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

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

I concur with the majority opinion's scholarly discourse regarding the law of "mistrials" and "new trials."

I respectfully dissent, however, to the majority opinion's holding that a new trial should not have been granted. The error in this case was invited by defendant's counsel.

In oral argument before this Court, defendant's counsel stated that it was important for the trial court and this Court to understand that defense counsel's references to "liars" during closing argument was merely responding to plaintiff counsel's argument that the defendant and some of his witnesses were liars. Defense counsel states he was arguing that plaintiff counsel's characterization of the defendant and his witnesses was unfair.

However, the defendant's counsel did not have the plaintiff's counsel's closing remarks transcribed for review by the trial court, when the defendant responded to the plaintiff's motion for a new trial. Defendant's counsel waited 20 months until *after* the trial court granted a new trial to order a transcript of the plaintiff counsel's closing remarks. By this time the court reporter had died and her notes of the trial testimony lost. No transcript is now available and, unfortunately we cannot read a transcript of the argument to verify defense counsel's claims.

A reasonably prudent attorney responding to a motion after verdict, particularly one involving the remarks of opposing counsel, would have had those remarks transcribed immediately and filed in the court record with a supporting legal memorandum. By waiting until after the trial court ruled on the post-verdict motion 20 months later, the trial court did not have the transcript to consider. The trial court – relying upon his memory of the trial proceedings – concluded that the defense counsel's closing comments prejudiced the outcome of the trial. More importantly, this Court can now only guess at what happened during the plaintiff's portion of the closing argument.

It is obvious defense counsel invited error by the trial court by not providing him the transcript to consider when ruling on the new trial motion. The trial court's recollection, if mistaken, was enhanced by the dilatory conduct of counsel. The defendant's counsel does not have clean hands and should not prevail because the trial court and this Court do not have an ostensibly important part of the closing arguments to review.

At oral argument before this Court, the defendant's counsel shrugged off the lack of a transcript as harmless, saying "hindsight is 20/20." The defense's failure to promptly obtain the transcript of opposing counsel's argument was not a peccadillo.

I therefore respectfully dissent to the reversal of the trial court's order granting a new trial.