

No. 25816 -- Finley v. Norfolk and Western Railway Company

Workman, J., concurring:

The result of this case is not very satisfying, for this was not the perfect trial. However, most of the error that occurred was unobjected to by the Appellant's counsel and not properly preserved for appellate review. See Cochran v. Appalachian Power Co., 162 W.Va. 86, 93, 246 S.E.2d 624, 628 (1978) ("The almost universal rule is that an appellate court need not consider grounds of [an] objection not presented to the trial court.").

Even though, perhaps cumulatively, the error which occurred would have been enough to reverse, because few objections were raised, the unobjected to errors are not properly the subject of the cumulative error doctrine. This Court has recognized that the cumulative error doctrine should be applied sparingly and only where the errors are apparent from the record. See Tennant v. Marion Health Care Foundation, Inc., 194 W.Va. 97, 459 S.E.2d 374, 395 (1995) ("Although we recognize that the cumulative error doctrine may be used by a circuit court in situations where there are numerous 'harmless' errors, as we have frequently noted, the doctrine should be used sparingly. Furthermore, 'if the errors ... are insignificant and inconsequential, the case should not be reversed under this rule.' I Franklin D. Cleckley, Handbook on Evidence § 1-7(B)(5) at 49. Additionally, the doctrine can only be applied if there are some errors in the record.

See State v. Carrico, 189 W.Va. 40, 427 S.E.2d 474 (1993) (cumulative error doctrine is inapplicable where no errors are present)"). Because so many of the errors now claimed to constitute cumulative error were unobjected to below, this Court simply cannot now conclude that the case should be reversed based upon cumulative error.

Finally, even though this decision was affirmed, that affirmation does not extend to the conduct of the attorneys, particularly the defense attorneys, involved in the trial. As the circuit court stated during a hearing on the Appellant's motion for a new trial:

I will state also that this is probably the worst case of personal attacks that I've seen in a case as well. Although on a relevancy matter and on the attack of credibility, I admitted a lot of things. I think I'm going to be more cautious in the future. And I want Mr. Mahaney [one of the attorneys for Norfolk and Western Railway Company] to know that, I'm not going to let another case get to that point where it is an attack on the individual plaintiff and the attorney.

It turned out to be more so. But it was too far in the stages of the trial at that point when I first realized that it had gone that way

. . . .

But I will tell you this, I was upset with some of the things that went on. And I don't think that's what trials should be. I don't think they should be personal attacks. We are looking at the evidence. You can attack the credibility of witnesses I think without getting personal with them. And especially not getting personal attacks on the attorneys that are involved in the case.

Like the trial judge, I strongly disapprove of these types of personal attacks taking place in the courtroom. Such conduct is totally inappropriate. As stated in the preamble to the Standards of Professional Conduct,

Lawyers' conduct should be characterized at all times by personal courtesy and professional integrity. In fulfilling their duty as lawyers to represent a client vigorously, they should be mindful of their obligations to the administration of justice. Lawyers owe to opposing counsel, the parties, the courts and the court's staff a duty of courtesy, candor, honesty, diligence, fairness and cooperation.

. . . .

Conduct characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully and efficiently, and tends to delay and often deny justice.

Although there exists no sanctions for a violation of the Standards for Professional Conduct,* lawyers should regulate themselves diligently by observing these Standards of Professional Conduct at all times.

*While there are no sanctions for violating the Standards of Professional Conduct, the same does not apply where an attorney violates the Rules of Professional Conduct. Any violation of the Rules of Professional Conduct is dealt with through the Rules of Lawyer Disciplinary Procedure.