IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

WANDA VOLNER and WILLIAM VOLNER,	)	
Plaintiffs/Appellants,	)	Madison Circuit No. C-93-362
v.	)	
VANTREESE DISCOUNT PHARMACY, INC. and JAMES ELWOOD KING, JR.,	)	Appeal No. 02A01-9712-GS-00298
Defendants/Appellees.	)	

APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY
AT JACKSON, TENNESSEE

THE HONORABLE JOHN FRANKLIN MURCHISON, JUDGE

For the Plaintiffs/Appellants:	For the Defendants/Appellees:
T. Robert Hill Frankie E. Wade Sherry M. Percival Jackson, Tennessee	Richard Glassman Richard Sorin Memphis, Tennessee

AFFIRMED

HOLLY KIRBY LILLARD, J.

CONCURS:

W. FRANK CRAWFORD, P.J., W.S.

ALAN E. HIGHERS, J.

OPINION

This is a pharmacist malpractice case. The plaintiff appeals a jury verdict in favor of the defendants, asserting the use of improper argument in closing statements. The trial court denied the plaintiff's motion for a new trial. We affirm.

Plaintiff Wanda Volner ("Volner") had a long history of lupus erythematosus, which was controlled by steroid medication. On December 22, 1992, her physician gave her a prescription for five milligrams of a steroid, prednisone. Volner took the prescription to the Defendant Vantreese Pharmacy. The pharmacist, James Elwood King ("King"), filled the prescription with ten milligrams of prednisone, rather than five milligrams. Volner ingested the ten milligram pills for four days.

On December 26, 1992, Volner developed a severe headache on the left side of her head. She was admitted to the hospital where doctors determined she had suffered a stroke, resulting in partial blindness. Volner filed suit against Vantreese Pharmacy and King, alleging malpractice. Volner was represented by T. Robert Hill ("Hill"). The jury returned a verdict for Vantreese Pharmacy and King.

After the trial, Volner moved for a new trial. In the motion, Volner argued that during closing argument, counsel for Vantreese Pharmacy, Richard Glassman ("Glassman") engaged in improper argument which was unwarranted by the evidence and designed to appeal to the passions and prejudices of the jurors. Volner asserted that the jury instructions were insufficient to repair the damage. The trial court denied Volner's motion for a new trial. Volner now appeals the trial court's denial of the motion for new trial.

The closing argument to which Volner objects consisted of the following exchanges:

> Mr. Glassman: Has anybody come in here and told you anything else other than loss of vision in the right quadrants of both eyes? And I'm not making light of that, but this is an important point; nobody. If there was any doctor out there in the world that could tell you that, I guarantee you Mr. Hill with all his resources and all his camera equipment and all his electronic stuff would have a videotape in here running showing you this lady has a problem with her face . . . . It's a lawyer trying to sell you something just like through the years have sold juries on McDonald's coffee spills, on using dynamite to unclog a toilet and the guy that lit the dynamite got hurt. It's lawyers who sell the cases where you use hedge trimmers to try to cut your grass and you cut your toe. But you know what that has caused? That's caused drug manufacturers to put in their warnings every conceivable thing on earth--
>
> Mr. Hill: Objection. There is no evidence of that. That's outside the realm of this record. Your Honor please. It's improper argument, as is most of the rest of it.

At this point, the court gave an instruction to the jury regarding the argument of the package inserts of drug manufacturers.

Court: Well, there is no proof of why the manufacturers of pharmaceutical companies put anything--put what they do in those papers they sell with their product, although, you know, you can draw inferences that you may want to draw from what you saw. You saw the document; you saw what it said. And if Mr. Glassman draws some inference that's not justified, I'm going to let the jury decide that. Juries have a way of judging the arguments of lawyers, and we trust that they'll do that.

Mr. Glassman: Thank you.

Mr. Hill: Just note for the record--

Court: Absolutely, absolutely.

Mr. Hill: --my exception to this form of argument and this improper argument.

Court: And we'll give you a rebuttal on it, keeping in mind, you know, again I want to put an emphasis on this, not because of anything Mr. Glassman will say, but just what I've said before because we might have other objections. What lawyers say are not evidence. The evidence has come to you in the form of testimony. And the lawyers, we give them a great deal of latitude in making jury arguments. Some people may think we give them too much, but I feel like I have great confidence in jurors, and I think that jurors know how to receive this, and we like to give lawyers latitude and let them go at it.

And with that we're going to let you go ahead and we're going to let Mr. Hill do some rebuttal if he would like to.

Mr. Glassman: Thank you, Your Honor. Can I go back at it?

Court: You can go back at it.

Mr. Glassman: Thank you.

Court: Remembering that there is no proof in this record what caused any pharmaceutical company to put -- What do you call those things?

Mr. Glassman: Package inserts.

Court: Package inserts. There's no proof behind that. I think that maybe Dr. Powers did draw some inferences and make some suggestions, but there isn't any proof ....

On appeal of a denial of a motion for new trial, the standard of review is whether the trial court abused its discretion in refusing to grant a new trial. "A trial court is given wide latitude in granting a motion for new trial, and a reviewing court will not overturn such a decision unless there has been an abuse of discretion." ***Loeffler v. Kjellgren***, 884 S.W.2d 463, 468 (Tenn. App. 1994) (citing ***Mize v. Skeen***, 63 Tenn. App. 37, 42-43, 468 S.W.2d 733, 736 (1971); ***Tennessee Asphalt Co. v. Purcell Enter.***, 631 S.W.2d 439, 442 (Tenn. App. 1982)).

Volner argues that the trial court erred in denying his motion for a new trial. Volner contends that Glassman engaged in improper argument by referring to the resources of the firm representing

Volner, and that the argument was designed to appeal to passions and prejudices of the jury by attacking the civil justice system.

We first address Volner's argument on Glassman's reference to the financial condition of Hill's firm. It is well established that the trial court, in its sound discretion, shall determine what is proper argument in a particular case. ***Painter v. Toyo Kogyo of Japan***, 682 S.W.2d 944, 951 (Tenn. App. 1984); ***see also J. Avery Bryan, Inc. v. Hubbard***, 225 S.W.2d 282, 287 (Tenn. App. 1949). Generally, appellate courts will not review the action of the trial court in refusing to grant a mistrial or a new trial based upon improper argument of counsel "unless the argument is clearly unwarranted and made purely for the purpose of appealing to passion, prejudices and sentiment, which cannot be removed by the trial judge's sustaining the objection of opposing counsel, or unless we affirmatively find that such argument affects the results of the trial." ***Doochin v. U.S. Fidelity & Guar. Co.***, 854 S.W.2d 109, 116 (Tenn. App. 1993); ***see also Davis v. Hall***, 920 S.W.2d 213, 217 (Tenn. App. 1995); ***Perkins v. Sadler***, 826 S.W.2d 439, 442 (Tenn. App. 1992). Appellate courts have tended to reverse a trial court's refusal to grant a new trial "where counsel's misconduct has been persistent." ***Doochin***, 854 S.W.2d at 116 (citing ***English v. Ricks***, 117 Tenn. 73, 78, 95 S.W. 189, 190 (1906); ***Prewitt-Spurr Mfg. Co. v. Woodall***, 115 Tenn. 605, 609, 90 S.W. 623, 624 (1905).

In this case, Glassman made a reference to Hill's resources by stating during closing argument: "I guarantee you Mr. Hill with all his resources and all his camera equipment and all his electronic stuff would have a videotape in here running showing you this lady has a problem with her face . . . ." At that time, Hill made no objection to this statement. Glassman continued and subsequently referred to other litigation not involving the parties, such as "McDonald's coffee spills." Hill then objected: "[o]bjection. There is no evidence of that. That's outside the realm of this record, You Honor please. It's improper argument, as is most of the rest of it."

In ***Davis v. Hall***, the Court held that counsel's remarks in opening statement regarding the plaintiff's previous worker's compensation settlement did not amount to reversible error, noting that defense counsel failed to object to the statement and did not move for a curative instruction or mistrial. ***Davis***, 920 S.W.2d at 218. ***See also Morgan v. Duffy***, 94 Tenn. 686, 30 S.W. 735, 736 (1895). In this case, plaintiff's counsel did not object to the statement regarding the resources of

Hill's firm, nor did he move for a curative instruction or for mistrial. Under these circumstances, we find that the trial court did not err in refusing to grant Volner's motion for new trial on this basis.

Volner argues that Glassman appealed to the prejudices of the jury by attacking the civil justice system and alluding to litigation by plaintiffs and large jury verdicts. Glassman argued in part:

> It's a lawyer trying to sell you something just like through the years have sold juries on McDonald's coffee spills, on using dynamite to unclog a toilet and the guy that lit the dynamite got hurt. It's lawyers who sell the cases where you use hedge trimmers to try to cut your grass and you cut your toe. But you know what that has caused? That's caused drug manufacturers to put in their warnings every conceivable thing on earth--

At this point, plaintiff's counsel objected on the grounds that the argument consisted of facts outside of the record. Although there was no request for a curative instruction, the trial court admonished the jury:

> Well, there is no proof of why the manufacturers of pharmaceutical companies put anything--put what they do in those papers they sell with their product, although, you know, you can draw inferences that you may want to draw from what you saw. You saw the document; you saw what it said. And if Mr. Glassman draws some inference that's not justified, I'm going to let the jury decide that. Juries have a way of judging the arguments of lawyers, and we trust that they'll do that.

Subsequently, plaintiff's counsel objected to the form of the argument. The trial court again instructed the jury:

> And we'll give you a rebuttal on it, keeping in mind, you know, again I want to put an emphasis on this, not because of anything Mr. Glassman will say, but just what I've said before because we might have other objections. What lawyers say are not evidence. The evidence has come to you in the form of testimony. And the lawyers, we give them a great deal of latitude in making jury arguments. Some people may think we give them too much, but I feel like I have great confidence in jurors, and I think that jurors know how to receive this, and we like to give lawyers latitude and let them go at it . . . .

Before Glassman continued his argument, the Court again instructed the jury that there was no proof in the record concerning why pharmaceutical companies include the amount of information in the package inserts.

Thus, in the absence of any request for a curative instruction or any motion for mistrial, the trial court nevertheless admonished the jury three times. Under these circumstances, we find that it is unlikely that the conduct of counsel affected the outcome of the trial.

The decision of the trial court is affirmed. Costs are assessed against the Appellants, for which execution may issue if necessary.

HOLLY KIRBY LILLARD, J.

CONCUR:

W. FRANK CRAWFORD, P. J., W.S.

ALAN E. HIGHERS, J.