claim, and relatedly, establishing Conrail's knowledge. This is supported by

the two limiting instructions issued by the trial court. Finally, the probative value of the OSHA evidence was not substantially outweighed by the danger of unfair prejudice. The trial explicitly instructed the jury before and after the evidence was introduced that the evidence was not to be considered as evidence of any wrongdoing by Conrail in this case. A jury is presumed to follow the trial court's instructions. *State v. Sheline*, 8th Dist. Cuyahoga No. 106649, 2019-Ohio-528, ¶ 55, citing *State v. Garner*, 74 Ohio St.3d 49, 656 N.E.2d 623 (1995).

{¶ 26} Conrail argues that the OSHA evidence was presented in such an inflammatory way that it undoubtedly created a danger of unfair prejudice and confusing the issues. After a thorough review of the record, we disagree that the manner in which the evidence was introduced was particularly inflammatory, let alone so inflammatory as to unfairly prejudice Conrail. Further, the way in which the jury was instructed as to the purpose of the evidence sufficiently mitigates any risk that the jury would have confused the issues. In light of the foregoing, we decline to hold that the trial court abused its discretion in admitting the OSHA evidence. Therefore, Conrail's third assignment of error is overruled.

IV. Expert Testimony

{¶ 27} In its fourth assignment of error, Conrail argues that the trial court erred in allowing Howell's treating physician to testify as an expert and offer an opinion on whether Howell's lung cancer had been caused by his occupational exposure to asbestos, silica, and diesel exhaust. Howell argues that Conrail waived this argument because it neither filed a motion to exclude Exten's testimony nor

requested a *Daubert* hearing. While this is correct, we do not agree that Conrail waived this argument. Prior to Exten's testimony, Conrail objected to Exten testifying as an expert in anything other than the subject of Howell's treatment. The trial court overruled this objection.

{¶ 28} Evid.R. 702 governs expert testimony and provides:

> A witness may testify as an expert if all of the following apply:
>
> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a common misconception among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
>
> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:
>
> (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
>
> (2) The design of the procedure, test, or experiment reliably implements the theory;
>
> (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

{¶ 29} At trial, Exten was qualified as an expert in hematology and oncology and as a treating oncologist of Howell. Exten testified that about 90% of his practice is related to treating cancer, that lung cancer is probably the most common diagnosis in his practice, and that he has extensive experience in working with his patients to identify the causes of their conditions. He described that part of his

internal medicine training involved evaluating a patient's risk factors for disease, including occupational factors such as asbestos exposure. He also testified without objection that asbestos causes cancer, and that the combination of asbestos exposure and smoking creates a synergistic effect wherein the impact of those two factors together is "greater than the sum of those two parts." Finally, Exten testified over Conrail's objection that in his medical opinion, "there is a reasonable degree of medical certainty that Kevin Howell's exposure to asbestos, silica dust, and diesel exhaust fumes in the course of his employment on the railroad were substantial contributing factors to the initiation and development of his lung cancer."

{¶ 30} There is no dispute that Exten's testimony relates to matters beyond the knowledge or experience possessed by lay persons, pursuant to Evid.R. 702(A). Conrail also does not dispute that Exten is sufficiently qualified to testify generally as an expert on Howell's treatment for lung cancer, pursuant to Evid.R. 702(B). Conrail maintains that, notwithstanding Exten's qualifications, his specific opinions in this case exceeded the scope of his expertise. Conrail argues that his causation opinion was improper because he has no training or experience in the subject, what he knows about the subject he learned in medical school or encountered for the first time while preparing to testify, and the only literature on the subject he is familiar with consists of synopses of studies and articles. We disagree. Although Conrail is correct that Exten has no specialized training in occupational medicine, as outlined above, he has significant experience in diagnosing and treating lung cancer, and such experience necessarily involves identifying the causes of the cancer. Further,

this court has previously held that Evid.R. 702 imposes no requirement that a causation opinion be backed by a specific epidemiological study. *Walker v. Ford Motor Co.*, 8th Dist. Cuyahoga No. 100759, 2014-Ohio-4208. Likewise, "it is well established that experts 'may draw inferences from a body of work,' provided that 'any such extrapolation accords with scientific principles and methods.'" *Id.*, quoting *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, 850 N.E.2d 683, ¶ 18. The combination of Exten's medical training and professional experience in the diagnosis and treatment of cancer are sufficient to support his testimony. The trial court did not abuse its discretion in allowing Howell's treating physician to testify as to causation. Therefore, we overrule Conrail's fourth assignment of error.

V. Rebuttal Summation

{¶ 31} In Conrail's fifth assignment of error, it argues that the trial court's failure to prevent or remedy Howell's counsel's improper arguments during rebuttal summation undermined its right to a fair trial and therefore Conrail is entitled to a new trial. Specifically, Conrail argues that Howell's counsel improperly emphasized Conrail's failure to call any witnesses at trial and implied that Conrail's lawyers were being untruthful. We disagree.

{¶ 32} Counsel is afforded great latitude in presentation of closing argument to the jury, and control over the latitude allowed rests within the trial court's discretion. *AAA All City Heating, Air Conditioning & Home Improvement v. New World Communications of Ohio, Inc.*, 8th Dist. Cuyahoga No. 83334, 2004-Ohio-5591, ¶ 30, citing *Pang v. Mich*, 53 Ohio St.3d 186, 186, 559 N.E.2d 1313 (1990), and

Hitson v. Cleveland 8th Dist. Cuyahoga No. 57741, 1990 Ohio App. LEXIS 5466, 13 (Dec. 13, 1990). Therefore, the court's determination of "'whether the bounds of permissible argument have been exceeded * * * will not be reversed absent an abuse of discretion.'" *Torres v. Concrete Designs, Inc.*, 8th Dist. Cuyahoga Nos. 105833 and 106493, 2019-Ohio-1342, ¶ 15, quoting *Caruso v. Leneghan*, 8th Dist. Cuyahoga No. 995823, 2014-Ohio-1824, ¶ 57.

{¶ 33} "Closing argument allows counsel to summarize the evidence presented and assist the jury in analyzing, evaluating, and applying the evidence." *Torres* at ¶ 19, quoting *Kassay v. Niederst Mgt.*, 2018-Ohio-2057, 113 N.E.3d 1038, ¶ 43 (8th Dist.). Conrail argues that Howell improperly commented on its failure to call any witnesses. According to Conrail, this is particularly egregious in light of the circumstances predicating the exclusion of their sole proposed witness, Gary Blum. In support of its argument, Conrail cites several cases for the proposition that where a particular witness is prevented from testifying based on a party's motion, that party is not permitted to comment on that witness's absence at trial. This proposition is inapplicable to circumstances of the instance case. Howell's counsel did not comment on the absence of Blum in particular; he stated — accurately — that Conrail failed to call any witnesses. These comments may have been more analogous to the cases cited by Conrail if Blum had been the only witness that Conrail could have called, but that is not the case here. Conrail argues that it "would have" called another former employee if it had been permitted to, but it offers no explanation for its apparent inability to identify and call another such witness, and

the record shows that it was not precluded from calling any witness other than Blum. Therefore, Howell's counsel's commentary on the failure of Conrail to call any witnesses was an accurate summary of the evidence presented at trial. This commentary was not improper, and therefore does not warrant a new trial.

{¶ 34} Similarly, the references to Conrail's counsel made during Howell's closing argument were not improper. Conrail argues that Howell's counsel disparaged its counsel and called its counsel's truthfulness into question, and this was improper. During their final remarks, Howell's counsel summarized the evidence it presented during trial, including testimony from lay and expert witnesses and documentary evidence. Counsel contrasted this evidence with the lack of evidence presented by Conrail, and specifically argued that one of Conrail's responses to an interrogatory was contradicted by the evidence Howell presented at trial, stating:

> The testimony from that witness stand has been unrefuted. The only voice you've heard in the courtroom for the defendant is Mr. Alexandersen [Conrail's counsel.]
>
> So, it comes down to who do you believe? Do you believe the witnesses that sat up there, swore to tell the truth and testified before you, or do you believe the railroad's lawyers?
>
> I'm going to submit that you can't believe the railroad's lawyers because we know for sure as soon as a lawsuit came along they said, "Defendant states that it has no information that would substantiate the use of asbestos in the operations performed by the Plaintiff."

The Ohio Supreme Court has held that "abusive comments directed at opposing counsel * * * during closing argument should not be permitted by any court." *Pesek v. Univ. Neurologists Assn.*, 87 Ohio St.3d 495, 500, 2000-Ohio-483, 721 N.E.2d

1011. In *Pesek*, the conduct was drastically different than the comments complained of by Conrail here. Appellee's trial counsel in *Pesek* personally attacked appellant's counsel, telling the jury that his many "deliberate misrepresentations" should inspire in them "disgust" in both the legal system and appellant's counsel. *Id*. at 500. Counsel also stated that appellant's counsel had told half-truths and untruths, threatened witnesses, and suppressed evidence. *Id*. The Supreme Court in *Pesek* noted that these remarks were "simply not warranted by the evidence" and were therefore "inexcusable, unprincipled, and clearly outside the scope of final argument." *Id*. at 501. Unlike in *Pesek*, all of the comments complained of here by Conrail were directly related to the evidence presented at trial. Further, while Howell's closing argument emphasized the dearth of evidence presented by Conrail, it did so within the bounds of a final argument and without inexcusable or unprincipled attacks on Conrail's counsel. Therefore, we disagree with Conrail's assertion that these remarks were inappropriately disparaging, particularly in light of the context of Howell's closing argument, and the totality of circumstances of the evidence presented at trial. Conrail's fifth assignment of error is overruled.

VI. Cumulative Error

{¶ 35} Finally, Conrail argues in its sixth assignment of error that the cumulative effect of the foregoing assigned errors deprived it of a fair trial. Because we do not find that any of Conrail's alleged errors at trial deprived it of a fair trial, we cannot hold that their cumulative effect warrants a new trial. This assignment of error is overruled.

{¶ 36} Judgment affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

RAYMOND C. HEADEN, JUDGE

PATRICIA ANN BLACKMON, P.J., and
ANITA LASTER MAYS, J., CONCUR