

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE Nos. 04-85286, 04-85574 AND 04-85605
(Consolidated)

MARK A McLEOD, Guardian for the Estate of Walter Hollins,

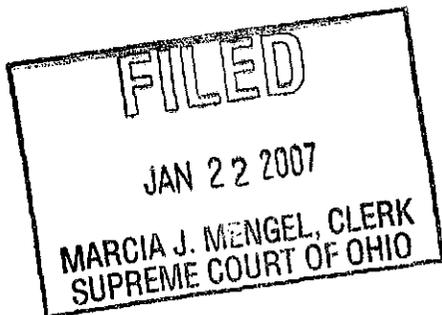
Appellee,

v.

MT. SINAI MEDICAL CENTER, *et al.*,

Appellants.

**MERIT BRIEF OF AMICUS CURIAE LIFE LEGAL DEFENSE FOUNDATION
IN SUPPORT OF APPELLEE**



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I. Introduction

This is a medical malpractice case arising from the events surrounding the birth of Walter Hollins on January 29, 1987. At the time of his birth, a Cesarean section was ordered because baby Hollins was in distress. Once the procedure was ordered, it took the medical team approximately two hours to deliver baby Hollins, and the record indicates that he experienced some degree of asphyxia at birth. Mr. Hollins was born with cerebral palsy and was severely retarded. A jury trial began on May 4, 2004 with the causation of Mr. Hollins' debilitating illnesses at the core of the contested issues. The plaintiff, appellee herein, maintained that Mr. Hollins' condition was a direct result of medical malpractice. The jury agreed, and on May 24, 2004, it returned a verdict for the plaintiff finding that the defendants were professionally negligent.

II. Statement Of Interest Of Amicus Curiae

Life Legal Defense Foundation ("LLDF") is a nonprofit organization dedicated to giving innocent and helpless human beings of any age, especially unborn children, a trained and committed defense against the threat of death, as well as supporting their advocates in the courtrooms of the United States. LLDF's interest in this case is focused on appellants' allegations of attorney misconduct by appellee's counsel for speaking from the perspective of his client, Walter Hollins, while he was an unborn child in distress and imminent danger of being harmed by oxygen deprivation during a 90-minute delay preceding his birth by Cesarean section. The appeals court found that appellee's counsel's conduct was not beyond the bounds of zealous advocacy, and LLDF supports that conclusion.

III. Where Appellants Have Failed To Establish That The Jury's Verdict Was The Result Of Passion or Prejudice, The Verdict Must Be Upheld.

After reviewing the record in this case, the Eighth District Court of Appeals (“appeals court”) found no merit in appellants’ arguments that the alleged misconduct by appellee’s counsel somehow deprived them of a fair trial. The appeals court rejected appellants’ arguments, and explained that “counsel’s behavior has to be of such a reprehensible and heinous nature that it constitutes prejudice before a court can reverse a judgment because of the behavior.” Journal Entry and Opinion of the Eighth District Court of Appeals (May 15, 2006) (“Opinion”), at 12 (citations omitted). The appeals court found that there was “no reasonable basis to conclude” that any of the trial irregularities in the case “had a prejudicial effect on the outcome of the trial.” *Id.* at 11-12. Moreover, the appeals court found that it was seriously disingenuous for appellants to claim that they were denied their right to a fair trial when they failed to rebut much of appellee’s evidence at trial. *Id.* at 12.

One of appellants’ claims rejected by the appeals court is that appellee’s counsel engaged in improper conduct by speaking from the perspective of his client, Walter Hollins, while Mr. Hollins was an unborn child in distress and imminent danger of being harmed by oxygen deprivation during a 90-minute delay preceding his birth. Appellant Mt. Sinai’s argument consists of the conclusory statement that appellee’s counsel utilized “charged images to inflame juror emotions,” and a listing of the alleged improper statements, all of which were made during counsel’s closing argument:

I am standing here as the voice of Walter. Walter is a baby in his mother’s womb waiting to be born. Doctors, nurses, I’m suffocating. Please help me be born. Tr. 2167-68.

I am suffocating. Help me be born. *Id.* at 2171.

Dr. Jordan, help me be born. *Id.* at 2175.

Oh, please, help me. Help me be born. I'm drowning." *Id.* at 2181.

Please, please, Dr. Jordan, please, nurses, please help me be born. *Id.* at 2186.

Please, please help me be born. *Id.* at 2190.

I'm dying. Please save me. [M]ommy, grandma, someone, please save me. I'm dying. Please help me. *Id.* at 2195.

[P]lease, please nurses, I'm a little baby. I want to play baseball. I want to hug my mother. I want to tell her that I love her. Help me, please help me to be born." *Id.* at 2199.

Merit Brief of Appellant Mt. Sinai Medical Center at 42-43.

In addressing this alleged misconduct, the appeals court reasoned that:

There is nothing that prohibits counsel from being zealous in their representation. Further, trial counsel should be accorded wide latitude in opening and closing arguments. [Citation omitted.] Here, defense counsel did not even object to the claimed improper comments in plaintiff's closing. . . . In this case, while the remarks by counsel may have been questionable, they were not so outrageous as to warrant a new trial.

Opinion at 11-12. The appeals court went on to conclude that it found "nothing in the record" that would lead it to hold that the jury's finding was "a product of passion or prejudice." *Id.* at 14 (emphasis added). This conclusion is correct under the law and should be affirmed.

Ohio jurisprudence indicates that a judgment will not be overturned simply because it is excessive unless the court is also convinced that the excess is due to the influence of passion or prejudice, or it is so excessive it strikes one at first blush as being unreasonable and outrageous, or there is no evidence whatever to support it, or it is manifestly opposed to the clear weight of the evidence. *Murray v. Long*, 256 N.E.2d 225, 228 (Ohio Ct. App. 1968) (citation omitted). Most importantly, where "there is any margin for a reasonable difference of opinion in the matter the judgment will be sustained." *Id.* (emphasis added).

Ohio appeals courts have long upheld these principles. In *Lance v. Leohr*, 459 N.E.2d 1315, 1316 (Ohio Ct. App. 1983), the appeals court noted that while the record in that case revealed that counsel employed “artful subterfuge which sometimes stretched the bounds of propriety to their limit,” there were no instances of conduct “so highly improper or inflammatory as to amount to clear evidence that the verdict was the product of the jury’s passion or prejudice.” The court noted that absent such evidence, the judgment must be affirmed. *Id.* at 1316.

More than twenty years earlier, in *Groves v. Phillips Petroleum Co.*, 257 N.E.2d 759 (Ohio Ct. App. 1960), the appeals court there found that counsel’s use of a certain word in opening and closing arguments was “wrong” and condemned because the facts of the case did not call for its use, nevertheless the court stated that it had read and reread the context in which the word was used and came to the conclusion that it did not result in error prejudicial to the right of the appellants. *Id.* at 765.

It is also a well-recognized rule of law that alleged misconduct by counsel, if it occurs, “will not be considered by a reviewing court where no objection is taken at the time it occurs, or if the attention of the trial court is not directed to [it].” *Yerrick v. East Ohio Gas Co.*, 198 N.E.2d 472, 474-75 (Ohio Ct. App. 1964) (citing *Walsh v. J.R. Thomas’ Sons*, 110 N.E. 454 (1915)). While appellant Mt. Sinai contends that “[t]he transcript is littered with objections throughout the proceedings,” it fails to cite any objections raised at the time of the alleged misconduct by counsel, or to explain why none were raised at those times. *See Merit Brief of Appellant Mt. Sinai Medical Center* at 45.

The images verbalized by counsel during closing argument were of baby Hollins waiting to be born and suffering from oxygen deprivation. He tells the doctors and nurses

that he's suffocating, drowning and dying, all conditions that follow naturally from oxygen deprivation. While the statements may have been descriptive and colorful, they were nevertheless a summation of the facts adduced in evidence, and thus entirely permissible for closing argument.

Contrary to the argument raised by *amicus curiae* for appellants, the statements did not constitute inadmissible evidence and were based in the facts of the case. *See Merit Brief of Amicus Curiae Ohio Association of Community Health Centers in Support of Appellants* at 17-18. Appellee's counsel's simply attempted to verbalize to the jury in a comprehensible fashion what baby Hollins was likely experiencing in the minutes immediately preceding his birth given the facts adduced at trial.

It is now virtually universally recognized that unborn children at baby Hollins' stage of development (just before birth) have a fully developed central nervous system and experience pain and anxiety even though they are not yet born. Counsel's speaking from the perspective of his client during closing argument constitutes zealous but perfectly appropriate advocacy. There is nothing improper about this technique, and the appellants likely recognized as much, as they lodged no objections during counsel's closing argument. *See* Opinion at 12. Nor did the trial court intervene.

Appeals courts have the same power and control of verdicts and judgments as trial courts, and may weight the evidence and exercise an independent judgment. *See Yerrick*, 198 N.E.2d at 476. When no passion or prejudice is apparent or demonstrated, or the appeals court fails to find that the verdict is so out of line with the established facts as to indicate passion or prejudice, a reversal of the judgment and granting of a new trial is unwarranted. *See id.*

It is well recognized that

One of the most difficult decisions for a judge to make concerns a claim that the verdict is excessive, it being the product of passion and prejudice. How does one measure pain? How does one measure embarrassment because of a disfigured face? If there is evidence of loss of wages; of medical, hospital, and other expenses; it does not become a difficult problem to make an addition and arrive at a sum. The other features of a verdict are not concrete and, hence, must be left to the judgment of a jury; unless that jury verdict shocks the conscience of the court, the result reached by that body must be approved.

Groves, 257 N.E.2d at 765.

In this case, appellants and *amici* fail to make the necessary showing that the jury's verdict was due to the influence of passion or prejudice. They do not show that the jury was swayed by their emotions, or that there was an absence of reflection on their part, or that their verdict was formed without due knowledge or examination. *See Yerrick*, 198 N.E.2d at 476. Nor do appellants or *amici* demonstrate that the verdict in this case is so excessive that it strikes one at first blush as being unreasonable and outrageous, or that there is no evidence whatever to support it, or that it is manifestly opposed to the clear weight of the evidence. *See Murray*, 256 N.E.2d at 228 (citation omitted).

They have also failed to show that there is no margin for a reasonable difference of opinion on the matter. *See supra* at 8. Indeed, appellants' lack of objections at the time of the purported misconduct, and the trial court's lack of intervention during counsel's closing argument tends to show such difference of opinion regarding the purported misconduct and supports the appeals court's ruling in this case.

Here, the appeals court found appellee's counsel's conduct to be within the bounds of zealous advocacy, and there being nothing in the record that would lead it to conclude that

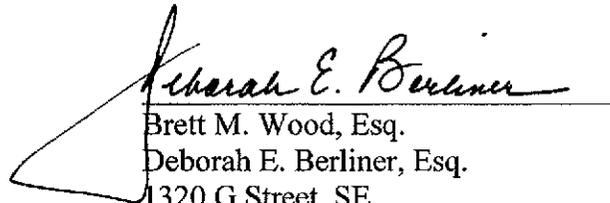
the jury's finding was a product of passion or prejudice, that verdict should be upheld. This was the conclusion of the appeals court, and it is correct under the law.

IV. Conclusion

Two courts reviewed the trial court's order in this case granting a new trial and adjudged it to be erroneous. For those reasons, and all of the reasons stated herein, LLDF respectfully submits that this Court should affirm the appeals court's ruling.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing MERIT BRIEF OF AMICUS CURIAE LIFE LEGAL DEFENSE FOUNDATION IN SUPPORT OF APPELLEE has been served by U.S. Mail, postage prepaid, upon the following on this 20th day of January, 2007.

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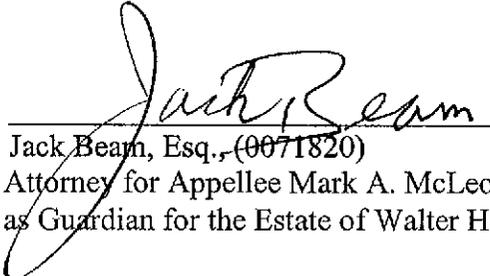
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