

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

No. 06-029

CATHERINE I. SMITH and
JOHN SMITH,

Plaintiffs Below, Appellees

v.

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

Defendants Below, Appellants

BRIEF OF APPELLEES

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

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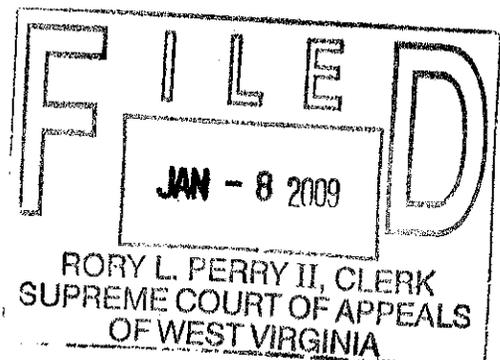


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I. KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER COURT:

The only issue presented by this Appeal is whether the Honorable Martin J. Gaughan abused his discretion by declaring a mistrial after Appellants' counsel intentionally violated a pre-trial motion *in limine* by vouching for his client's case and by making repeated personal attacks on the character of opposing counsel in front of the jury. Judge Gaughan declared a mistrial after having personally witnessed those multiple and unprovoked attacks in content and tone, and the Appellees respectfully submit that Judge Gaughan did not abuse his discretion in doing so.

In their Brief before this Court, the Appellants attempt to characterize the closing argument of their counsel, Richard Stuhr, as nothing more than a harmless commentary on the evidence. In order to do so, the Appellants must quote very sparsely and selectively from Mr. Stuhr's closing argument. For example, the Appellants omit the fact that one of the very first things Mr. Stuhr did on closing was falsely accuse Appellees' counsel of calling the defendant a "lying, cheating, loathsome, despicable human being."¹ Mr. Stuhr quickly followed that up by letting the jury know that he was an "officer of the court" who did not get paid to "try to hoodwink" them or "deceive" them. *Id.* at 4. In an apparent effort to contrast himself with Mr. Blass (Appellees' counsel), Mr. Stuhr told the jury that Mr. Blass was "the only one" who really believed in the plaintiffs' case and stated, "And he won't give up." *Id.* at 10.

Later in his closing, Mr. Stuhr falsely accused Mr. Blass of calling one of the witnesses a "big fat liar." *Id.* at 16. With respect to this outrageous accusation, Mr. Stuhr assured the jury that the consequences of his behavior during closing argument were his to bear, stating, "If I'm wrong, then I'll pay the price. Don't hold it against my client." *Id.* at

¹ See Transcript of Proceedings on November 17, 2003 ("*Appellants' Closing*") at 3.

17. Undeterred, Mr. Stuhr then accused Mr. Blass of saying things even though “he knows the evidence is exactly the opposite” and building the plaintiffs’ case on “a big lie.” Id. at 20, 22.

From there, Mr. Stuhr proceeded to argue that in order for the plaintiffs to have a case, nearly every witness would have to be lying. As Mr. Stuhr stated, “There has to be an awful lot of liars in this case, folks, for them [the plaintiffs] to be right about an awful lot of things.” Id. at 24. Finally, Mr. Stuhr concluded his summation by falsely representing that Mr. Blass had called the defendant a “liar and a cheat and a fraud” and a “despicable jerk.” Id. at 38-39.

As Judge Gaughan recognized having sat through closing arguments and observed the demeanor of counsel and the jury, there is absolutely no room for this type of behavior in West Virginia trial courts. The Appellees respectfully submit that Judge Gaughan was correct to grant a mistrial and the Appellees ask this Honorable Court to AFFIRM Judge Gaughan’s grant of a new trial.

II. FACTS:

This medical malpractice case arose when the defendant, Derek Andreini, M.D., separated Catherine Smith’s shoulder causing severe and permanent injuries. At the time, Cathy Smith was a 44 year old Operating Room Technician. In November of 1999, she fell and hurt her shoulder. She eventually found her way into the hands of Dr. Andreini, who held himself out as an orthopedic surgeon.

Dr. Andreini saw Cathy Smith for the first time on February 18, 2000 and had her scheduled her for surgery a week later. As the jury heard, Dr. Andreini told Cathy Smith that he was going to perform an “arthroscopy right shoulder with possible shaving and possible

acromioplasty.”² Significantly, in the middle of that operation, Dr. Andreini also performed an entirely different procedure known as a “manipulation under anesthesia,” a procedure that Dr. Andreini had never told Cathy Smith about.³ Fortunately, Mrs. Smith did not suffer an injury as a result of that procedure and she was able to start what looked to be a successful program of physical therapy designed to get her back to work.

Shortly more than a month later, Dr. Andreini aborted the physical therapy program and scheduled Cathy Smith for another surgery. This time, Dr. Andreini did tell Cathy Smith that he was going to manipulate her right shoulder, but he left out several absolutely critical facts from his pre-operative discussion with his patient. First, despite overwhelming evidence that physical therapy was working, Dr. Andreini told Mrs. Smith that she had no alternative but to undergo another manipulation procedure.⁴ He also failed to warn Mrs. Smith about the possibility of an injury to her brachial plexus.

The brachial plexus is a group of nerves located in a person’s shoulder. Those nerves are essential in allowing a person to control movement and function in their arm. The evidence at trial was undisputed that a brachial plexus injury was a known complication of a manipulation procedure and, as this case so tragically illustrates, once it happens a brachial plexus injury has devastating consequences. However, the consent form given to Mrs. Smith by Dr. Andreini before the second manipulation procedure failed to mention the possibility of a brachial plexus injury. Id. The second manipulation procedure commenced on March 30, 2000 and Dr. Andreini discharged Cathy Smith shortly thereafter.

² See February 18, 2000 “Consent to Surgery or Other Procedure” (Pages 000079 to 80 of the Medical Records Trial Exhibit) (attached for convenience as **Ex. 1**).

³ See February 25, 2000 Operative Report (Pages 000081-83 of the Medical Records Trial Exhibit) (attached for convenience as **Ex. 2**).

⁴ See March 30, 2000 Consent to Surgery or Other Procedure (Pages 000130-131 to the Medical Records Trial Exhibit) (attached for convenience as **Ex. 3**).

At trial, it was undisputed that four days later, on April 3, 2000, Dr. Andreini diagnosed Cathy Smith as having a dislocated right shoulder. It was also undisputed that her dislocated right shoulder had, in turn, caused a catastrophic and permanent injury to Cathy Smith's brachial plexus.

In addition to the informed consent issues, the crux of the plaintiffs' case was that Dr. Andreini failed to recognize the fact that he had dislocated Cathy Smith's shoulder in a timely fashion. The plaintiffs introduced evidence that Dr. Andreini should have recognized that he had separated Cathy Smith's shoulder much earlier and, if he had met the standard of care in that respect, he would have been able to keep Cathy Smith from suffering the devastating consequences of a permanent brachial plexus injury.

As such, a factual dispute arose about the events following the second manipulation under anesthesia on March 30, 2000. After that second manipulation, Dr. Andreini discharged Cathy Smith to her home. Within hours, however, Cathy Smith was back in the Wheeling Hospital Emergency Room complaining of paralysis and numbness in her right shoulder.

At trial, Dr. Andreini claimed that he went to the Emergency Department to see his patient that day, as he was obviously required to do under the standard of care. For her part, Cathy Smith testified that Dr. Andreini did not come to see her in the Emergency Room. Although this is the type of factual dispute that often occurs at trial, it is important that Cathy Smith's recollection was supported by the testimony of her friend, Carol Anderson, who accompanied Cathy to the hospital that day. Additionally, although Dr. Andreini did dictate a note regarding his visit that afternoon, any mention of that visit was conspicuously absent

from Dr. Andreini's office notes, even though he was in the habit of documenting visits with his patients in the hospital.⁵

As a result of Dr. Andreini's malpractice, Cathy Smith's dislocated shoulder was not diagnosed on March 30, 2000. Instead, her dislocated shoulder went undiagnosed for another four days. By then, the traction on her brachial plexus caused by the separated shoulder had resulted in a complete and catastrophic injury.

Following the belated diagnosis, Dr. Andreini continued to treat Cathy Smith for her brachial plexus injury. While he recognized that she had developed a debilitating and painful condition known as "post traumatic sympathetic dystrophy," Dr. Andreini was always very encouraging to Cathy Smith. He would tell her that she was "improving quite nicely" and that she was an "excellent patient." Indeed, as of June of 2001, Dr. Andreini told Cathy Smith that he "would anticipate a very nice recovery although it will be slow. I would anticipate by February of 2002 that the patient will be able to return back to work."⁶ Even to this day, Dr. Andreini argues that Cathy Smith's decision to continue to treat with him proves beyond a doubt that Cathy Smith doesn't believe in her case. However, the fact remains that Cathy Smith continued to treat with Dr. Andreini *because he promised her that he could make her better.*

Like so many other things, Dr. Andreini's optimism proved completely unfounded. Cathy Smith never was able to return to her job and even Dr. Andreini admitted to the serious and permanent nature of Cathy Smith's injuries.

⁵ See Office Notes of Dr. Andreini (Page 00012 in the Medical Records Trial Exhibit) (attached for convenience as Ex. 4).

⁶ See, e.g., Dr. Andreini's Office Notes (Pages 000023-26 of the Medical Records Trial Exhibit) (attached for convenience as Ex. 5).

This matter proceeded to trial in November of 2003. Prior to trial, Dr. Andreini filed a series of motions *in limine*, including a motion to “prohibit plaintiffs’ counsel from commenting or making personal attacks on the character or truthfulness of defense counsel in the presence of the jury.”⁷ Given what eventually transpired, Dr. Andreini’s argument on that motion is highly instructive:

It has been the experience of defense counsel that in medical malpractice trials, plaintiffs or their attorneys occasionally attempt to comment on the character of defense attorneys, their reputation for truthfulness and/or untruthfulness, the methods by which they have defended an action, or their experience in defending medical malpractice cases and similar subjects. Such comments are irrelevant and should be excluded at the trial of this matter. W. Va. R. E. 401-402.

Further, even if such comments were somehow relevant, they are extremely prejudicial, inflammatory, and misleading and such comments confuse the real issues before the jury. As such, the miniscule probative value of such comments is substantially outweighed by the danger of unfair prejudice and confusion of the issues, and should be excluded at the trial of this matter and forbidden in the presence of the jury. W. V. R. E. 403.

Id. (emphasis supplied). Judge Gaughan granted that motion and reduced his ruling to a written Order in advance of trial.⁸

The case proceeded through trial with both parties presenting evidence in support of their claims. The parties concluded the presentation of evidence and, on November 17, 2003, Richard Stuhr, Esq., delivered his summation of Dr. Andreini’s behalf. As the transcript of that summation indicates, the entire theme of Mr. Stuhr’s closing argument was a personal attack on the character and credibility of Scott Blass, Esq., Cathy Smith’s lawyer.

⁷ Defendants’ Motion in Limine One: Omnibus Motion in Limine (K).

⁸ See Judge Gaughan’s Pretrial Order entered November 10, 2003.

As with any other well-developed summation, Mr. Stuhr led off with his theme, which amounted to a request to the jury that they consider who the truly “despicable human being” was in the development of this case. As Mr. Stuhr began:

SUMMATION – DEFENDANT

Mr. Stuhr: It will come as no shock to you that Dr. Andreini, through his lawyers, takes considerable issue with a number of Mr. Blass’s comments. Not only regarding his abilities as a physician – it’s not enough for the plaintiffs to come in to this courtroom and have a legitimate difference of opinion with Dr. Andreini in regard to whether he is responsible for this nice lady’s injuries. That’s not enough.

No, they have to tell you that he is a lying, cheating, loathsome, despicable human being.

Let’s face it, be honest, that’s precisely what you just heard.⁹

Despite Mr. Stuhr’s representations, however, that was not “precisely what [the jury] just heard.” Indeed, the complete mischaracterization of plaintiffs’ closing argument is a common element to Mr. Stuhr’s closing and also to the Appellants’ Brief before this Court. Because the Appellants have not secured a transcript of Mr. Blass’ closing, the Appellants ask this Honorable Court to accept as true Appellants’ Counsel’s recollection of these events and to disregard Judge Gaughan’s observations having witnessed the two summations himself. On this point, it is worth remembering that Judge Gaughan found that while “Defense counsel went beyond the scope of proper argument by grossly mischaracterizing Plaintiffs’ closing argument and by injecting harm and vituperative remarks . . . Plaintiffs’ counsel carefully crafted his argument not to employ such vituperative language.”¹⁰

The next part of Mr. Stuhr’s strategy on closing was to make it clear to the jury that lawyers are officers of the court with a “duty not to lie to you, not to deceive you, or mislead

⁹ See Transcript of Proceedings on November 17, 2003 (“*Appellants’ Closing*”) at 3.

¹⁰ Order of Judge Gaughan entered July 25, 2005 at 2, 4-5.

you.” He went on to point out that “I [Mr. Stuhr] don’t get paid to get up here and try to hoodwink you. I don’t get paid to get up here and try to deceive you, pull the wool over your eyes. Use whatever expression you like. And I don’t want to do that.” Id. at 4.

Having expounded on the standard of care applicable to lawyers, he launched into a broad-side and totally unprovoked attack on Mr. Blass. The centerpiece of that attack was his argument that Mr. Blass, and only Mr. Blass, was responsible for the entire trial.

As Mr. Stuhr argued to the jury, “the only one critical of Dr. Andreini for [the first manipulation] procedure is Mr. Blass. The only one. And he won’t give it up. But that’s not the only thing he won’t give up.” Id. at 10. Along the same lines, Mr. Stuhr next accused Mr. Blass of misrepresenting evidence:

Mr. Blass knows there is no evidence from any expert witness to the effect that Dr. Andreini was negligent in recommending the second manipulation. No one. . . . But one person and only one person persists in telling you and telling you that [Dr. Andreini] was negligent with regard to that first surgery. Only one.

Id. at 11.

Having accused Mr. Blass of being the only reason for the trial in the first place, Mr. Stuhr then cautioned the jury not to be fooled “because I get up here and misrepresent the evidence to you. You shouldn’t do it because I get up here and mislead you and try to deceive you.” Id. at 12.

The attack persisted and took a new tack when Mr. Stuhr accused Mr. Blass of calling a defense witness a “big fat liar.” At that point, the following exchange took place:

Mr. Stuhr: . . . On the other hand if you had a shoulder injury and you were concerned about your ability to make a living, couldn’t work, couldn’t sleep at night, and it goes 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.

Mr. Stuhr: I'm from Lake Charles, Louisiana, and you know, that doesn't matter, but where I come from, we call things the way we see them. And I'm here to tell you that not only has Mr. Blass repeatedly impugned my client's integrity and truthfulness, you pick a word, any word you want, and you pick a good word you can say about a human being, and he has done the opposite. And he has also done that to Dr. Rodosky.

Id. at 16-17. Realizing temporarily that he had gone too far, Mr. Stuhr attempted to convince the jury that he would be called to task for his outrageous statements, telling them immediately thereafter, "If I'm wrong, then I'll pay the price. Don't hold it against my client. I am here to tell you something, and that's what I'm going to do." Id. at 17.¹¹

Mr. Stuhr soon got over his embarrassment and went back on the attack, accusing Mr. Blass once again of arguing in one way even though "he knows the evidence is exactly the opposite." Id. at 20. In fact, Mr. Stuhr went as far as to argue that:

[t]here is a whole lot more to this issue than Mr. Blass would have you believe. There has to be an awful lot of liars in this case, folks, for them to be right about an awful lot of things.

Dr. Ruben [the emergency room doctor – who was not a witness at trial] has to be a liar, no way around it. The physical therapist you heard from this morning has to be a liar. There are a number of other people who would have to be fibbing to you in order for them to be right.

¹¹ One wonders what "price" Mr. Stuhr thought he would end up paying if not the mistrial that was ultimately granted.

Id. at 24.

At a later point, Mr. Stuhr resorted to mocking Mr. Blass on the testimony of Dr. Rodosky: “This guy Rodosky had nothing better to do in his life, his professional life, than come to Wheeling, West Virginia, to flat out lie to you. Apparently had a day where he didn’t have anything to do, and so he thought he would come here and just fib to us.” Id. at 26.

With respect to the fact that the nurse’s notes from Cathy Smith’s March 30, 2000 visit to the Emergency Room do not mention a visit from Dr. Andreini, Mr. Stuhr told the jury that he found Mr. Blass’ argument “interesting, if not hypocritical.” Id. at 28. But Mr. Stuhr saved his lowest blow until the end.

At the end of his summation, Mr. Stuhr brought up the fact that Cathy Smith continued to treat with Dr. Andreini even after she knew of his malpractice and used that fact not against Cathy Smith, but against Mr. Blass:

What does your common sense tell you about Mr. Blass’s claims about my client, his character and his integrity, who he is as a human being.

Is that what patients do who believe their doctor did all of those things to them? Is that what we would do? Doctor, you’re such a despicable jerk, I’m going to continue coming back to your office for three years, despite everything you have done to me, all the lies and all the cheating and all the fraud, you ruined my life, but I’m going to keep coming back and I’m going to keep coming back.

Id. at 39-40.

At the conclusion of closing arguments, the plaintiffs moved for a mistrial and Judge Gaughan took that motion under advisement pending the verdict. When the jury returned a verdict in the defendants’ favor, the parties were given an opportunity to brief their respective positions on the pending motion for a mistrial.

On July 29, 2005, the trial court granted the plaintiffs' motion on the grounds that the Appellants' closing argument violated the Court's pre-trial Order and constituted an unwarranted attack on the Appellees' counsel.¹² In a direct challenge to Judge Gaughan's ability to perceive events in his own courtroom, this Appeal followed.

III. RESPONSE TO ASSIGNMENT OF ERROR:

JUDGE GAUGHAN DID NOT ABUSE HIS DISCRETION BY GRANTING A MISTRIAL IN RESPONSE TO COUNSEL'S INTENTIONAL VIOLATION OF THE COURT'S PRE-TRIAL ORDER AND REPEATED PERSONAL ATTACKS ON THE CHARACTER AND CREDIBILITY OF OPPOSING COUNSEL

IV. STANDARD OF REVIEW:

Judge Gaughan was present during the entire trial, including Mr. Stuhr's closing argument. He had an opportunity to view first-hand the demeanor and tone of closing arguments and the effect of those arguments on the jury. As such, the Appellees agree with the Appellants that this Honorable Court should review Judge Gaughan's decision under an "abuse of discretion" standard. As this Court held in Syl. Pt. 4, Moore, Kelly and Reddish, Inc., v. Shannondale, Inc., 152 W. Va. 549, 165 S.E.2d 113 (1968):

Whether a motion for 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.

V. ARGUMENT:

A. JUDGE GAUGHAN WAS RIGHT TO GRANT A MISTRIAL GIVEN THE OUTRAGEOUS CONTENT OF THE APPELLANTS' CLOSING ARGUMENT:

Appellants' closing argument clearly violated two long-standing principles of West Virginia law. First, West Virginia litigants are prohibited from personally attacking the

¹² See Order of Judge Gaughan Entered July 25, 2003.

character and credibility of opposing counsel and the witnesses, even in closing argument. As this Court held in Syl. Pt. 7, Slaven v. Baltimore & Ohio. R. Co., 114 W. Va. 315, 171 S.E. 818 (1933):

Vituperative remarks of counsel in argument before jury are improper, and may be sufficient cause for vacating verdict favorable to party represented by such counsel.

This prohibition particularly addresses accusations that opposing counsel or the witnesses have lied. As the Slaven Court stated:

Exceptions were taken to certain statements of one of plaintiffs' counsel in argument to the jury. Defendant's conductor and brakeman had given testimony on the trial. Counsel in argument asserted that they had lied. This is a very harsh term for any occasion and is certainly out of place in a trial in a court of justice. There, deliberation and equanimity should prevail, without vituperation or invective, which are discordant notes. Inconsistencies in testimony and falsification, if there be either, can be pointed out by counsel without resort to "the short and ugly word." Such expression and similarly virulent and affronting ones are improper, and their use may constitute sufficient ground for setting aside a verdict favorable to the party represented by counsel using them.

Slaven, 171 S.E. at 821.

Second, the Appellants summation violated Rule 3.4 of the West Virginia Rules of Professional Conduct, which states:

A lawyer shall not:

...

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

The principle that counsel may not attack the character and credibility of his or her opponent or personally vouch for the record has been reaffirmed again and again by this Honorable Court and courts from around the United States. See State v. Bolen, 219 W. Va. 236, 240-43, 632 S.E.2d 922, 926-29 (2006) (new trial granted where counsel vouched for the record and argued that his witness could not lie to them because of his spiritual beliefs); State v. Hamrick, 216 W. Va. 477, 479-481, 607 S.E.2d 806, 808-810 (2004) (new trial granted where attorney vouched for his own case in violation of Rule 3.4 of the Rules of Professional Conduct); State v. Moore, 186 W. Va. 23, 27, 409 S.E.2d 490, 494 (1990) (conviction reversed, in part, because prosecutor improperly argued that certain witnesses “came in here and lied to you today.”); In re Katz, 476 F. Supp. 2d 572, 573-77 (W.D. Va. 2007) (attorney properly held in contempt for violating court order and calling opposing witnesses liars); George v. Mann, 622 So.2d 151, 152 (Fla. App. 3d Dist. 1993) (new trial warranted where attorney implied that witnesses were lying and the entire lawsuit was a set up because “[t]his line of argument, even if not objected to, constitutes reversible error”); Tucker v. Kansas City So. Railway, 765 S.W.2d 308, 309-12 (Mo. App. W. Dist. 1988) (new trial warranted where counsel accused his opponent of being “intellectually dishonest”); Thomas v. Dalpos, 26 Ill. App.3d 877, 883-84, 326 N.E.2d 42, 46-47 (Ill. App. 1st Dist. 1975) (new trial warranted where counsel argued that his opponent had suborned perjury); Board of County Road Commissioners v. GLS LeasCo, Inc., 394 Mich. 126, 131-32 & n. 3, 229 N.W.2d 797, 799-800 & n. 3 (Mich. 1975) (“counsel have no right, either by direct charge or insinuation, to attempt to prejudice a jury against opposing counsel. Such conduct is not ethical, and should not be permitted”), quoting Levinson v. Fidelity & Casualty Co. of New York, 348 Ill. 495, 505, 181 N.E. 321, 325 (1932).

Appellants' argument was particularly egregious here in several respects. First, Mr. Stuhr vouched for his own character and credibility time and again. In doing so, he specifically invoked the Rules of Professional Conduct by identifying himself as an officer of the court with a "duty not to lie to you, not to deceive you, or mislead you." He went on to point out that "I [Mr. Stuhr] don't get paid to get up here and try to hoodwink you. I don't get paid to get up here and try to deceive you, pull the wool over your eyes. Use whatever expression you like. And I don't want to do that." *Appellants' Closing* at 4. Given the overall theme of the Appellants' closing argument, this was an obvious attempt to contrast himself with his own perception of Mr. Blass. Statements from Mr. Stuhr that he was from Lake Charles, Louisiana, where "we call things the way we see them" are along the same lines. *Id.* at 16-17.

Second, Mr. Stuhr's entire closing argument was effort to make a villain out of Mr. Blass in the eyes of the jury. Given the malpractice environment that existed around the State and in the Northern Panhandle at the time, there can be no doubt that this was a deliberate strategy. In advocating for tort reform, doctors and insurance companies knew they could not attack their patients by calling them greedy plaintiffs, but they learned quickly that "trial lawyers" made a very appealing target.

In his closing argument, Mr. Stuhr deliberately adopted this strategy on an individual level. For example, Mr. Stuhr drove a wedge between Cathy Smith and her lawyer by arguing that Mr. Blass was "the only one" responsible for the entire trial. *Id.* at 11. He argued that Cathy Smith must not believe in her own case because she kept going to see Dr. Andreini, despite "Mr. Blass's claims . . . that [Dr. Andreini is] such a despicable jerk." *Id.* at 39-40.

To this end, Mr. Stuhr explicitly told the jury that Mr. Blass was making claims that he knew were not supported by the evidence. Id. at 11, 20.

Perhaps most egregiously, Mr. Stuhr continually and repeatedly misled the jury about the plaintiffs' claims. To be clear, nobody ever accused Dr. Andreini of being a "despicable jerk." Nobody called Dr. Rodosky a "big fat liar." Those were Mr. Stuhr's words, not the words of Mr. Blass. Nonetheless, Mr. Stuhr went on, and on, and on with his accusations that "[t]here is a whole lot more to this issue than Mr. Blass would have you believe. There has to be an awful lot of liars in this case, folks, for them to be right about an awful lot of things." Id. at 24.

Given the entire theme of Appeler's summation, Judge Gaughan was right when he found as follows:

Defense counsel went beyond the scope of proper argument by grossly mischaracterizing Plaintiffs' closing argument and by injecting harsh and vituperative remarks. Specifically, he falsely accused Plaintiffs' [sic] as describing Dr. Andreini as a big fat liar, a cheat, a fraud, and a despicable human being. Furthermore, defense counsel personally attacked plaintiffs' counsel and suggesting that he was lying and being deceitful. The Court feels the only proper remedy is to declare a mistrial.

July 29, 2005 Order at page 2. Certainly, this was not an abuse of discretion on Judge Gaughan's part.

The Appellants state that no matter how egregious Mr. Stuhr's comments were, a mistrial was not proper because, the Appellants argue, there was no explicit proof that the plaintiffs would have won but for Mr. Stuhr's comments. This is a particularly interesting argument for the Appellants to make given what Dr. Andreini said in his motion *in limine* seeking to prevent personal attacks on counsel:

Further, even if such comments [attacks on opposing counsel] were somehow relevant, they are extremely prejudicial, inflammatory, and misleading and such comments confuse the real issues before the jury. As such, the miniscule probative value of such comments is substantially outweighed by the danger of unfair prejudice and confusion of the issues, and should be excluded at the trial of this matter and forbidden in the presence of the jury. W. V. R. E. 403.¹³

As the Appellants clearly recognize, and as the cases cited above illustrate, arguments that attack the character of opposing counsel and arguments that vouch for the record are prejudicial in and of themselves.

Requiring Cathy Smith to identify exactly *how* and quantify exactly *how much* Mr. Stuhr's arguments prejudiced her case is impossible, given the confidentiality that surrounds the jury's deliberations. It is clear, however, that the plaintiffs' claims at trial were well-supported by the record. Mrs. Smith testified on her own behalf and she presented testimony from her friends and family. She also presented testimony on all elements of her claims by Henry Danaceau, M.D., a Board Certified orthopedic surgeon. Dr. Danaceau testified that Dr. Andreini failed to obtain Cathy Smith's informed consent and failed to meet the standard of care in his treatment of Mrs. Smith. Even Dr. Andreini admitted that Mrs. Smith had suffered a severe, permanent, and debilitating injury. At the end of the day, Mrs. Smith's claims were properly in front of the jury before Mr. Stuhr's prejudicial summation.

Under these circumstances, the Appellees respectfully suggest that Judge Gaughan did not abuse his discretion in finding that Mr. Stuhr's summation warranted a mistrial. Additionally, this error was well preserved by the record.

¹³ Defendants' Motion in Limine One: Omnibus Motion in Limine (K) (emphasis supplied).

B. THE ERROR INJECTED INTO THIS TRIAL BY MR. STUHR WAS PRESERVED BECAUSE OF THE COURT'S PRE-TRIAL ORDER, THE APPELLEES' TIMELY OBJECTION, AND THE APPELLEES' PROMPT MOTION FOR A MISTRIAL.

As a preliminary matter, the Appellant *himself* sought and obtained an order *in limine* prohibiting attacks on the character and truthfulness of opposing counsel. While Dr. Andreini's motion was formally limited to attacks on his attorneys, Judge Gaughan is vested with the discretion to interpret his pre-trial orders and determine what type of conduct violates those orders. Syl. Pt. 4, Honaker v. Mahon, 210 W. Va. 53, 552 S.E.2d 788 (2001). Further:

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.

Id. at Syl. Pt. 5. Here, for the Appellants to suggest that Judge Gaughan's order prevented the plaintiffs' counsel from attacking his lawyers, while leaving his counsel free to fire away at Mr. Blass warrants no additional comment. The Appellants' violation of the spirit, if not the text, of their own motion *in limine* would be sufficient by itself to preserve this error, but that is not the only reason Mr. Stuhr's error was preserved.

The fact remains that Mr. Blass did object to Mr. Stuhr's closing argument and clearly stated that the basis for his objection was that Mr. Stuhr was inappropriately characterizing the plaintiffs' closing argument. See Appellants' Closing at 16-17. While there are numerous other examples of objectionable comments in Mr. Stuhr's closing, they are all of the same type: a mischaracterization of Mr. Blass's statements using vituperative language. As this Court held in Syl. Pt. 10, State v. Satterfield, 193 W. Va. 503, 457 S.E.2d 440 (1995):

“ ‘Where objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal.’ Syllabus Point 1, State Road Commission v. Ferguson, 148 W.Va. 742, 137 S.E.2d 206 (1964).” Syllabus point 3, O’Neal v. Peake Operating Co., 185 W.Va. 28, 404 S.E.2d 420 (1991).

See also, Syl. Pt. 2, State v. Adkins, 209 W. Va. 212, 544 S.E.2d 914 (2001) (in order to preserve the error, counsel must “make [a] timely and proper objection to remarks of counsel made in the presence of the jury.”). As such, all that was required was a timely objection, which the Appellees made. There is no requirement that the Appellees interrupt opposing counsel’s argument again, again, and again simply because the same types of objectionable comments continue to come up.

Along the same lines, the Appellant complains that the Appellees did not ask for a curative instruction at the time. On this point, State v. Stephens, 206 W. Va. 420, 525 S.E.2d 301 (1999) is instructive.

In Stephens, the prosecutor told the jury in closing argument that, in his opinion, the defense attorney didn’t really believe in his client’s innocence. The defense attorney objected at the time, and the trial court gave a curative instruction. After the jury was excused to begin its deliberations, the defense counsel made a motion for a mistrial and the trial court denied that motion. Stephens, 206 W. Va. at 423, 525 S.E.2d at 304. This Court reversed the trial court and remanded the case for a new trial, in part, based on counsel’s clear violation of Rule 3.4 of the West Virginia Rules of Professional Conduct. Id., 206 W. Va. at 305, 525 S.E.2d at 424.

In addressing whether the trial court’s curative instruction was sufficient, Stephens observed:

The state argues that despite the error in the prosecutor's argument and the judge's initial "curative" instructions, the court's final remarks on the subject to the jury "undid the harm."

Judge Learned Hand once said that an instruction to the jury to ignore an objectionable piece of testimony is the "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else." Nash v. United States, 54 F.2d 1006, 1007 (2d Cir.1932). Where an instruction to a jury to disregard an improper argument is ineffective, a mistrial is an appropriate remedy. See State v. Gwinn, 169 W.Va. 456, 471, 288 S.E.2d 533, 542 (1982); State v. Bennett, 179 W.Va. 464, 473, 370 S.E.2d 120, 129 (1988).

As the instant case illustrates, the ability of a "curative" instruction to "unring the bell" with respect to such prosecutorial argument is uncertain at best. The prosecutorial argument in question goes to not a partial, minor, or tangential issue in the case-but to the core issue of a defendant's overall guilt. The improper argument focuses directly on and derives its force from the failure of the defendant's chief spokesperson to come forward with an affirmative statement to the effect that his client is innocent. The argument's use in rebuttal, when defense counsel can say nothing more, is particularly effective. By charging that defense counsel is appearing on behalf of a case that he or she cannot vouch for, the argument attacks the sincerity of and enlists the unwilling support of the very person who addresses the jury on behalf of the defendant, and on whose efforts the defendant must rely wholly at trial.

Stephens, 206 W. Va. at 425-26, 525 S.E.2d at 306-07. A nearly identical situation arose here. Mr. Stuhr waited until the last moment, his closing argument, to launch this vicious and unwarranted attack on Mr. Blass and Cathy Smith's entire case. Any attempt at a curative instruction would have been fruitless and, most importantly, would not have altered Judge Gaughan's obligations with respect to the Appellees' motion for a mistrial at all.

Indeed, through his Order on the Appellees' motion for a mistrial, Judge Gaughan stated that Mr. Stuhr's comments were so outrageous that he would have granted a mistrial even in the absence of a motion from Cathy Smith's counsel. July 29, 2005 Order at page 5.

Considering that the trial judge who watched the spectacle of Mr. Stuhr's closing felt that way, it would have been plain error for Judge Gaughn to have refused the mistrial motion regardless of the sufficiency of the Appellees' efforts to protect the record. See Syl. Pt. 7, State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995).

There was already a pre-trial order that should have prevented this situation from arising. When the Appellants' counsel began violating that pre-trial order in an egregious and repeated fashion, counsel for the Appellees asserted a timely objection. At the earliest opportunity, Appellee's counsel moved for a mistrial. Under the circumstances, no more was required to protect the record.

C. JUDGE GAUGHAN WAS WITHIN HIS DISCRETION TO TAKE THE PLAINTIFFS' MOTION FOR A MISTRIAL UNDER ADVISEMENT UNTIL THE JURY RETURNED ITS VERDICT:

As soon as was practicable after closing arguments, the Appellees made their motion for a mistrial. Judge Gaughan took that matter under advisement while the jury deliberated. The Appellees respectfully submit that there is no error in the way Judge Gaughan handled the Appellees' motion.

The Appellants cite Vilar v. Fenton, 181 W. Va. 299, 382 S.E.2d 352 (1989) for the proposition that a mistrial can only be granted before the jury reaches a verdict. However, Vilar presented a far different set of circumstances than those presented here. In Vilar, following a trial regarding the validity of a will, the judge discovered that he had a potential conflict of interest. On that ground alone, he *sua sponte* declared a mistrial, and transferred further proceedings to a new judge. Id., 181 W. Va. at 299-300, 382 S.E.2d at 352-53. In a passage that illustrates just how different Vilar was from what happened here, this Court explained:

Consequently, it is generally recognized that 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. The Illinois court has aptly summarized this point in Williams v. Deasel, 19 Ill.App.3d 353, 311 N.E.2d 414 at 415 (1974):

A motion for a mistrial is a procedural tool whetted and honed for use during the trial to cut it short for legal reasons which preclude a verdict and entering a judgment that cannot possibly stand. It can therefore be utilized only as a pre-verdict **motion** and not a **post-verdict or post-trial motion**.

In the case at bar, only after the verdict had been entered, the jury discharged, and a motion for a new trial filed, did the trial judge become aware of possible grounds for his disqualification; thus, his declaring a mistrial was procedurally incorrect.

Id., 181 W. Va. at 300, 382 S.E.2d at 353 (emphasis supplied). In fact, the technical nature of the Vilar opinion is demonstrated by the ultimate disposition of the case. This Court did not reinstate the jury verdict. Rather, this Court remanded the matter so that a new judge could decide the Appellants' motion as a motion for a new trial, rather than a motion for a mistrial.

Id., 181 W. Va. at 301, 382 S.E.2d at 354.

Here, and unlike Vilar, the Appellees made their motion for a mistrial before the verdict was returned and, in deference to judicial economy, the trial court took the matter under advisement while the jury deliberated. By the time this case went to trial, the parties had invested numerous hours and thousands and thousands of dollars. Even after Mr. Stuhr's summation, there remained a possibility, however slight, that the jury would see through what he had done and find for the plaintiffs. Before the jury returned its verdict, there was simply no way to know *for sure* if Mr. Stuhr had wasted everyone's time and money. There was no error in simply waiting to find out that he had.

Indeed, the sequence of events here is very much similar to the sequence in State v. Stephens, *supra*, where the defendant made a motion for mistrial after the jury had retired for deliberations. The Appellees respectfully submit that that once a motion for a mistrial is timely made, it makes no sense to force the trial judge to race the jury back to the courtroom with a ruling.

VI. CONCLUSION:

Judge Gaughan was present in the courtroom when Mr. Stuhr launched his all-out attack on his opposing counsel. Mr. Stuhr, in Judge Gaughan's presence, vouched for his own case, totally misrepresented the contents of the plaintiffs' case, and accused plaintiffs' counsel of the most serious forms of professional abuse. As Judge Gaughan stated in his order, he would have ordered a mistrial even in the absence of a motion from Cathy Smith.

Mr. Stuhr's comments violated Judge Gaughan's pretrial order and were objected to in a timely manner by Appellee's counsel. Judge Gaughan took the Appellee's timely motion for a mistrial under advisement and ultimately ruled in Cathy Smith's favor. The Appellees very respectfully submit that Judge Gaughan did not abuse his discretion and ask this Court to AFFIRM his ruling.

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EXHIBITS

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