

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

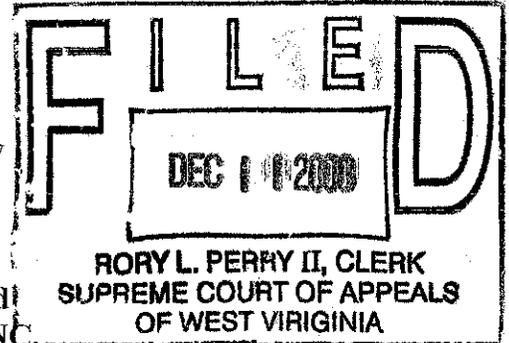
No. 34271

CATHERINE I. SMITH and
JOHN SMITH,

Appellees and Plaintiffs Below

v.

DEREK ANDREINI, M.D. and
ORTHOPAEDIC SURGERY, INC.



Appellants and Defendants Below

APPELLANTS' INITIAL BRIEF

FROM THE CIRCUIT COURT OF OHIO COUNTY
CIVIL ACTION NO. 01-C-451

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I. KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER COURT

The issue on Appeal is whether it was proper for Judge Martin Gaughan of the Circuit Court of Ohio County to grant Appellees' motion for mistrial 20 months *after* a jury in Ohio County had rendered a verdict in favor of the Appellants Derek Andreini, M.D. and Orthopaedic Surgery, Inc. According to the Order of July 25, 2005 granting the Appellees' motion for mistrial, the trial court based its ruling on comments made by defense counsel in closing argument that were perceived as unfairly prejudicial to the Appellees. The comments at issue by defense counsel in closing argument were triggered by allegations at trial from Appellee Catherine Smith and her counsel that Dr. Andreini had testified falsely and fabricated a medical record of an emergency department examination of Appellee Catherine Smith by Dr. Andreini on the afternoon March 30, 2000.

II. STATEMENT OF FACTS

The Appellees filed this medical malpractice action in the Circuit Court of Ohio County on October 24, 2001, alleging that orthopedic surgeon Derek Andreini, M.D. of Wheeling was negligent with regard to the treatment of Appellee Catherine Smith, by failing to promptly diagnose and treat a dislocated right shoulder in the hours that followed a procedure performed by Dr. Andreini known as a "manipulation under anesthesia" involving the right shoulder. Appellees alleged that during the manipulation, Dr. Andreini caused an immediate and unrecognized dislocation of the right shoulder that in turn caused traction (stretching) on the brachial plexus nerve for a period of four days until it was diagnosed by Dr. Andreini during an office visit on April 3, 2000. This brief outpatient procedure, performed at Wheeling Hospital on March 30, 2000, was intended to reverse the development of adhesive capsulitis following right shoulder arthroscopy to repair a torn rotator cuff. The rotator cuff repair had previously been performed by Dr. Andreini on February 25, 2000 for injuries sustained by Mrs. Smith due to fall at work in 1999.

The following facts are relevant to the remarks at issue that were made by counsel for Dr. Andreini in closing argument. The manipulation under anesthesia was an outpatient procedure performed by Dr. Andreini at approximately 9:30 a.m. on the morning of March 30, 2000. At approximately 11:55 a.m., Mrs. Smith was discharged from Wheeling Hospital with instructions to be seen by Dr. Andreini the following day for post-operative follow-up. After Mrs. Smith had returned to her home in Cameron, West Virginia, a phone call was placed to the office of Dr. Andreini to notify him that she was experiencing numbness and an inability to move her right upper extremity. Catherine Smith was instructed to immediately proceed to the emergency department at Wheeling Hospital where she would be met by Dr. Andreini after notification of her arrival.

Mrs. Smith arrived at the Wheeling Hospital emergency department at approximately 2:30 p.m. on March 30, 2000. The Wheeling Hospital record documents that during this Emergency Department admission, Mrs. Smith was seen and examined by (1) emergency medicine specialist Jeffrey Rubin, M.D., (2) by treating neurologist Srini Govindan, M.D. and (3) by Dr. Andreini. (Neither Dr. Rubin nor Dr. Govindan were the subject of any criticism in this case). Dr. Andreini prepared a dictated and typed note of his thorough examination of Mrs. Smith's right shoulder in the Wheeling Hospital Emergency Department on March 30, 2000, which is significant for the absence of any sign, symptom or physical appearance indicative of dislocation of the right shoulder (Tr. 44A, Dr. Andreini's "History and Physical Examination" record of Emergency Room Consult on March 30, 2000). Dr. Andreini next saw Mrs. Smith in his office for a post-op visit on March 31, 2000, and again found no sign, symptom or indication of dislocation of the right shoulder. Mrs. Smith was next seen by Dr. Andreini in his office on April 3, 2000, at which time a dislocation of the right shoulder was apparent and was diagnosed.

The Appellees have alleged that Dr. Andreini failed to diagnose the right shoulder dislocation for four days, resulting in four days of traction on the brachial plexus nerve that caused permanent and irreversible loss of right upper extremity function. In this case, there has been no dispute by Dr. Andreini that Mrs. Smith suffered a severe loss of shoulder function following the manipulation due to a brachial plexus neuropathy, a rare and unfortunate but known and recognized complication that can occur during manipulation even with proper technique by the orthopedic surgeon. However, the timing and mechanism of the brachial plexus neuropathy was one of the major issues in dispute at trial. It was the opinion of Dr. Andreini that the dislocation had not occurred until a point in time after a post-operative office visit on March 31, 2000, but prior to the second post-op office visit on April 3, 2000 when the right shoulder dislocation was diagnosed by Dr. Andreini. In contrast, Appellees' theory at trial was that the shoulder was dislocated during the manipulation on the morning of March 30, 2000 and the four day delay in diagnosis of the dislocation was the cause of the brachial plexus neuropathy. At trial, the Appellee's theory was directly contradicted by the fact that no dislocation was seen or detected by Dr. Andreini, Dr. Rubin or Dr. Govindan in the emergency department on March 30, 2000. The Appellee's theory was also directly contradicted by the fact that no dislocation was seen or detected by Dr. Govindan in an office visit on March 31, 2000. The Appellees' theory was also directly contradicted by the fact that no dislocation was seen or detected by or by Dr. Andreini in his office on March 31, 2000. Because of this contentious issue of causation, a critical factual dispute arose at trial over whether Dr. Andreini had actually seen and examined Mrs. Smith in the ED on March 30, 2000. At trial, Appellee Catherine Smith told the jury that she was "absolutely positive" that Dr. Andreini had *not* come to the ED to examine her on March 30, 2000, and that Dr. Andreini had prepared a false record in the chart concerning this encounter on March 30, 2000. Appellees' assertion at trial that Dr. Andreini manufactured a false

record about examining her in the emergency department on March 30, 2000 is crucial to understanding why Judge Gaughan's order for a mistrial concerning comments by defense counsel in closing argument constituted clear reversible error.

The trial of this matter began on Monday November 10, 2003. In opening statement, Appellees' counsel Geoff Brown unequivocally told the jury that Dr. Andreini failed to see Catherine Smith in the emergency department on March 30, 2000 (contrary to Dr. Andreini's dictated and typed note). Mrs. Smith testified on Wednesday November 12, 2003, and stated in no uncertain terms during direct examination and on cross-examination that Dr. Andreini never saw her in the emergency department on March 30, 2000. More importantly, Mrs. Smith testified that Dr. Andreini had falsified the medical record with his note for that encounter, given the fact that he had not actually examined her in the emergency department on that date. The presentation of evidence was completed on Monday November 17, 2003, and closing arguments were given by Scott Blass for the Appellees and Richard W. Stuhr for the Appellants. In the course of the opening portion of the closing argument, Mr. Blass implied that defense expert and orthopedic surgeon Mark Rodosky, M.D. had not been truthful at trial because he had been impeached with the transcript of his pretrial deposition. During Appellants' portion of closing argument, the following statement was made Mr. Stuhr with reference to the comments by Mr. Blass regarding defense expert Mark Rodosky, M.D., which drew an objection from Mr. Blass:

[By Mr. Stuhr] So I think, Ladies and Gentlemen, all of these things speak to the qualifications of the experts that the parties on both sides brought before you, to tell you about shoulder surgery and shoulder manipulations and how you do them.

On the other hand, if you had a shoulder injury, couldn't work, couldn't sleep at night, and it goes on and on and on for several months, would you be pleased to have the benefit of Dr. Rodosky's training and expertise, or is he the big fat liar that Mr. Blass says he is?

Mr. Blass: Your Honor, I object to that statement, I don't believe I used the words "Big, fat liar."

Mr. Stuhr: Folks, I'm from Lake Charles Louisiana –

Mr. Blass: I don't care where he's from, I don't think that is appropriate, and I object.

(Tr. 62, at pp. 16-17). Judge Gaughan did not rule or comment on the objection. This was the *only* objection by Mr. Blass during or immediately following the closing argument by Mr. Stuhr.

After the completion of closing arguments, the jury was sent to the jury room for deliberations and the attorneys retired to chambers with Judge Gaughan and his court reporter, at which time Appellees' counsel made a motion for mistrial based only on the comment by Mr. Stuhr that was the subject of the objection noted above. However, Appellees' counsel asked the trial court to defer ruling on the motion until *after* the jury rendered a verdict. The jury returned a verdict in favor of the Appellants on the evening of November 17, 2003. After the jury was dismissed, Judge Gaughan advised the parties that the entry of judgment would be delayed until the trial court ruled on the motion for mistrial. To this day, no judgment order has ever been entered by the Court in this matter.

A hearing was held on the motion for mistrial on February 6, 2004. Prior to the hearing, Judge Gaughan's court reporter Mary Brdar-Bahney prepared the portion of the transcript of the closing argument of Mr. Stuhr (without the opening or rebuttal portions of closing argument by Mr. Blass), as she had been requested to do by Appellees' counsel. At the conclusion of the hearing, Judge Gaughan indicated that a ruling on the motion would be forthcoming, and nothing further was requested from the Appellees or the Appellants.

For reasons that cannot be explained by the Appellants, the trial court did not issue its ruling until July 25, 2005, over 20 months after the verdict for the Appellants and following prodding by counsel for the Appellants (Tr. 63-69). In his Order of July 25, 2005, Judge Gaughan granted the

Appellees' motion for mistrial based on (1) comments in closing argument by Mr. Stuhr that the trial court found to be in violation of a pretrial order as to a motion in limine by Appellants, and (2) multiple prejudicial statements by Mr. Stuhr during closing, including and in addition to the sole comment that drew objection by Appellees' counsel. Judge Gaughan's Order lacks an explanation of how the allegedly objectionable comments by Mr. Stuhr brought about a defense verdict that would have been a verdict for the Appellees if those comments had not been made. The trial court's Order set forth that it was a "Final Order" which could be appealed to the West Virginia Supreme Court of Appeals prior to the retrial of the case.

On August 23, 2005, defense counsel attempted to contact Mary Brdar-Bahney, the court reporter for the trial in November 2003, for the purpose of requesting transcription of portions of the trial. At that time, defense counsel learned from Judge Gaughan's secretary that Mary Brdar-Bahney had passed away in early 2005. This prompted a letter to Judge Gaughan to convey the request for the following portions of trial transcript for preparation of this Petition for Appeal, pursuant to Rule 3(a) of the West Virginia Rules of Appellate Procedure (Tr. 69-70, letter of defense counsel to Judge Gaughan dated 8/23/05):

1. All of the trial testimony of plaintiff Catherine Smith, including all direct and cross-examination, that took place on Wednesday, November 12, 2003; and
2. The entire closing argument of both counsel for the plaintiffs and counsel for the defendants, including any discussion out of the presence of the jury during or after the closing argument that in any way related to the plaintiffs' objection to the defendants' closing argument or the plaintiff's motion for mistrial.

By November 2005, it became apparent that Judge Gaughan's new court reporter would not be able to produce the requested segments of transcript in advance of the deadline for filing the Petition for Appeal. On November 11, 2005, counsel for the Appellants filed "Appellants' Motion For Extension of Deadline To File Petition For Appeal" as evidence by letter dated November 11, 2005.

Judge Gaughan granted the motion, without objection, by Order entered November 15, 2005, which extended the deadline for filing the Petition for Appeal to January 25, 2006. A telephonic hearing was convened on January 9, 2006 by Judge Gaughan, with counsel for the Appellees and counsel for the Appellants, at which time the court advised the parties that the requested portions of transcript could not be prepared in advance of the upcoming deadline. Judge Gaughan also advised the parties that he had contacted the Clerk of the West Virginia Supreme Court of Appeals, and learned the trial court could grant another 60 day extension or the Appellants could file a motion directly with the West Virginia Supreme Court of Appeals to obtain the extension. It was determined that Judge Gaughan would grant another 60 day extension, without objection by the Appellees. Judge Gaughan entered a second order of extension on January 24, 2006, which granted yet another extension for the filing of the Petition for Appeal to March 24, 2006. When defense counsel was advised that the requested portions of transcript could not be produced before March 24, 2006, a motion for a third extension of the deadline for filing the Petition for Appeal was filed directly with the West Virginia Supreme Court of Appeals. By Order No. 06-029 dated March 20, 2006, the West Virginia Supreme Court of Appeals granted the third extension for filing the Petition for Appeal, to May 24, 2006.

In May 2006, Judge Gaughan's court reporter Jennifer Karaffa produced the trial testimony of Appellee Catherine Smith, one of two segments of trial transcript that had originally been requested on August 23, 2005. However, the more important segment of trial transcript containing the closing argument of Mr. Blass was not produced. Defense counsel was advised by Judge Gaughan's secretary that the format of the former court reporter's electronic "notes" from the closing argument by Mr. Blass was not in the same format as that of the trial testimony of Appellee Catherine Smith, and technical difficulties were preventing the current court reporter from interpreting those electronic notes. When it was clear that the transcript of the full closing argument

could not be produced by the May 24, 2006, defense counsel contacted Rory Perry, the Clerk of the West Virginia Supreme Court of Appeals, concerning the technical problem with the format of the closing argument and the obvious need for yet another extension. At the suggestion of Mr. Perry, a motion for a fourth extension was filed, and an indefinite extension was granted by the Supreme Court of Appeals (Order 06-065), allowing an extension to file this petition for appeal to a point 30 days after receipt of the final transcript.

After several periodic inquiries by defense counsel, Judge Gaughan and his secretary finally issued a letter concerning the missing trial transcript, dated March 6, 2008 and addressed to defense counsel, with copies to Sue O'Dell at the West Virginia Supreme Court of Appeals (Tr. 71-72, letter from Judge Gaughan to defense counsel dated 3/6/08). The letter indicated that no audio tapes or "notes" of the closing could be found. Rory Perry then advised all counsel by letter dated March 18, 2008 of this determination and the new deadline for filing the Petition to a date 30 days from receipt of the letter, despite the inability of Judge Gaughan's court reporter to produce a transcript of the entire closing argument and any related objections, motions or discussions on the record. The Petition for Appeal was filed with the Clerk of the Circuit Court of Brooke County on April 17, 2008.

III. ASSIGNMENT OF ERROR

**THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY
GRANTING APPELLEES' MOTION FOR MISTRIAL 20 MONTHS
AFTER THE JURY RENDERED A VERDICT FOR THE APPELLANTS**

IV. STANDARD OF REVIEW

On appeal, the standard of review of a trial court's ruling on a motion for mistrial is an "abuse of discretion" standard:

4. Whether a motion for a mistrial should be sustained or overruled is a matter which rests within the trial court's discretion and the action of the trial court in ruling on such a motion will not be cause for reversal on appeal unless it clearly appears that such discretion has been abused.

Syllabus Point 4, Moore, Kelly and Reddish, Inc. v. Shannondale, Inc., 152 W.Va. 549, 165 S.E.2d 113 (W.Va. 1968).

A mistrial should only be granted under extreme circumstances when the prejudice of an objectionable event cannot be cured by the trial court:

11. Mistrials in civil cases are generally regarded as the most drastic remedy and should be reserved for the most grievous error where prejudice cannot otherwise be removed.

Syllabus Point 11, Vilar v. Fenton, 181 W.Va. 299, 382 S.E.2d 352 (W.Va. 1989).

With regard to claims of prejudicial remarks in closing argument, the Supreme Court has also held that "[a] judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice." Syl. pt. 5, State v. Ocheltree, 170 W.Va. 68, 289 S.E.2d 742 (1982).

V. ARGUMENT

A. **The Appellees Waived Their Right To A Mistrial**

As mentioned above, the closing argument of defense counsel drew only one solitary objection by Appellee's counsel, during which Mr. Blass protested in open court that during the opening stage of his closing argument he had not used the figure of speech "big fat liar" with reference to defense expert Mark Rodosky, M.D. While this was a correct statement, it is obvious from a review of the context of Mr. Stuhr's closing argument that he occasionally used adjectives, figures of speech and characterizations that no reasonable juror would have believed were literal quotations of either the Appellees or their counsel. Having not the slightest reservation over the well-aged dilemma of objecting during the closing argument of another attorney, Mr. Blass objected but simply indicated that he had not used the words "big fat liar." Mr. Blass did not argue that the comment was prejudicial or inflammatory in any way. Mr. Blass chose not to request a curative instruction. Mr. Blass neglected to request a ruling from the court on this solitary objection despite Judge Gaughan's silence. No other objections were posed during the closing argument, and no request was ever made by Appellees' counsel for a curative instruction at any point during closing argument. Unfortunately for the Appellants, the missing portion of trial transcript containing the closing argument of Mr. Blass has vanished, as it would have shown how Mr. Blass in the first part of closing argument repeatedly drilled the point that defense expert Mark Rodosky, M.D. was not believable, truthful or credible because he had been impeached with his deposition by Mr. Blass on cross-examination. This was the basis for the accurate statement by Mr. Stuhr in closing argument that *the Appellees* would have the jury believe that Dr. Rodosky was lying.

The Appellees' motion for mistrial was not made until after the completion of closing arguments, in Judge Gaughan's chambers after the jury had retired to the jury room for its

deliberations. Once the motion was made, the only basis for the motion was Mr. Stuhr's statements that the Appellees and their counsel wanted the jury to believe that both Dr. Rodosky and Dr. Andreini were lying. At that time, Appellees' counsel made a specific request to the trial court to defer ruling on the motion for mistrial until after the verdict. Although several other statements were cited in Judge Gaughan's Order of July 25, 2005 as the basis for the post-verdict mistrial, none of those statements were cited by Appellees' counsel in the oral motion for mistrial made on the record immediately after the jury began its deliberations.

The requirement for adequate preservation of an objection at trial is well defined in West Virginia:

We have continuously stated that "[t]o preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect." Syl. Pt. 2, State ex rel Cooper v. Caperton, 196 W.Va. 208, 470 S.E.2d 162 (1996). We have further explained:

The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace.... It must be emphasized that the contours for appeal are shaped at the circuit court level by setting forth with particularity and at the appropriate time the legal ground upon which the parties intend to rely.

Id. at 216, 470 S.E.2d at 170 (citation omitted).

Brooks v. Galen of West Virginia, 220 W.Va. 699, 705, 649 S.E.2d 272, 278 (2007)

In Pasquale v. Ohio Power Company, 187 W.Va. 292, 418 S.E.2d 738 (W.Va. 1992), the Supreme Court of Appeals imposed the requirement for an aggrieved litigant to request a curative instruction and to lodge a timely objection to improper remarks in closing argument:

10. " 'This court will not consider errors predicated upon the abuse of counsel of the privilege of argument, unless it appears that the complaining party asked for and was refused an instruction to the jury to disregard the improper remarks, and duly excepted to such refusal.' McCullough v. Clark, 88 W.Va. 22, 106 S.E. 61, pt. 6, syl." Syllabus Point 1, Black v. Peerless Elite Laundry Co., 113 W.Va. 828, 169 S.E. 447 (1933).

Id. at Syllabus Point 10.

In State v. Adkins, 209 W.Va. 212, 544 S.E.2d 914 (W.Va. 2001), the prosecuting attorney in closing argument referred to the Appellant and one of his witnesses as “liars,” but defense counsel failed to object. Syllabus Points 1 and 2 illustrate that an improper remark in closing argument will only justify a new trial if prejudice or manifest injustice has resulted and a timely and proper objection has been made:

1. “A judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice.” Syllabus point 5, State v. Ocheltree, 170 W.Va. 68, 289 S.E.2d 742 (1982).

2. “Failure to make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a waiver of the right to raise the question thereafter either in the trial court or in the appellate court.” Syllabus point 6, Yuncke v. Welker, 128 W.Va. 229, 36 S.E.2d 410 (1945).

Syllabus Points 1 and 2, State v. Adkins, *id.* See also Yuncke v. Welker, *supra*, (holding that failing to make a timely objection to comments made in a closing argument prevented the trial court from curing any potential prejudice and the issue was waived for appeal); and Page v. Columbia Natural Resources, 198 W.Va. 378; 480 S.E.2d 817 (1996) (holding that counsel waived error when failing to object to statements made during a closing argument). In the opinion, the Supreme Court in State v. Adkins declined to apply the plain error doctrine to reverse the Appellant’s conviction as it did not believe that the reference to Appellant and his witness as “liars” rose to the level of plain error.

In State v. Satterfield, 193 W.Va. 503, 457 S.E.2d 440 (W.Va. 1995), the Appellant argued on appeal that the prosecuting attorney made improper statements in closing argument concerning defense counsel. The allegedly improper comment was preceded by a statement by defense counsel in his closing argument that the State had withheld information. In response, the prosecutor in his rebuttal closing argument referred to the statement made by defense counsel as “nothing but a low down lie.” No objection was made by defense counsel at the time of trial, and for that reason the

Supreme Court deemed the issue to have been waived when it was raised after the trial. 193 W.Va. at 516, 457 S.E.2d at 453.

The doctrine of waiver of objection to prejudicial remarks in closing argument was strictly enforced by Justice Starcher in Rowe v Sisters of the Pallotine Missionary Society, 211 W.Va. 16, 560 S.E.2d 491 (W.Va. 2001). In Rowe, Justice Starcher concluded that counsel for the appellant hospital in a malpractice case had waived the Appellant's right to appeal the trial court's refusal of a motion for mistrial made after the start of jury deliberations, for allegedly objectionable remarks made during closing argument by counsel for the Appellee. In the majority opinion, Justice Starcher wrote:

FN6. The appellant also contends that certain arguments made by the appellee's counsel during closing argument were prejudicial. The appellant's counsel did not make a contemporaneous objection to any of these arguments, nor did the appellant ask for a curative instruction before the jury retired for its deliberations. Instead, after the jury began deliberating, the appellant made a motion for a mistrial which was denied by the circuit court. **We have repeatedly held that a party's failure to make a timely objection to improper closing argument, and to seek a curative instruction, waives the party's right to raise the question on appeal.** See Syllabus Point 6, Yuncke v. Welker, 128 W.Va. 299, 36 S.E.2d 410 (1945); Syllabus Point 6, McCullough v. Clark, 88 W.Va. 22, 106 S.E. 61 (1921). We decline to address the contentions raised by the appellant.

Footnote 6, Rowe v Sisters of the Pallotine Missionary Society, Id. (emphasis added).

Just as the appellant in Rowe waived the right to a mistrial by failing to timely object to prejudicial statements during closing argument and request a curative instruction, the Appellees in this case waived their right to a mistrial (1) by failing to timely object to all of the comments that were alleged to have been prejudicial, and (2) by failing to request a curative instruction from the trial court. If the closing argument was so clearly inflammatory and prejudicial that it single-handedly reversed the outcome of the trial for the Appellees, then why did Appellees' counsel make only one narrow objection, and then fail to request either a ruling from the court, a curative

instruction or even a bench conference? If the closing argument was so egregious, then why did Appellees counsel and the trial court remain silent when other allegedly objectionable statements were made that formed the basis for the *written* motion for mistrial three weeks after the verdict? The reason is obvious - during the closing argument these comments were clearly nothing more than characterizations and figures of speech that no reasonable juror would treat as literal and verbatim quotations from counsel for the Appellees.

In this case, the closing argument remark by defense counsel that Dr. Andreini had been accused of lying and falsifying medical records was predicated on the testimony of Catherine Smith and both the opening statement and closing argument of Appellees' counsel. Defense counsel was entitled to point out the inconsistencies of these statements and arguments, and defend Dr. Andreini against those unvarnished attacks on his truthfulness. The Appellees and their counsel "opened the door" by accusing Dr. Andreini of lying and the mistrial was therefore unjustified. Since Mr. Stuhr's closing argument was based on the testimony of Appellees' witnesses and the arguments of Appellees' counsel, the subject matter of Mr. Stuhr's remarks was nothing new to the jury. It was Mrs. Smith and her counsel that alleged at trial that Dr. Andreini had not seen Mrs. Smith in the emergency department on March 30 and that his note about that encounter was a complete fabrication. The blunt statements made by Mr. Stuhr were based on an accurate assessment of the Appellees' theme from opening statements through closing argument - that neither Dr. Andreini nor Dr. Rodosky were truthful and (figuratively speaking) were "big fat liars" in their eyes.

Under the well settled law of West Virginia, Appellees waived any entitlement to a mistrial in this instance. In the absence of a proper objection and request for a curative instruction, Judge Gaughan's grant of the mistrial was reversible error.

B. The Trial Court Erred In Granting A Mistrial After The Jury Rendered Its Verdict

Appellees' counsel not only failed to request a curative instruction, but also failed to move the trial court for mistrial until after the jury began its deliberations. Appellees' counsel also requested that the trial court defer ruling on the mistrial until after the jury rendered its verdict. The trial court obliged the request by delaying the ruling on the motion for mistrial - for a period of over 20 months from November 17, 2003 to July 25, 2005. The decision to grant the mistrial after the verdict was rendered was reversible error, consistent with the Supreme Court's holding in Vilar v. Fenton:

Prior to the entry of the verdict by a jury, a mistrial is procedurally possible; however, **declaring a mistrial after the jury verdict is rendered is improper.**

Syllabus By The Court, Vilar v. Fenton, supra (emphasis added). Because the mistrial was deferred at the request of Appellees' counsel until after the verdict was rendered, the Appellees effectively waived the request for the mistrial and it should not have been granted.

C. The Trial Court Erred In Concluding That Appellants' Closing Argument Was So Prejudicial As To Justify A Mistrial

Judge Gaughan based his Order granting the mistrial on comments in closing argument that he characterized as "vituperative" and "intemperate," adjectives that were used in State v. Kennedy, 162 W.Va. 244, 249 S.E.2d 188 (1978), and were called to the attention of the court by counsel for the Appellees in their written motion for mistrial. In its Order of July 25, 2005, the trial court found that the closing argument by Mr. Stuhr was prejudicial, but failed to provide a satisfactory explanation or justification for the presumption that these comments had in fact turned a certain verdict for the Appellees into a verdict for the Appellants.

In the medical malpractice case of Mackey v. Irisari, 191 W.Va. 355, 445 S.E.2d 742 (1994), the Supreme Court reviewed the closing argument of Jim Bordas (the partner of Mr. Blass) during which the jury was told that it was a “shame” that the legislature had limited non-economic damages to one million dollars since the case “called out for a verdict of several million dollars.” The Supreme Court ruled that even though the statement may have been improper, it was not so prejudicial as to have warranted a new trial. In affirming the resulting verdict of \$1,842,128.48, the Supreme Court reaffirmed the wide latitude of counsel in closing argument:

8. “Great latitude is allowed counsel in argument of cases, but counsel must keep within the evidence, not make statements calculated to inflame, prejudice or mislead the jury, nor permit or encourage witnesses to make remarks which would have a tendency to inflame, prejudice or mislead the jury.” Syl. pt. 2, State v. Kennedy, 162 W.Va. 244, 249 S.E.2d 188 (1978).

Syllabus Point 8, Mackey v. Irisari, id. As indicated in the opinion by Justice McHugh, a new trial is not warranted simply on the basis of improper remarks in closing argument, if those remarks were not prejudicial enough to warrant a new trial.

In State v. Adkins, supra, the Supreme Court held that the Appellant did not establish a sufficient nexus between the prejudicial remarks by the prosecuting attorney in closing argument (a reference to the Appellant and one of his witnesses as “liars”) and the unfavorable verdict. The Supreme Court reaffirmed the requirements for showing a degree of “proximate causation” between the improper remarks and the outcome of the trial:

3. “Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.” Syllabus point 6, State v. Sugg, 193 W.Va. 388, 456 469 (1995).

Syllabus Point 3, State v. Adkins, supra.

A requirement of “proximate causation” (i.e. prejudice or manifest injustice affecting the outcome) with regard to improper remarks in closing argument was affirmed by the Supreme Court in the medical malpractice case of Foster v. Sakhai, 210 W.Va. 716, 559 S.E.2d 53 (W.Va. 2001):

9. “The discretion of the trial court in ruling on the propriety of argument by counsel before the jury will not be interfered with by the appellate court, unless it appears that the rights of the complaining party have been prejudiced, or that manifest injustice resulted therefrom.” Syl. pt. 3, State v. Boggs, 103 W.Va. 641, 138 S.E. 321(1927).

Syllabus Point 9, Foster v. Sakhai, id. In that case, the Supreme Court found that the trial court should not have granted a new trial to the defendant physician based on improper references to the \$1,000,000 non-economic damages cap in the plaintiffs’ closing argument, as the comments did not justify a new trial. Chief Justice McGraw, writing for the majority, found that the lower court’s grant of a new trial would result in prejudice and manifest injustice to the appellants and plaintiffs below.

A similar result was reached in State v. Barker, 168 W.Va. 1, 281 S.E.2d 142 (1981):

1. “A judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney ... to a jury which do not clearly prejudice the accused or result in manifest injustice.” Syl. pt. 1, State v. Dunn, W.Va., 246 S.E.2d 245 (1978), in part.

Syllabus Point 1, State v. Barker, id. In that case, the Supreme Court affirmed the trial court’s refusal to grant a new trial based on remarks in closing argument that the appellant “would have every interest in the world in lying because he was trying to save his own neck...” 168 W.Va. at 6, 281 S.E.2d at 146.

The relative insignificance of Mr. Stuhr’s remarks in closing argument and the lack of prejudice to the Appellees is evident by simply revisiting the contentious factual issue that spawned the comments on which the Appellees based their written motion for mistrial. The references to the Appellees’ accusation of “lying” by Dr. Andreini were in direct reference to the allegation of

Catherine Smith at trial that Dr. Andreini created a false medical record for the emergency room visit on March 30, 2000. This claim was first made at trial during the direct examination of Mrs. Smith by Mr. Blass:

[By Mr. Blass]

Q: Did you see Dr. Andreini in the emergency room on March 30th when you were taken to the emergency room?

A: No, I did not.

Q: Are you sure about that?

A: I am sure about that.

Q: Why are you so sure about that?

A: Because he was my doctor, and I think if here was there, I would have seen him.

Q: Did the emergency room doctor tell you he had contacted Dr. Andreini?

A: I am not sure.

Q: Were you told to see Dr. Andreini the following day?

A: Yes.

(Tr. 61, trial testimony of Catherine Smith, at p. 27). The Appellees' theme of fraudulent and deceptive behavior on the part of Dr. Andreini surfaced again during the cross-examination of Mrs. Smith by the undersigned defense counsel in the following passage:

[By Mr. Copenhaver]

Q: You put [sic] a lot of testimony about how it is your belief and belief of others that you did not see Dr. Andreini in the emergency department on March 30, 2000, and it is your testimony today that Dr. Andreini did not come to the ER?

A: It is my testimony.

Q: There is no doubt in your mind?

A: There is no doubt in my mind.

Q: Absolutely, positively --

A: I am absolutely, positively that he was not there.

Q: You knew when this lawsuit was filed in October 2001 that Dr. Andreini had put a false record in your chart at Wheeling Hospital. Why did you keep going back? Is it simply because he was the only one who would see you?

A: I seen him for referrals. When I went back to him, he always said, there is light at the end of the tunnel, you are looking good, keep going to physical therapy, you are improving, I am so proud of you, and that is what I was told every time. So they didn't want me going to back to hear that. I knew he wasn't going to manipulate me again.

(Tr. 61, trial testimony of Catherine Smith, at pp. 54-55) Mrs. Smith simply did not have a reasonable explanation for why she continued to see Dr. Andreini as recent as May 15, 2003 (18 months *after* the filing of the lawsuit, and less than 6 months before the trial in November 2003) if she also believed that he had lied in his deposition about the emergency department visit and falsified her medical record with the consultation note. As the cross-examination proceeded, Mrs. Smith's contempt for Dr. Andreini became more apparent:

[By Mr. Copenhaver]

Q: So when you got to the emergency department at that point in time, as you told us before, in that entire four-hour period, you never saw Dr. Andreini, not once?

A: I did not once see him. I know that for a fact.

Q: You sound pretty adamant about it? You sound pretty frustrated about it.

A: I am upset about it.

(Tr. 61, trial testimony of Catherine Smith, at p. 84). The inconsistencies in her testimony became even more apparent when she had no explanation for why the lack of medical attention by Dr. Andreini in the emergency department had not been a source of discontent the next day in his office:

[By Mr. Copenhaver]

Q: Now, when you saw Dr. Andreini on March 31, in his office, I would imagine you must have still been simmering for [sic] the fact that he hadn't shown up in the emergency department the night before to come in to see you? Is that an accurate statement?

A: At that point, I don't know. I can't sit here and say that I was --

Q: Were you as angry on the morning of March 31 as you were this morning, a little while ago, when I was asking you that?

A: Probably.

Q: So why did you --

A: I don't know. I have been angry about a lot of things.

Q: Why didn't you ask Dr. Andreini on March 31 about why didn't he come to see you in the emergency department if you were so frustrated about it?

A: I don't know.

(Tr. 61, trial testimony of Catherine Smith, at pp. 100-101).

Mrs. Smith claimed that Dr. Andreini had not only failed to see her in the emergency room, but that Dr. Andreini was *not* the physician that put her wrist in a splint, even Dr. Andreini documented that he had placed the splint according to his note of March 30, 2000 (Tr. 44A):

[By Mr. Copenhaver]

Q: Who put on the splint? Do you remember?

A: No.

Q: You have no idea who put that splint on, isn't that true?

A: I know it wasn't him.

Q: Then if you know it wasn't him, how can you be so sure it was anybody? You can't identify --

THE WITNESS: Can I ask you something?

THE COURT: Ma'am, you are not allowed to ask him questions.

THE WITNESS: I am sorry.

BY MR. COPENHAVER:

Q: If you can be so certain that Dr. Andreini is not the one who put the splint on in the emergency department, how can you be so sure that it was somebody else?

A: If you are doctoring with a doctor, you think you would see him. I never seen Dr. Govindan there. He wasn't my doctor, but I never seen him. Wouldn't you think if Dr. Andreini was in there that night, I would remember.

Q: I think so.

A: I think I would. And he wasn't there.

(Tr. 61, trial testimony of Catherine Smith, at p. 86). After counsel for Appellants confirmed Mrs. Smith's accusation that Dr. Andreini had lied about placing her in the wrist splint, Mrs. Smith expressed her belief that Dr. Andreini's emergency department consultation note for March 30 was a fabrication and that he had lied in his deposition (and at trial, by inference) about examining her there:

[By Mr. Copenhaver]

Q: Now, with regard to the splint, there is absolutely no question in your mind that Dr. Andreini did not put that splint on, right?

A: Correct.

Q: So, basically, what you are telling this jury is that record that you have seen so much about that is typed up at 8:10, 8:11, on March 31, is a fraud? Is that what you are telling this jury, it is completely 100% false?

A: He wasn't there, so --

Q: So the answer to my question is, yes, it is false.

A: I would say it is false.

Q: Certainly by the time you filed this lawsuit, you knew that that record was in the chart, and you went back to him anyway, you kept going back to him even after the lawsuit was filed?

A: I probably didn't know it was in the chart at that time.

Q: When did you come to find out that – let's do it this way. Certainly when the records were obtained – obviously, they were obtained before the lawsuit was filed, right?

A: I don't know.

Q: This lawsuit was filed –

A: Oh, I don't know.

Q: You don't know, okay. But you know, at least by the time that Dr. Andreini's deposition was taken in February 2002, that it was his memory that he had been in the emergency department?

A: That is what he said.

Q: I imagine you found out about that, that he was claiming he went to the emergency department on March 30, when you came in there?

A: Right.

Q: And so you [sic] probably known this, that Dr. Andreini has been lying about this visit to the emergency department for at least a year and a half, that is how long you have known about it, correct?

A: Yes.

(Tr. 61, trial testimony of Catherine Smith, at pp. 89-91). At this point, the irrefutable contradiction of Mrs. Smith's claim at trial of false testimony and record fabrication, and her continued treatment with Dr. Andreini through May 2003, could not have been clearer. By the end of her cross-exam, Mrs. Smith had lost all credibility as to this sequence of events between March 30 and April 3, 2000, which was so critical to the Appellees' theory of liability.

Based on the trial testimony of Mrs. Smith and Dr. Andreini, it was clear that either Dr. Andreini or Catherine Smith was not telling the truth about the ER visit on March 30. The cornerstone of the criticism leveled against Dr. Andreini by Appellees' expert witness was that the brachial plexus nerve injury was caused by the failure of Dr. Andreini to diagnose the dislocation for four days after the second manipulation under anesthesia. This was a pivotal factual issue in the case

- if the jury believed that Dr. Andreini did in fact examine the patient on March 30, 2000 in the emergency department, he could not have missed the dislocation based on the extensive physical exam that he documented in his note, and the dislocation had therefore not occurred by that point. On the other hand, if Dr. Andreini lied about the emergency department exam on March 30, 2000 and concocted a fraudulent note about this exam, his credibility would have been totally destroyed.

Mr. Stuhr's characterization of the accusations by Mrs. Smith and her attorneys in closing argument had no impact on the outcome of the trial, as it was ultimately Mrs. Smith's credibility that had been ruined by her unbelievable and contradicted accusations at trial that Dr. Andreini lied about examining her in the emergency department on March 30 and then fraudulently created a false record of the exam. This conclusion is inescapable when one considers that the jury knew that Mrs. Smith continued to return to Dr. Andreini for several months after the lawsuit had been filed and medical records had been obtained, and Dr. Andreini had testified in his deposition in 2002 that he had in fact examined Mrs. Smith in the emergency department on March 30, 2000 and found no dislocation at that time. Moreover, the absence of dislocation on March 30, 2000 had been refuted at trial by the testimony not only of Dr. Andreini and Dr. Rodosky, but by Dr. Rubin, the emergency room physician that also examined Mrs. Smith in the emergency department on March 30, 2000.

In light of these contradictions and the impact on Mrs. Smith's credibility, it is clear that while the trial court may have thought that the closing argument by Mr. Stuhr was improper or prejudicial, Judge Gaughan simply did not address in his Order of July 25, 2000 how the closing argument impacted the outcome of the trial. The closing argument was not significant to the outcome of the case and the trial court's ruling of mistrial should be reversed.

D. The Trial Court Erred In Concluding That Appellants' Closing Argument Violated The Pretrial Order As To Subsection K of Appellants' Omnibus Motion In Limine

In its Order of July 25, 2005, the trial court adopted an ill-conceived and erroneous argument by the Appellees that the closing argument by Mr. Stuhr had violated a pretrial order that included a pretrial ruling as to a subsection of a motion in limine that actually had been submitted by the Appellants. The Appellees' claim of violation of the pretrial order had not been made at the time of the oral motion for mistrial, and was asserted for the first time in the written motion for mistrial filed on December 11, 2003, over three weeks after the defense verdict. In support of this erroneous conclusion, both the Appellees and the trial court cited Honaker v. Mahon, 210 W.Va. 53, 552 S.E.2d 788 (W.Va. 2001). The Appellees' written motion and the trial court's Order of July 25, 2005 cited Syllabus Point 5 of Honaker, set forth below:

5. A deliberate and intentional violation of a trial court's ruling on a motion *in limine*, and thereby the intentional introduction of prejudicial evidence into a trial, is a ground for reversing a jury's verdict. However, in order for a violation of a trial court's evidentiary ruling to serve as the basis for a new trial, **the ruling must be specific in its prohibitions, and the violation must be clear.**

Syllabus Point 5, Honaker v. Mahon, *id.* (emphasis added).

Absent from the Appellees' written motion and the trial court's Order of July 25, 2005, was Syllabus Point 6 of Honaker, set forth below:

6. In deciding whether to set aside a jury's verdict due to a party's violation of a trial court's ruling on a motion *in limine*, a court should consider whether the evidence excluded by the court's order was deliberately introduced or solicited by the party, or whether the violation of the court's order was inadvertent. The violation of the court's ruling must have been reasonably calculated to cause, and probably did cause, the rendition of an improper judgment. A court should also consider the inflammatory nature of the violation such that a substantial right of the party seeking to set aside the jury's verdict was prejudiced, and the likelihood that the violation created jury confusion, wasted the jury's time on collateral issues, or otherwise wasted scarce judicial resources. The court may also consider whether the violation could have been cured by a jury instruction to disregard the challenged evidence.

Syllabus Point 6, Honaker v. Mahon, id. By its Order of July 25, 2005, the trial court clearly did not fulfill all of the requirements of Syllabus Point 6 before basing its decision on this alleged violation.

Upon close inspection of the original motion in limine that was alleged to have been violated, and with comparison to the trial court's pretrial Order, the misinterpretation of the Court's own motion initially by the trial court is plainly evident. The motion at issue is found in subsection K of "Appellant's Motion In Limine One: Omnibus Motion In Limine," served on April 24, 2003 (Tr. 45-54). Subsection K, by its title, was simply a motion in limine "To Prohibit Appellees' Counsel From Commenting or Making Personal Attacks On The Character Or Truthfulness of Defense Counsel In The Presence of The Jury." The complete ruling on subsection K in the trial court's pretrial Order entered on November 10, 2003 actually mirrors the title of the motion:

- k. Appellants' motion in limine to prohibit plaintiff's counsel from commenting or making personal attacks on the character or truthfulness of defense counsel in the presence of the jury – **GRANTED**.

(Tr. 55-60, Judge Gaughan's pretrial Order entered 11/10/03). The misinterpretation of this ruling within the pretrial Order, induced by the Appellees' written motion for mistrial after the verdict, was clearly erroneous and utterly inexplicable. First, the claimed violation of the pretrial order was based only on comments by Mr. Stuhr in closing argument about the obvious implication *by Appellees' counsel* throughout the case and in closing argument that witnesses for the defense (particularly Dr. Andreini and Dr. Rodosky) had not been truthful, and therefore were not to be believed. Second, none of the comments in closing argument that are at issue were "personal attacks on the character or truthfulness" of Appellees counsel.

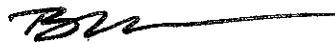
The trial court was clearly misguided by Appellees' erroneous claim of the violation of the pretrial order, and this was perpetuated in the Order of July 25, 2005. The alleged violation of the pretrial order was an improper basis for the trial court's granting of the mistrial.

VI. CONCLUSION

In conclusion, the trial court's Order of July 25, 2005 granting the Appellees' motion for mistrial constituted reversible error, based on the Appellees' waiver of objections to the closing argument, the trial court's clear misinterpretation of its own pretrial order and the lack of any explanation, rational or otherwise, by the trial court of how the jury would have rendered a defense verdict rather than a verdict for the Appellees but for the closing argument by defense counsel.

Accordingly, Appellants Derek Andreini, M.D. and Orthopaedic Surgery, Inc. request that the West Virginia Supreme Court of Appeals reverse Judge Gaughan's Order of July 25, 2005 granting Appellees' Motion For Mistrial, with instructions that the case be remanded to the trial court for entry of the judgment order in favor of Derek Andreini, M.D. and Orthopaedic Surgery, Inc.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned counsel does hereby certify that on December 10, 2008, the foregoing **Appellants' Initial Brief** was served by U.S. Mail on said date to counsel of record for the Appellees:

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