No. 23943 - Mary Coleman, et al. v. Irwin Sopher

Maynard, Justice, dissenting:

To begin with, there is simply no tort here. This case is just another example of some of the craziness going on in the American judicial system today. This case is not about righting a wrong, it is all about the relentless pursuit of money. It is a fake claim based on imagined evidence.

First, this family sought an autopsy of their loved one. The family claims the autopsy was done at their request, absent which the autopsy would not have been performed. For what purpose did they seek to have the body of their loved one dissected? Not for medical science or to solve a crime. They wanted their loved one dissected in order to get a black lung check. Their sensibilities were not offended in the least by having the body of their loved one cut open, bones sawed apart and organs removed

and examined. In fact, that is exactly what they wanted done so they could get the black lung check.

After the first autopsy, the remains of the deceased were interred. The plaintiffs then had the coffin disinterred, the body exhumed and dissected a second time in a second autopsy, all in their dogged effort to win the black lung claim. The body was autopsied the second time by Dr. E. Hansbarger. It was done in a poorly lit, dingy back room at the mausoleum. Dr. Hansbarger wanted to take the body outside and do the dissection behind the building in broad daylight. Cemetery officials refused to allow him to do so. None of these facts disturbed the family.

Dr. Hansbarger then took the lungs and central chest from the body, put the organs in plastic bags, took them in the bags to his lab and analyzed them. Then he disposed of them. The lungs and central chest were never returned to the body and were not reinterred. Oddly, these facts did not offend the family. They are not in the least upset that Dr. Hansbarger disposed of the deceased's lungs and central chest, but they are

emotional wrecks because the heart is not with the body. Dr. Hansbarger further testified at trial that it was possible he missed the presence of the heart during his autopsy. Dr. Sopher also testified he did not remove the heart during the first autopsy and his written records reflect that as well. Based on this kind of appallingly weak evidence, this Court has upheld a simply awful verdict.

I further dissent because I believe the circuit court abused its discretion by admitting testimony at trial that Dr. Sopher had donated brain tissue to the Marshall University Medical School without notice to decedents' family members in the past.

The majority declines to address the West Virginia Rule of Evidence 404(b) issue because it finds Dr. Sopher failed to raise, on the record, the specific errors he now asserts in his appeal to this Court. The majority notes that Dr. Sopher's counsel made two objections pertaining to the form of the particular question being asked Dr. Sopher on cross-examination and one objection based on relevancy. The majority states further that "[w]hile the record indicates that Sopher presented a motion

in limine for the exclusion of the evidence herein complained of, the record fails to establish that the specific challenges now raised were presented to or addressed by the court below. Thus, Sopher failed to preserve these alleged errors." I disagree with the majority's assessment of what the record reveals concerning Dr. Sopher's preservation of the errors now raised in this Court.

Although the portion of the pre-trial proceedings relevant to this issue is anything but a model of clarity, I believe Dr. Sopher's counsel said enough to give the trial court an opportunity to address the issue at a time when corrective action could have been taken. West Virginia Rule of Evidence 404(b) provides, in part, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Based on this rule, Dr. Sopher now asserts, in part, that the testimony at issue "only tended to prove [his] character and his propensity to act in conformity therewith." A careful reading of portions of the pre-trial proceedings of October 1, 1992 reveals a dialogue between the court, Mr. Cometti, attorney for the appellees, and

Mr. Johns, attorney for Dr. Sopher, concerning proposed evidence, including testimony that Dr. Sopher's office "had shaved off parts of brains from cadavers in their custody and sent to Marshall University" for the purpose of general experimentation. After much discussion, the court determined "that probably this evidence would be admissible. *At least, I don't think I ought to sustain the motion in limine*" (emphasis added). Dr. Sopher's attorney responded by requesting permission to submit additional cases on the issue and stated, in part, "I did not think that this would be something that would be a difficult issue. *I thought the law was fairly straight forward that you can't use other similar acts to show that that's the way someone acted on this occasion . . .*" (emphasis added). He then proceeded to argue that the evidence in question did not properly set forth a pattern or habit of behavior. In fact, the discussion at the preliminary hearing precipitated by Dr. Sopher's motion *in limine* concerning the testimony at issue, as well as other evidence, is quite in-depth and covers twelve pages of transcript. It is obvious to me, and it should be obvious to the majority, that Dr. Sopher's attorney presented the circuit court with a sufficiently

specific legal argument in order to adequately preserve the error assigned in his appeal to this Court.

In addition, the trial transcript reveals that when the appellees' counsel elicited the testimony at issue from Dr. Sopher on cross-examination, Dr. Sopher's counsel stated "I object to his line of questioning on the basis of irrelevance." Clearly, counsel objected and he objected on grounds of relevance. How the majority can claim that a proper objection, timely made and based on relevancy, failed to adequately preserve the error now raised on appeal is a mystery to me. The purpose of Rule 404 is to determine relevance. The title of Article IV of the West Virginia Rules of Evidence, which includes Rules 401 through 411, is "RELEVANCY AND ITS LIMITS." Each and every rule from 401 through 411 deals with relevancy and only with relevancy. Obviously then, an objection at trial to the admission of evidence based on relevancy should be sufficient to preserve an error grounded in Rule 404(b).

Since filing a motion *in limine* resulting in a hearing covering twelve pages of transcript is not sufficient to preserve an error on appeal, and raising an objection at trial based on relevancy is likewise insufficient, I am at a loss to know what a lawyer in West Virginia has to do to preserve an error for purposes of appeal.

I believe, also, that if the Court had considered Dr. Sopher's Rule 404(b) assignment of error, it would have found the testimony at issue to be inadmissible. In Syllabus Point 8 of *TXO Production v. Alliance Resources,* 187 W.Va. 457, 419 S.E.2d 870 (1992)[1] this Court formulated the standard of admissibility under Rule 404(b):

> Protection against unfair prejudice from evidence admitted under Rule 404(b) of the *West Virginia Rules of Evidence* [1985] is provided by: (1) the requirement of Rule 404(b) that the evidence be offered for a proper purpose; (2) the relevancy requirement of Rule

[1]The holding in *TXO* was modified by *State v. McGinnis,* 193 W.Va. 147, 455 S.E.2d 516 (1994) in that *McGinnis* held that the admissibility of Rule 404(b) evidence must be determined as a preliminary matter under Rule 104(a) rather than 104(b). Also, *Alkire v. First Nat. Bank of Parsons,* 197 W.Va. 122, 475 S.E.2d 122 (1996) modified the holding in *TXO* on grounds not relevant here.

> 402---as enforced through Rule 104(b); (3) the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice; and, (4) Rule 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.

In Syllabus Points 1 and 2 of *State v. McGinnis,* 193 W.Va. 147, 455 S.E.2d 516 (1994) this Court expanded upon this standard by stating:

> 1. When offering evidence under Rule 404(b) of the West Virginia Rules of Evidence, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction.

2. Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in *State v. Dolin,* 176 W.Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general

> charge to the jury at the conclusion of the evidence.

In the recent case of *Stafford v. Rocky Hollow Coal Company,* 198 W.Va. 593, 482 S.E.2d 210 (1996), this Court utilized this very standard. In *Stafford,* the plaintiff instituted a civil action against his former employer alleging, among other things, wrongful discharge and breach of an employment contract. A verdict was returned in favor of the plaintiff, and the employer appealed to this Court claiming, *inter alia,* that the trial court admitted evidence of prior bad acts of the employer in violation of Rule 404(b). After assessing the facts in light of the above-stated standard, this Court determined that the trial court did not conduct the requisite analysis prior to the admission of the prior bad acts evidence and, consequently, reversed the verdict and remanded the matter for further proceedings.

In the present case, a properly conducted assessment of the testimony at issue in light of the standard stated above would likewise result in a determination that the trial court abused its discretion in

admitting the testimony. I believe that the testimony that Dr. Sopher donated brain tissue to the Marshall University Medical School in the past without notifying relatives tended only to prove Dr. Sopher's character and his propensity to act in conformity therewith. Although the appellees elicited the testimony for the stated purpose of showing motive or intent, they failed to explain how such evidence proved that Dr. Sopher would have a motive for removing or that he intentionally removed Coleman's heart. Further, this Court stated in Syllabus Point 9 of *State v. Derr,* 192 W.Va. 165, 451 S.E.2d 731 (1994):

> Although Rules 401 and 402 of the West Virginia Rules of Evidence strongly encourage the admission of as much evidence as possible, Rule 403 of the West Virginia Rules of Evidence restricts this liberal policy by requiring a balancing of interests to determine whether logically relevant is legally relevant evidence. Specifically, Rule 403 provides that although relevant, evidence may nevertheless be excluded when the danger of unfair prejudice, confusion, or undue delay is disproportionate to the value of the evidence.

"The balancing necessary under Rule 403 must affirmatively appear on the record." *McGinnis,* 193 W.Va. at 156, 455 S.E.2d at 525. Here, the trial court failed to perform the Rule 403 balancing test. In addition, the trial court failed to give a limiting instruction either when the testimony was given or in the general jury instructions. Interestingly, in the pre-trial hearing when the testimony at issue, as well as other challenged evidence, was discussed, the court warned the appellees' counsel concerning the admission of the challenged evidence, "if that evidence is not admissible, I think it's so prejudicial that I can't cure it with a curity *(sic)* instruction." The trial court was exactly right on that point. This was highly prejudicial evidence that nevertheless was admitted against Dr. Sopher.

Also, after finding that Dr. Sopher "intentionally removed the heart of Elmer Coleman and should have known that the intentional removal of Elmer Coleman's heart would cause the plaintiffs emotional distress," the jury awarded Mary Coleman $75,000 in compensatory damages, and the two children, Wesley and Michelle Coleman, $30,000 each in compensatory damages.

These amounts were reduced by the court to $50,000 for Mary Coleman and $10,000 each to the two children. The jury awarded punitive damages against Dr. Sopher in the amount of $50,000. This Court upheld the punitive damages award.

In Syllabus Point 8 of *Dzinglski v. Weirton Steel Corp.*, 191 W.Va. 278, 445 S.E.2d 219 (1994) this Court stated:

> In permitting recovery for emotional distress without proof of physical trauma when the distress arises out of the extreme and outrageous conduct intentionally caused by the defendant, damages awarded for the tort of outrageous conduct are essentially punitive damages. Therefore, in many cases emotional distress damages serve the policy of deterrence that also underlies punitive damages.

Even though *Dzinglski* was decided after the trial in this case, the Court noted in *Dzinglski*

that

> In *Mace v. Charleston Area Medical Center Foundation, Inc.*, 188 W.Va. 57, 422 S.E.2d 624, 633 (1992), we expressed our concern that in cases where damages

> for emotional distress are sought, "a claim for emotional distress without any physical trauma may permit a jury to have a rather open-hand in the assessment of damages." In *Wells v. Smith,* 171 W.Va. 97, 297 S.E.2d 872 (1982), we recognized that in permitting recovery for emotional distress without proof of physical trauma where the distress arises out of the extreme and outrageous conduct intentionally caused by the defendant, damages awarded for the tort of outrageous conduct are essentially punitive damages.

Therefore, in this case, I believe the plaintiffs were allowed a double recovery by allowing the jury "to stack punitive damages upon punitive damages, thereby effectively imposing two punitive damage verdicts against [Dr. Sopher] for the same acts." *Dzinglski,* 191 W.Va. at 288, 445 S.E.2d at 229.

The plain fact is the majority dropped the ball on this one, particularly on the Rule 404(b) issue. It declines to address the merits of the issue by holding Dr. Sopher to a ridiculously high standard for preservation of his objection for assignment of error to this Court.

By doing so, it upholds the admission of evidence against Dr. Sopher that was clearly prejudicial. Also, this Court manages to be inconsistent. Eleven months ago a verdict was reversed in this Court where prior act evidence was wrongly admitted. *Stafford, supra.* In the case at bar, this Court has upheld a verdict where prejudicial prior act evidence was admitted. With its refusal to properly address the Rule 404(b) issue, the majority is splitting legal hairs, a practice at which lawyers are experts. Here, however, such behavior results in inconsistent principles, inconsistent results, and the affirming of a verdict based, in part, on improper evidence. Therefore, I dissent.