No. 29161 - Brian W. Rowe v. Sisters of the Pallottine Missionary Society, a non-profit corporation

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OF WEST VIRGINIA

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Davis, J., concurring, in part, and dissenting, in part:

The majority opinion addressed the Hospital's assignment of error involving the refusal of the trial court to give a comparative negligence instruction. I fully concur with the majority's resolution of that issue. However, the Hospital also assigned as error the closing argument statements made by plaintiff's counsel. The majority opinion has not addressed that assignment of error on its merits. It is from this part of the opinion that I dissent. I believe the Hospital was entitled to a new trial based upon improper remarks made by the plaintiff's counsel during closing argument.

A. The Million Dollar Racehorse Argument Was Prejudicial

During the first half of plaintiff's closing argument, the following remarks were made to the jury by plaintiff's counsel:

> And like I said, the value of loss of enjoyment of life is something that we don't value. People don't have any way. You can't go to the store. But I know one thing, if Brian Rowe was horse, I could come in here and say, well, that horse's leg's worth---a Kentucky Derby winner, millions and millions of dollars. You wouldn't have any problem. This young man is certainly worth as much as a horse.

The hospital contends that it properly objected, and that the statement was reversible error.

1. ***The issue was preserved for appellate review.*** The majority opinion contends that a proper objection to the above statement was not presented. However, the record reflects differently. Immediately after plaintiff's counsel concluded the first half of closing argument, defense counsel approached the bench and motioned for a mistrial. For reasons not apparent in the record, the initial discussion of this matter was off the record. However, once the jury retired to deliberate, the issue was placed on the record as follows.

> Judge: . . . Mr. Farrell, you made an objection at the conclusion of the opening part of Mr. Levine's closing argument. Do you--I will state that that was done after the comment. Of course, the comments are always made before you can object, but it was made at the closing of his argument and not at the time of the comments.
>
> Do you have any motions or things to say in that regard?
>
> Defense Counsel: Yes, your Honor. I would like to place on the record my objection that at the conclusion of the first half of Mr. Levine's closing argument, I approached the Court and informed the Court that I objected to Mr. Levine's argument concerning urging the jury to award damages based upon his comparison of what a Kentucky Derby winning horse and the horse's leg would be worth.
>
> Judge: Speak up a little.
>
> Defense Counsel: I'm trying not to talk so loud that the jury may hear.
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> Using the analogy of a Kentucky Derby winning horse, that if it had a damaged leg would be worth millions, and urging the jury to award to the plaintiff in this case likewise. We believe that is reversible error and I want to preserve my objection for it.

The manner in which defense counsel objected in this case was consistent with Rule 23.04(b) of the West Virginia Trial Court Rules, which states in part that "[c]ounsel shall not be interrupted

in argument by opposing counsel, except as may be necessary to bring to the court's attention objection to any statement to the jury made by opposing counsel and to obtain a ruling on such objection." Rule 23.04(b) relaxes the general requirement of contemporaneous objection for closing argument purposes. *See Lacy v. CSX Transp. Inc.*, 205 W. Va. 630, 639, 520 S.E.2d 418, 427 (1999) ("Rule 23.04 . . . disfavors objections by counsel during closing arguments."). Therefore, this issue was properly preserved for appellate review and should have been addressed by the majority opinion.

2. *The racehorse argument constituted reversible error.* Our cases have indicated "that this Court reviews rulings by a trial court concerning the appropriateness of argument by counsel before the jury for an abuse of discretion." *Lacy*, 205 W. Va. at 639, 520 S.E.2d at 427. Moreover, "'[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.'" Syl. pt. 9, *State v. Flint*, 171 W. Va. 676, 301 S.E.2d 765 (1983) (quoting Syl. pt. 3, *State v. Boggs*, 103 W. Va. 641, 138 S.E. 321 (1927)).

In this case, the Hospital has argued that the trial judged abused its discretion in denying a new trial because of the improper closing remarks by plaintiff's counsel. The issue presented by the Hospital was addressed by the Court in *Roberts v. Stevens Clinic Hosp., Inc.*, 176 W. Va. 492, 345 S.E.2d 791 (1986). *Roberts* was a wrongful death case in which a jury returned a verdict for the plaintiff in the amount of $10,000,000. The defendant appealed. One of the issues raised was that the plaintiff

improperly suggested a verdict amount to the jury. Specifically, "[c]ounsel argued that if a $10,000,000 racehorse had been killed through the negligence of a veterinary hospital, the measure of damages would be exactly $10,000,000." *Roberts*, 176 W. Va. at 499, 345 S.E.2d at 799. We recognized in *Roberts* that suggesting a verdict amount to the jury through a racehorse analogy was prejudicial and therefore reversible error. Unfortunately, the defendant in *Roberts* did not object to the statement during closing arguments. Consequently, the Court declined to reverse the jury verdict and award a new trial. However, because the Court found the error to be so egregious, relief was granted by reducing the jury's award from $10,000,000 to $3,000,000.

In this case, plaintiff's counsel used an analogy to suggest a verdict amount to the jury that was expressly disapproved in *Roberts*. Here, the majority opinion has taken great liberty to protect the verdict by refusing to squarely address the issue on its merits. I cannot accept the majority's position of simply ignoring the issue. The issue was properly preserved. Under *Roberts*, the Hospital was entitled to a new trial. Moreover, in syllabus point 7 of *Bennett v. 3 C Coal Co.*, 180 W. Va. 665, 379 S.E.2d 388 (1989), we held, in part, that suggesting a verdict amount to a jury for noneconomic damages will "result in reversible error where the verdict is obviously influenced by such statement." The million dollar racehorse argument, without question, influenced the jury to return a verdict for the plaintiff in the amount of $880,186.00.

Therefore, I concur, in part, and dissent, in part to the majority opinion. I am authorized to state that Justice Maynard joins me in this concurring and dissenting opinion.