No. 34271 - Catherine I. Smith and John Smith v. Derek Andreini, M.D. and Orthopaedic Surgery, Inc.

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June 9, 2009
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Workman, Justice, concurring, in part, and dissenting, in part:

I concur with the majority's decision in this case to the extent that it holds that for purposes of appeal, this Court may consider an improperly granted order declaring a mistrial as an order granting a new trial. I respectfully dissent, however, from the majority's decision insofar as it concludes that the trial court abused it discretion by setting aside the jury's verdict and granting the appellees, Catherine and John Smith, a new trial. I believe that the record as presented to this Court was not sufficient to warrant the reversal of the trial court's order. The Smiths argued below, and the trial court agreed, that they were entitled to a new trial because of certain remarks made by counsel for Dr. Andreini, the appellant, during his closing argument. In this appeal, Dr. Andreini asserted that the trial court erred in granting a new trial because the remarks made by his attorney were merely responsive to comments made by counsel for the Smiths during his closing argument and were not prejudicial. In particular, Dr. Andreini stated in his brief submitted to this Court that,

> Mr. Blass [the Smiths' attorney] 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 [Dr. Andreini's attorney] in closing argument that

> [the Smiths] would have the jury believe that Dr. Rodosky is lying.

Although Dr. Andreini's argument in this appeal hinged on the closing argument made by counsel for the Smiths, he failed to submit the transcript of the closing argument made by the Smiths' attorney for this Court to review.

"In a long line of unbroken precedent, this Court has held that the responsibility and burden of designating the record is on the parties and that appellate review must be limited to those issues which appear in the record presented to this Court." *State v. Honaker*, 193 W.Va. 51, 56, 454 S.E.2d 96, 101 (1994) (footnote omitted). This Court has explained that

> "[t]he designation of the record is important. . . . Not only must the significant portion of the record relating to that alleged error be identified, the precise part of the record must be designated. Otherwise, the error will be treated as nonexisting. *See State v. Flint*, [171 W.Va. 676], 301 S.E.2d 765 (W.Va.1983)." II Franklin D. Cleckley, Handbook on West Virginia Criminal Procedure 497-98 (1993).
>
> It is counsel's obligation to present this Court with specific references to the designated record that is relied upon by the parties. The failure of counsel to file the appropriate parts of the record below makes it difficult for this Court to read the parties' briefs and understand their arguments.

Id. at 56 n.4, 454 S.E.2d at 101 n.4. Accordingly, this Court has stated that

> "[a]n appellant must carry the burden of showing error in the judgment of which he complains. This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment."

> Syllabus Point 5, *Morgan v. Price*, 151 W.Va. 158, 150 S.E.2d 897 (1966).

Syllabus Point 2, *WV Dept. of Health and Human Resources Employees Federal Credit Union v. Tennant*, 215 W.Va. 387, 599 S.E.2d 810 (2004).

The record indicates that counsel for Dr. Andreini did not attempt to obtain the transcript of the closing argument made by the Smiths' attorney until more than twenty months after the verdict was rendered in this case. Even though the Smiths moved for a mistrial immediately following the closing arguments and even though the trial court held a hearing on the issue three months following the trial, Dr. Andreini's counsel did not request the transcript of the closing argument made by counsel for the Smiths until after the trial court granted a new trial. By that point, the transcript could not be produced because of the death of the trial judge's court reporter. It is clear that if Dr. Andreini's counsel had acted diligently and in a timely manner, the transcript of the closing argument made by the Smiths' attorney could have been obtained. In that regard, counsel for the Smiths acquired the transcript of the closing argument made by Dr. Andreini's attorney and submitted it to the trial court prior to the hearing on their motion for a mistrial.

Absent the transcript of the closing argument made by the Smiths' attorney, I do not believe that the record submitted to this Court provided a basis to reverse the trial court's order granting a new trial. This Court has held that "[t]he 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." Syllabus Point 3, *State v. Boggs*, 103 W.Va. 641, 138 S.E. 321 (1927). In this case, the trial court, after hearing both closing arguments, concluded that "[d]efense counsel went beyond the scope of proper argument by grossly mischaracterizing Plaintiff's closing argument and by injecting harsh and vituperative remarks." The trial court was in a better position than this Court to make that call, especially given the record presented to this Court. I do not believe there were sufficient grounds to conclude that the trial court abused its discretion in setting aside the verdict and granting a new trial. Accordingly, I would have affirmed the July 25, 2005, order of the trial court.

Based upon the foregoing, I concur, in part, and dissent, in part.