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CIRCUIT COURT  
IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

CATHERINE I. SMITH and  
JOHN SMITH

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DRENDA L. MILLER

Plaintiffs,

v.

Civil Action No.: 01-C-451  
Honorable Martin J. Gaughan

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

Defendants.

**ORDER**

This matter came before the Court by way of a written motion initiated by Plaintiff's, Catherine I. Smith and John Smith (hereinafter Smith's), Motion for Mistrial.

The Court has studied the Motion, Plaintiff's Response thereto, the memoranda of law, affidavits, depositions and exhibits submitted by the parties; considered all papers of record, and reviewed the pertinent legal authorities. As a result of these deliberations, for the reasons set forth below, the Court has concluded that Plaintiff's Motion for Mistrial is Granted.

In a deposition Defendant, Derek Andreini, M.D. and Orthopaedic Surgery, Inc. (hereinafter Andreini), testified that he did not explain the risks involved with a shoulder manipulation procedure until he met with Plaintiff fifteen (15) minutes beforehand in the fracture room, and that he signed the consent form in the fracture room. Significantly, Plaintiff was moved to the fracture room after the sedative was administered.

At trial Defendant testified that he explained the procedure to Plaintiff in the "preop" room before any sedative was administered. In closing arguments, Plaintiff highlighted these

discrepancies.

Plaintiff counsel also highlighted the inconsistency in testimony between Defendant, who said he examined Plaintiff in the emergency room later in the day after the procedure, and Plaintiff, who stated she did not remember seeing Defendant in the emergency room.

It was further argued by Plaintiff that regardless if Defendant was there or not, he did not order an x-ray. The failure to order an x-ray under the circumstances was negligent.

Plaintiff admits that attorneys are given great latitude in arguing their cases before the jury, but asserts that defense counsel crossed the line by personally attacking Plaintiff and plaintiff's counsel.

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

Additionally, the Court granted a Motion in Limine filed in an omnibus motion which the Court stated applied to both parties. Part "K" of the Motion prohibited counsel for both parties from commenting or making personal attacks on the character or truthfulness of each other in the presence of the jury.

From the outset, defense counsel argued that Plaintiff's counsel was telling the jury "It's not enough for the Plaintiff's to come into this courtroom and have a legitimate difference of opinion with Dr. Andreini in regard to whether he was responsible for this nice lady's injuries.

That's not enough. No, they have to tell you that he is lying, cheating, loathsome, despicable human being. Let's face it, be honest, that is precisely what you just heard." TR, at 3.

This was not isolated, but part of the theme of Defense counsel's closing argument. For instance, Defense Counsel stated that the Plaintiff accused Defendant of being "a reprehensible human being...[that] he lied to you, he committed fraud." TR, at 37-8. Then inexplicably, Defense Counsel's finale he put these words in Plaintiff's mouth, "Doctor, you're...a despicable jerk." TR, at 39.

This theme was carried over to Defendant's witnesses. Concerning Defendant's expert, Dr. Rodosky, defense counsel asked the jury if he was a credible witness "or a big fat liar that Mr. Blass says he is?" TR, at 16. In fact, defense counsel summarized it this way, "There has been an awful lot of liars in this case folks, for them to be right about an awful lot of things...There are a lot of people who have to be fibbing to you in order for them to be right." TR, at 24.

Remarkably, defense counsel started to personally attack plaintiff counsel, and set it up by bolstering his own credibility by stating "I have a duty to not lie to you, or mislead you...And I don't get paid to get up here and hoodwink you. I don't get paid to get up here and deceive you, pull the wool over your eyes." TR, at 4.

Next, continuing the theme, defense counsel assessed Plaintiff counsel's use of medical records. Defense counsel stated "when the medical records say something he likes, they are in granite; and when those medical records say something he doesn't like, he tells you they are either a lie or wrong." TR, at 27-8.

There are two lines of authority. The first one deals with an in limine order. Syl. Pt. 5, Honaker v. Mahon, 210 W.Va. 53 (2001) states "a deliberate and intentional violation of a trial

court's ruling on a motion in limine, and thereby the intentional production of prejudicial evidence into a trial, is a ground for reversal of a jury verdict. There is no doubt the violation of this order was deliberate. After all the motion was brought by defendant in the first place. Certainly, Defendant was aware of the order and the scope.

State v. Kennedy, 162 W.Va. 244, 249 (1978) deals with the subject of intemperate, prejudicial remarks made in the course of argument. Kennedy states "that great latitude is allowed counsel in the argument of cases is an established rule. It is well settled, however, that counsel must keep within the evidence and not make statements calculated to inflame the minds of jurors intending to introduce verdicts warped by prejudice." Id at 249.

Furthermore, "vituperative remarks of counsel in argument before the jury are improper and may be sufficient cause for setting aside a verdict favorable to the party represented by such counsel." Slaven v. Baltimore & Ohio R.R. Co., 114 W.Va 315 (1983).

Slaven is especially relevant to this case because two witnesses who testified favorably for the Slaven Defendant were labeled as liars by Counsel. The Court recognized the duty of counsel to point out inconsistencies in the testimony of the witnesses, but noted that it was improper to make vituperative remarks suggesting that a witnesses was deliberately lying.

The case at hand is Slaven magnified a hundredfold. Defense counsel developed what can only be described as a "big fat liar" theme. It was defense counsel, not Plaintiff, who used words like "liar," reprehensible, loathsome, and despicable. Lying became the dominant theme, the drum which defense counsel beat consistently from the beginning of his argument to the end.

If plaintiff's counsel would have that kind of language in reference to Defendant, or defendant's counsel this Court would have similarly granted a mistrial. However, plaintiff's

counsel carefully crafted his argument not to employ such vituperative language.

Defendant points that this motion was not timely made and there was no objection to defense counsel's closing argument sufficiently made or preserved. Further, there is no basis for deferring a ruling on a motion for a mistrial until the jury returns a verdict. However, this Court would have granted this motion for mistrial *sua sponte* at the closing of arguments, but judicial economy dictated the jury should reach a verdict. Thereby, avoiding the possibility of an unnecessary retrial. If the verdict would have favored Plaintiffs, then this would be harmless error, and there would be no need for granting the mistrial because no prejudice would have occurred.

Moreover, plaintiff's counsel did enough by just objecting to defense counsel's comments describing Plaintiffs and plaintiff's counsel as "big fat liars." Additionally, moving for mistrial at the close of arguments was enough to preserve these issues.

Furthermore, there is a long held tradition not to interrupt opposing counsel during closing arguments. Plaintiff's counsel upheld this tradition to the best of his abilities, except out of necessity to object to the "big fat liar" comment and to preserve this issue.

Henceforth, defense counsel's vituperative language and personal attacks on Plaintiffs and plaintiff's counsel were unnecessary, they violated this Court's in limine motion and they violated case law regarding these issues and Plaintiff's Motion for Mistrial shall be granted. Since, this Court has granted the motion in question, Defendant shall have the opportunity to test this Court's Order in front of the West Virginia Supreme Court of Appeals before retrying the case.

WHEREFORE, it is ADJUDGED, ORDERED and DECREED that Plaintiff's, Catherine

I. Smith and John Smith, Motion for Mistrial is GRANTED. This is a Final Order and Defendant shall have the opportunity to test this Court's Order before the West Virginia Supreme Court of Appeals before retrying the case. The Circuit Clerk shall transit attested copies of this Order to all counsel of record.

ENTER this 29th day of July 2005.

  
MARTIN J. GAUGHAN, JUDGE  
First Judicial Circuit

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ENTERED IN CIVIL  
ORDER BOOK 137  
PAGE 132  
as dated on Order.

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CLERK OF THE CIRCUIT  
COURT OF OHIO COUNTY, WV