NO. COA01-1433

NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2002

DEBI EVANS, Administratrix
of the Estate of
JOHNNY B. EVANS,

Plaintiff,

v. Rutherford County
No. 99 CVS 804

RUTHERFORD HOSPITAL, INCORPORATED;
RUTHERFORD INTERNAL MEDICINE
ASSOCIATES, P.A., and GARY
R. SCHAFER, M.D.,

Defendants.

Appeal by plaintiff from order entered 10 May 2001 by Judge Dennis J. Winner in Rutherford County Superior Court. Heard in the Court of Appeals 9 September 2002.

Blanchard, Jenkins, Miller & Lewis, P.A., by Robert O. Jenkins; Law Office of T. Kent Baldwin, by T. Kent Baldwin, for plaintiff-appellant.

Northup & McConnell, P.L.L.C., by Isaac N. Northup, Jr., and Anna R. Hamrick, for defendant-appellees.

MARTIN, Judge.

Debi Evans, as administratrix of the estate of Johnny B. Evans ("plaintiff") appeals the denial of her motion for a new trial against Rutherford Hospital Inc., Rutherford Internal Medicine Associates, P.A., and Gary R. Schafer, M.D. ("defendants"). We affirm the trial court's denial of plaintiff's motion.

Plaintiff initiated this wrongful death medical negligence action on 3 August 1999, alleging defendants' failure to provide proper medical care to her husband, Johnny Evans, resulting in his death from coronary atherosclerosis. Prior to trial, defense counsel informed plaintiff's counsel that Dr. Brian Hearon, a defense witness, would be unable to appear and testify as an expert witness at trial due to the recent death of his son in an automobile accident. Defendants filed an affidavit from Dr. Hearon to this effect on 12 February 2001. Upon receiving this information, plaintiff filed a motion to use Dr. Hearon's 19 July 2000 deposition at trial pursuant to Rule 32 of the Rules of Civil Procedure. The trial court considered the motion and concluded Dr. Hearon was unable to testify, and that both plaintiff and defendants would be permitted to use Dr. Hearon's deposition at trial.

Although it does not appear from the record, both parties agree the trial court informed defense counsel that he could share with the jury that Dr. Hearon would not be testifying due to the recent death of his son, and that defense counsel made reference to Dr. Hearon's situation in his opening statement. Prior to plaintiff's reading portions of Dr. Hearon's deposition into evidence, the trial court told the jury that "because of a tragic automobile accident . . . the witness was just not capable of appearing as a live witness; and that's why deposition evidence is being introduced."

The trial proceeded, and on 22 February 2001, a jury returned

a verdict in favor of defendants. Plaintiff filed a motion for a new trial on 2 March 2001 based, in part, on the assertion that defense counsel made statements during his closing argument which were "grossly improper," "intentionally calculated to inflame and unfairly prejudice the jury," and a violation of the rules of court and professional conduct in that he "misled the jury as to the nature of certain evidence and why it was presented." Although closing arguments were not transcribed, and thus do not appear in the record, the motion was supported by four affidavits, including those of plaintiff's counsel, co-counsel, and an employee of co-counsel, all of whom testified that during closing arguments, defense counsel commented that plaintiff's counsel was "making things up;" thought the jury "would believe anything;" had engaged in a "dirty lawyer trick" by presenting Dr. Hearon's deposition testimony; was "taking advantage of" Dr. Hearon's inability to appear due to the death of his son; and was unfairly using the testimony of a witness unable to appear because of "his dead son." In addition, Shirley Bailey, Assistant Clerk of Superior Court of Rutherford County, submitted an affidavit stating that she was in the courtroom during defense counsel's closing argument, and that she heard him use the phrases "dirty lawyer trick" and that plaintiff's counsel was "taking advantage of" Dr. Hearon's unavailability due to his "dead son."

Defendants submitted an affidavit from Anna Hamrick, an attorney for Dr. Schafer, to the effect that defense counsel did not use the phrase "dirty lawyer trick" during his closing

argument; that based on discussions with the jury foreman it was evident the jury reached a verdict based on the evidence and the law; and that at no time during closing arguments did plaintiff's counsel object to any statements made by defense counsel. In addition, defendants tendered an affidavit of the jury foreman, which the trial court refused to consider.

Following a hearing on plaintiff's motion, the trial court entered an order in which it found that during his closing argument, defense counsel had made the statement that plaintiff's counsel had used a "dirty lawyer trick" and that the statement was inappropriate; that plaintiff's counsel failed to object to anything in the closing argument; and that plaintiff's counsel had attempted to respond to the allegation in his closing argument for plaintiff. While noting its disapproval of defense counsel's statement, the trial court determined it was not prejudicial and denied plaintiff's motion for a new trial. Plaintiff appeals.

Plaintiff's sole argument on appeal is that the trial court abused its discretion in denying her motion for a new trial because defense counsel's argument was grossly improper and calculated to prejudice the jury. Defendants cross-assign as error the trial court's failure to consider the affidavit of the jury foreman in ruling upon plaintiff's motion.

Our standard of review of the denial of a motion for a new trial pursuant to G.S. § 1A-1, Rule 59 (2001) is strictly limited to a determination of whether the trial court manifestly abused its

discretion. *Leftwich v. Gaines*, 134 N.C. App. 502, 517, 521 S.E.2d 717, 728, *disc. review denied*, 351 N.C. 357, 541 S.E.2d 713 (1999). "The trial court's discretion is '"practically unlimited,"'" and an order denying a motion under Rule 59 should be reversed "'only in those exceptional cases where an abuse of discretion is clearly shown.'" *Id.* at 517-18, 521 S.E.2d at 728 (citations omitted). "'[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice.'" *Id.* at 518, 521 S.E.2d at 728 (citation omitted).

We first note the trial court found only that defense counsel made the statement that plaintiff's counsel had engaged in a "dirty lawyer trick." The trial court made no findings as to whether defense counsel made any of the other statements alleged in plaintiff's supporting affidavits, such as the statement that plaintiff's counsel took advantage of Dr. Hearon's unavailability due to his "dead son." Plaintiff has not assigned error to the absence of such additional findings. Therefore, we may not consider any additional statements allegedly made by defense counsel, as the trial court did not determine whether, in fact, such statements were actually made. Our decision may only be based on the finding that defense counsel accused plaintiff's counsel of employing a "dirty lawyer trick."

Where a plaintiff fails to object to an allegedly improper argument at trial, "our review is limited to discerning whether the statements were so grossly improper that the trial court abused its

discretion in failing to intervene *ex mero motu*." *O'Carroll v. Texasgulf, Inc.*, 132 N.C. App. 307, 315, 511 S.E.2d 313, 319, *disc. review denied*, 350 N.C. 834, 538 S.E.2d 198 (1999). "'"[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it."'" *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998) (citations omitted), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999). Moreover, this Court "will not review the judge's exercise of discretion unless there exists such gross impropriety in the argument as would likely influence the jury's verdict." *Burchette v. Lynch*, 139 N.C. App. 756, 766, 535 S.E.2d 77, 84 (2000).

In *State v. Bowman*, 349 N.C. 459, 509 S.E.2d 428 (1998), *cert. denied*, 527 U.S. 1040, 144 L. Ed. 2d 802 (1999), our Supreme Court held that the prosecutor's comment during closing arguments that "'reasonable doubt is not created or manufactured by lawyers getting up here and arguing to you and trying to do those lawyer trick things'" did not amount to misconduct so improper as to prejudice the result of the trial. *Id.* at 473, 509 S.E.2d at 437. In so holding, the court noted that the comment appeared to be a statement referenced to lawyers in general, and to the extent it was directed at defense counsel, it was an isolated comment, and not a repeated attempt to diminish defense counsel before the jury. *Id.* at 473-74, 509 S.E.2d at 437.

In this case, we observe that had plaintiff believed at the time that the remark was grossly improper and truly prejudicial, plaintiff could have immediately objected and requested a mistrial. Instead, plaintiff's counsel failed to even object to the admittedly improper remark, and then proceeded to give a closing argument in which, according to the trial court, he attempted to refute the accusation that he had engaged in a "dirty lawyer trick."

Although plaintiff argues defense counsel's argument was grossly improper because it addressed issues not in evidence (i.e., the reasoning behind Dr. Hearon's failure to testify), the trial court made no finding which would support plaintiff's argument. In any event, we observe that the trial court did, in fact, address before the jury the issue of Dr. Hearon's unavailability and the reason therefor prior to introduction of his deposition testimony, and thus, we do not agree that any reference by Northup to that unavailability would necessarily have been improper in and of itself.

We agree with the trial court that defense counsel's statement characterizing plaintiff's counsel's use of the deposition as a "dirty lawyer trick" was improper, however, the record fails to reveal the required manifest abuse of discretion and substantial miscarriage of justice in the trial court's conclusion that the statement did not prejudice the result of the trial. We conclude the trial court did not abuse its discretion in failing to intervene *ex mero motu* and in failing to grant plaintiff a new

trial. In light of this holding, we need not address defendants' cross-assignment of error.

Affirmed.

Chief Judge EAGLES and Judge HUNTER concur.

Report per Rule 30(e).