



Loyola v. Ricks
Fla.App. 4 Dist.,2000.

District Court of Appeal of Florida,Fourth District.
Rene LOYOLA, M.D., Appellant/Cross-Appellee,
v.

Metissia RICKS, W. Edward Wengler, M.D., Treas-
ure Coast Surgical Group, P.A., and HCA Health
Services of Florida, Inc., d/b/a Columbia Medical
Center of Port St. Lucie, Appellees/Cross-Appellants.
No. 4D00-221.

Dec. 20, 2000.
Rehearing Denied March 9, 2001.

Patient filed medical malpractice action against phys-
ician and other health care providers. Following jury
verdict for physician, the Circuit Court, St. Lucie
County, [Scott M. Kenney, J.](#), granted patient's motion
for new trial. Physician appealed. The District Court
of Appeal held that: (1) trial court abused its discre-
tion by reserving ruling on patient's motion for mis-
trial, and (2) new trial was not warranted by defense
counsel's comments during opening statement.

Affirmed in part, reversed in part, and remanded.
West Headnotes

[1] Trial 388 18

[388](#) Trial

[388III](#) Course and Conduct of Trial in General
[388k18](#) k. Regulation in General. [Most Cited](#)

[Cases](#)

A trial court has discretion to reserve ruling on mo-
tions for a mistrial; however, this discretion must be
exercised in accordance with precepts of judicial eco-
nomy.

[2] New Trial 275 6

[275](#) New Trial

[275I](#) Nature and Scope of Remedy
[275k6](#) k. Discretion of Court. [Most Cited Cases](#)

Trial 388 18

[388](#) Trial

[388III](#) Course and Conduct of Trial in General

[388k18](#) k. Regulation in General. [Most Cited](#)

[Cases](#)

Trial court abused its discretion by reserving ruling
on plaintiff's motion for mistrial and subsequently
granting motion for new trial, where motion for mis-
trial was made the first day of trial prior to any testi-
mony, trial was scheduled to take five days, and trial
actually took six days.

[3] New Trial 275 6

[275](#) New Trial

[275I](#) Nature and Scope of Remedy

[275k6](#) k. Discretion of Court. [Most Cited Cases](#)

Trial court has broad discretion in determining a mo-
tion for new trial.

[4] Appeal and Error 30 977(3)

[30](#) Appeal and Error

[30XVI](#) Review

[30XVI\(H\)](#) Discretion of Lower Court

[30k976](#) New Trial or Rehearing

[30k977](#) In General

[30k977\(3\)](#) k. Grant of New Trial in
General. [Most Cited Cases](#)

Appeal and Error 30 977(5)

[30](#) Appeal and Error

[30XVI](#) Review

[30XVI\(H\)](#) Discretion of Lower Court

[30k976](#) New Trial or Rehearing

[30k977](#) In General

[30k977\(5\)](#) k. Refusal of New Trial.
[Most Cited Cases](#)

A stronger showing of abuse of discretion is required
to overturn an order granting a new trial than is re-
quired to overturn an order denying a new trial.

[5] Trial 388 127

[388](#) Trial

[388V](#) Arguments and Conduct of Counsel

[388k113](#) Statements as to Facts, Comments,

and Arguments

[388k127](#) k. Reference to Protection of Party by Insurance or Other Indemnity. [Most Cited Cases](#)

In medical malpractice action in which physician was the only remaining defendant, defense counsel did not improperly reference settlement with other defendants by stating, during opening statement, that there would be testimony about other health care providers but that plaintiff's attorney would not tell jury why other providers were not in courtroom. [West's F.S.A. § 768.041\(3\)](#).

[\[6\] Appeal and Error 30](#) ⇨ [1060.1\(6\)](#)

[30](#) Appeal and Error

[30XVI](#) Review

[30XVI\(J\)](#) Harmless Error

[30XVI\(J\)12](#) Arguments and Conduct of Counsel

[30k1060.1](#) In General

[30k1060.1\(2\)](#) Particular Argument or Conduct

[30k1060.1\(6\)](#) k. Comments on Failure to Produce Evidence or Call Witnesses. [Most Cited Cases](#)

In medical malpractice action in which physician was the only remaining defendant, any error was harmless with respect to defense counsel's comment, during opening statement, that there would be testimony about other health care providers but that plaintiff's attorney would not tell jury why other providers were not in courtroom; comment was isolated and never mentioned again by defense. [West's F.S.A. § 768.041\(3\)](#).

[William T. Viergever](#) and [Bonnie Eyler](#) of Sonneborn, Rutter, Cooney, Klingensmith & Eyler, P.A., West Palm Beach, for Appellant/cross-appellee.

[Lauri Waldman Ross](#) of Lauri Waldman Ross, P.A., Miami, and [Mark Vieth](#) of Tilghman & Vieth, P.A., Miami, for Appellee/cross-appellant-Metissia Ricks.

PER CURIAM.

The Appellant/Cross-Appellee, Dr. Rene Loyola ("Loyola"), appeals and the Appellee/Cross-Appellant, Metissia Ricks ("Plaintiff"), cross appeals an order granting the Plaintiff's motion for new trial. We affirm the cross-appeal, but we write to discuss two issues on appeal that require reversal.

The Plaintiff sued various doctors and the hospital after developing [compartment syndrome](#), which resulted in nerve damage after a shunt was placed in her forearm for dialysis purposes. Before trial, the Plaintiff settled with Dr. Wengler and the hospital. They were dismissed from the suit, and the case proceeded to trial against Loyola.

During opening statements, Loyola's attorney commented to the jury as follows:

Now, as Mr. Vieth pointed out, Dr. Loyola is not the only health care provider that you will be hearing about. That is, I gather you've gleaned, from what I've said up to this point, there's going to be testimony that the nurses should have done things differently, that Dr. Wengler should have done things differently, before it ever reached the point of ... of being contracted with permanent nerve damage. It just never should have happened.

It will not be something that you need to consider as to why they aren't in this courtroom, although you might want to ask yourself that question. I assure you, though, that this Miss Ricks and her attorney aren't going to tell you why they aren't here.

(emphasis added.) In response to the underlined portion of the defense's opening statement, the Plaintiff moved for a mistrial, but asked the trial court to reserve ruling on the motion. The trial court agreed to reserve ruling, and the case proceeded for five more days at which time the jury reached a verdict in favor of Loyola. The Plaintiff moved for a new trial based, in part, on the defense's comment to the jury during opening statements*425 regarding prior settlements. The trial court granted the motion based solely on that ground.

On appeal, Loyola argues the trial court abused its discretion by reserving ruling on the motion for mistrial, because the notions of judicial economy required an immediate ruling. In addition, Loyola contends that the trial court abused its discretion in granting a new trial, because there was no mention of a settlement, prior defendants, or a prior lawsuit. We agree.

[\[1\]](#) A trial court has discretion to reserve ruling on motions for a mistrial. See [Ed Ricke & Sons, Inc. v.](#)

[Green](#), 468 So.2d 908, 910 (Fla.1985). “However, this discretion must be exercised in accordance with precepts of judicial economy.... The power of a trial court judge to reserve ruling on a motion for a mistrial will not only conserve judicial resources but may also operate to prohibit a wrongdoer from profiting from his intentional misconduct.” *Id.*

[2] In the present case, the trial was scheduled to take five days. The trial actually took six days, in which approximately fifteen witnesses were presented. The motion for mistrial was made the very first day of trial prior to any witnesses testifying. We conclude that the interests of judicial economy were not served by a reservation of ruling based on these circumstances. As such, we hold the trial court abused its discretion by reserving ruling on the Plaintiff’s motion for mistrial and subsequently granting the motion for new trial.

[3][4] With regard to the order granting a new trial, a trial court has broad discretion in determining a motion for new trial. [Frei v. Alger](#), 655 So.2d 1215, 1216 (Fla. 4th DCA 1995). However, “a stronger showing of abuse of discretion is required to overturn an order granting a new trial than is required to overturn an order denying a new trial.” *Id.*

[5][6] [Section 768.041\(3\), Florida Statutes](#), provides that releases, covenants not to sue, and dismissals of defendants by order of the court “shall not be made known to the jury.” [§ 768.041\(3\), Fla.Stat. \(2000\)](#). In the present case, the defense counsel’s comment during opening statements did not reference any of the prohibited categories. No reference was made to a prior lawsuit, prior defendants, or a settlement. In addition, the jury was unaware that Dr. Wengler and the hospital were originally in the lawsuit, and therefore, they would not have necessarily thought the comment referenced a settlement. Moreover, even if the comment was error, we would find it to be harmless. The comment was isolated and never mentioned again by the defense. *See generally* [Melara v. Cicione](#), 712 So.2d 429, 431 (Fla. 3d DCA 1998); [Sayad v. Alley](#), 508 So.2d 485, 486 (Fla. 3d DCA 1987).

Although a stronger showing of abuse of discretion is required to overturn the grant of a new trial, we con-

clude that such a showing has been made here. Accordingly, we reverse and remand for the trial court to reinstate the jury’s verdict and enter judgment in favor of Loyola.

AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED.

[GUNTHER](#), [POLEN](#) and [STEVENSON](#), JJ., concur.

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