[Cite as *Riechers v. Biats*, 2010-Ohio-6448.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

AMBER RIECHERS, GDN. of C. R.	C. A. No. 25248
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
DAVID E. BIATS, D. O.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. CV 2006 02 0863

DECISION AND JOURNAL ENTRY

Dated: December 29, 2010

MOORE, Judge.

{¶1} Appellant, C.R., by and through his natural guardian, Amber Riechers, appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} C.R., a ten-year-old boy, suffers from permanent and irreparable nerve damage in his left arm. The damage stems from injuries C.R. sustained during delivery. During a difficult delivery, C.R. experienced shoulder dystocia, in which his shoulder became jammed against his mother's pubic bone. In an effort to free him and accomplish delivery, appellee, David Biats, D.O., performed several medical maneuvers. As a result of the shoulder dystocia, C.R. was born with a broken radius and a brachial plexus injury. C.R. filed a medical malpractice suit against Dr. Biats.

{¶3} Throughout the course of the litigation, defense counsel challenged medical experts that C.R. retained. Eventually, the parties stipulated that C.R. would withdraw Martin

Gubernick, M.D. as an expert witness and Dr. Biats would waive any objection as to the qualifications of Dr. Joseph Marino and would withdraw a previously filed motion in limine.

{¶4} Beginning on November 5, 2009, the matter was tried to a jury. During the trial, defense counsel made statements and elicited testimony implying that C.R. should have retained a more competent expert. The jury returned a defense verdict.

{¶5} On November 12, 2009, C.R. moved the court for a new trial. On November 30, 2009, the trial court overruled C.R.'s motion.

{¶6} C.R. timely filed a notice of appeal. He presented two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED IN DENYING [C.R.'S] MOTION FOR NEW TRIAL WHERE BIATS' COUNSEL ATTACKED [C.R.'S] EXPERT DURING CLOSING ARGUMENT AND THE TRIAL COURT FAILED TO INSTRUCT THE JURY TO DISREGARD BIATS' COUNSEL'S IMPROPER AND INFLAMMATORY ARGUMENTS."

{¶7} In his first assignment of error, C.R. contends that the trial court erred in denying his motion for a new trial where Dr. Biats' counsel attacked C.R.'s expert with improper and inflammatory arguments during closing argument. We do not agree.

{¶8} C.R. moved for a new trial on the basis of Civ.R. 59(A)(1), (2), (3) and (9), which provide a new trial on the following grounds:

> "(1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;
>
> "(2) Misconduct of the jury or prevailing party;
>
> "(3) Accident or surprise which ordinary prudence could not have guarded against;

"* * *

"(9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application."

{¶9} Civ.R. 59(A) further provides, and C.R. noted, that "a new trial may also be granted in the sound discretion of the court for good cause shown."

"Depending upon the basis of the motion for a new trial, this Court will review a trial court's decision to grant or deny the motion under either a de novo or an abuse of discretion standard of review. *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, [] paragraphs one and two of the syllabus (indicating that a de novo standard of review applies when the basis for a new trial motion rests solely upon a question of law while an abuse of discretion standard applies to motions based upon a matter requiring the court's discretion)." *Calame v. Treece*, 9th Dist. No. 07CA0073, 2008-Ohio-4997, at ¶13.

{¶10} Here, C.R. contends that the trial court abused its discretion in failing to grant the motion for new trial on the basis that defense counsel referred to Dr. Marino's business offering expert medical testimony as a "racket." Under the abuse of discretion standard, we must determine whether the trial court's decision was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶11} Defense counsel's statement during closing arguments included the following:

"[Defense Counsel]: Let's also talk about doctor Marino's medical, legal history, testimonial history. First of all, he reviewed a total of six cases. Every single one of them involved a brachial plexus injury. Every single one was for plaintiffs. He got into that racket because he was referred to --

"[Plaintiff's Counsel]: Objection.

"[Defense Counsel]: -- by --

"The Court: Well, the choice of words --

"[Defense Counsel]: He got into the business of being an expert witness in the medical/legal --

"The Court: Editorializing, folks.

"* * *

"The Court: Go ahead, sir."

{¶12} C.R. cites *Furnier v. Drury*, 163 Ohio App3d 793, 2004-Ohio-7362; *Pesek v. Univ. Neurologists Assn., Inc.* (2000), 87 Ohio St.3d 495; and *Fehrenbach v. O'Malley*, 164 Ohio App.3d 80, 2005-Ohio-5554, for the proposition that when defense counsel makes unwarranted attacks on an expert a new trial is warranted. These cases, however, are inapposite to C.R.'s case. In each of the cases C.R. cites, defense counsel engaged in multiple inappropriate attacks, often on the plaintiff, his or her family, *and* expert witnesses. In this case, C.R. directs this Court to a single instance in which defense counsel referred to an expert witness' work as a racket. C.R. then attempts to connect the word "racket" to organized crime and notes that definitions of the term include: "1. An organized criminal activity, esp., the extortion of money by threat or violence. 2. A dishonest or fraudulent scheme or business[,]" citing Black's Law Dictionary (2000) Abridged Seventh Edition.

{¶13} The Supreme Court of Ohio has held that

> "counsel should be afforded great latitude in closing argument, *State v. Champion* (1924), 109 Ohio St. 281, 289 [], and * * * the determination of whether the bounds of permissible argument have been exceeded is, in the first instance, a discretionary function to be performed by the trial court[.] *Pang v. Minch* (1990), 53 Ohio St.3d 186 [], paragraph three of the syllabus. Therefore, the trial court's determination will not be reversed absent an abuse of discretion. Id. However, '[w]here gross and abusive conduct occurs, the trial court is bound, sua sponte, to correct the prejudicial effect of counsel's misconduct.' (Emphasis omitted.) *Snyder v. Stanford* (1968), 15 Ohio St.2d 31, 37 []." *Pesek*, 87 Ohio St.3d at 501.

{¶14} While this Court in no way condones even one disparaging remark towards an expert witness, this isolated incident does not rise to the level of gross and abusive conduct like that found in *Pesek*. Moreover, a standard dictionary not limited to legal definitions defines "racket" to also mean "an easy and lucrative means of livelihood[.]" Merriam-Webster's

Collegiate Dictionary (11 Ed. 2005) 1024. Therefore, the trial court did not abuse its discretion in denying C.R.'s motion for new trial. *Blakemore*, 5 Ohio St.3d at 219. C.R.'s first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRED IN DENYING [C.R.'S] MOTION FOR NEW TRIAL WHERE THE TRIAL COURT REFUSED TO ALLOW [C.R.] TO REHABILITATE HIS EXPERT BY INTRODUCING EVIDENCE OF A STIPULATION THAT BIATS' COUNSEL WOULD NOT OBJECT TO THE QUALIFICATIONS OF [C.R.'S] MEDICAL EXPERT AFTER BIATS' COUNSEL VIOLATED THE AGREEMENT DURING CLOSING ARGUMENT."

{¶15} In his second assignment of error, C.R. contends that the trial court erred in denying his motion for new trial, which was based on the trial court's refusal to allow C.R. to rehabilitate his expert witness after defense counsel violated a stipulation. We do not agree.

{¶16} C.R. contends that the trial court's failure to grant him a new trial on this ground constituted the resolution of a legal question, subject to de novo review in this Court. *Calame* at ¶13. We need not determine this standard of review because C.R. failed to preserve this issue in the trial court.

{¶17} Sometime prior to trial, counsel for each side signed a stipulation to the effect that defense counsel would waive any objection as to the qualifications of Dr. Marino, C.R.'s expert witness. The parties never presented the stipulation to the judge, never entered the stipulation into evidence or published the stipulation to the jury. Plaintiff's counsel only attempted to present the stipulation during his rebuttal to defense counsel's closing argument. During cross-examination of Dr. Marino, defense counsel engaged in the following line of questioning:

> "[Defense counsel]: So, for instance, if you were to deliver a baby and there were a brachial plexus injury, the family could sue you and use your own testimony in these medical-legal cases against you; isn't that true?

"[Dr. Marino]: If you are telling me that, I guess it is true.

"[Defense counsel]: So if you delivered a baby with a brachial plexus injury that occurred following a shoulder dystocia, you will be negligent by your own testimony?

"[Dr. Marino]: That is absolutely correct.

"[Defense counsel]: But you don't have to worry about that, do you?

"[Dr. Marino]: No, I don't.

"[Defense counsel]: That is because you don't deliver babies any more.

"[Dr. Marino]: I delivered four thousand of them.

"[Defense counsel]: You have not delivered any since you started providing testimony under oath that any time there is a brachial plexus injury it must be from negligence, correct?

"[Dr. Marino]: That's correct.

"[Plaintiff's counsel]: Objection

"The Court: Overruled.

"[Defense counsel]: You practice, I think you told us, at Monmouth Medical?

"[Dr. Marino]: Monmouth Medical Center in Long Branch.

"[Defense Counsel]: Are there any doctors there that do deliver babies?

"[Dr. Marino]: Yes.

"[Defense counsel]: Did you refer [plaintiff's counsel] to any of them to get an opinion in this case?

"[Plaintiff's counsel]: Objection

"The Court: Sustained.

"[Defense counsel]: Any other OBs at your country club where [D]octor Ravits could have referred to a practicing OB?

"[Plaintiff's counsel]: Objection.

"The Court: Sustained."

{¶18} In this line of questioning, defense counsel questioned Dr. Marino's credentials. Specifically, defense counsel elicited testimony that Dr. Marino no longer delivers babies. Defense counsel also asked questions seeking confirmation that doctors who currently deliver babies would be better expert witnesses. Although plaintiff's counsel objected to these questions, he never sought to introduce the stipulation. Later, during closing arguments, the following occurred:

> "[Defense counsel]: Let's talk about [D]octor Marino as an expert. First of all, he hasn't delivered a baby sense [sic] 2002, about seven years ago. I would think if you are trying to prove that a doctor made a mistake in the delivery of her baby, you will go out and hire a doctor who actually delivers babies. [Plaintiff's counsel] didn't do that.
>
> "[Plaintiff's counsel]: May I approach the bench a second, your honor?
>
> "The Court: No.
>
> "* * *
>
> "[Defense counsel]: You would think that * * * you would hire an expert witness who, A, delivers babies, and, B, had all the qualifications that an expert witness should have."

{¶19} During plaintiff's rebuttal closing argument, plaintiff's counsel belatedly attempted to publish the stipulation to the court and jury for the first time through the following:

> "[Plaintiff's counsel]: * * * when [defense counsel] stood up in front of you and started challenging [D]octor Marino's qualifications, he signed a stipulation --
>
> "[Defense counsel]: Objection.
>
> "[Plaintiff's counsel]: -- waiving any objection to his qualifications.
>
> "[Defense counsel]: Objection.
>
> "The Court: That is not evidence, ladies and gentlemen, you will disregard it, and you will concentrate on the evidence presented to you, and only that."

{¶20} Accordingly, plaintiff's counsel never proffered the stipulation into evidence and thereby failed to preserve this issue for appellate review. "An appellate court need not review the propriety of [a trial court's ruling on an issue] unless the claimed error is preserved by an objection, proffer, or ruling on the record[.]" (Emphasis, quotation and citation omitted.) *State v. Grubb* (1986), 28 Ohio St.3d 199, 203. The "failure to timely advise a trial court of possible error, by objection or otherwise, results in a [forfeiture] of the issue for purposes of appeal." *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121.

{¶21} "By forfeiting the issue for appeal, [C.R.] has confined our analysis to an assertion of plain error." *State v. Gray*, 9th Dist. No. 08CA0057, 2009-Ohio-3165, at ¶7, citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶23.

> "In applying the doctrine of plain error in a civil case, reviewing courts must proceed with the utmost caution, limiting the doctrine strictly to those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material adverse effect on the character of, and public confidence in, judicial proceedings." *Goldfuss*, 79 Ohio St.3d at 121.

{¶22} While the behavior complained of could be viewed as ambush tactics, the case does not present exceptional circumstances justifying the application of plain error. Accordingly, we cannot say that the trial court erred in denying C.R.'s motion for a new trial. *Calame* at ¶13. C.R.'s second assignment of error is overruled.

III.

{¶23} C.R.'s assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

CARR, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

WILLIAM J. NOVAK, and MICHELLE D. BOGLE, Attorneys at Law, for Appellant.

THOMAS KILBANE, and HOLLY MARIE WILSON, Attorneys at Law, for Appellee.