STATE OF NORTH CAROLINA

COUNTY OF DURHAM

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
94 CvS 454

FINESSE G. COUCH, Individually
and as Administratrix Of the
Estate of Carnell Simmons Couch
Plaintiff,

v.

DUKE UNIVERSITY,
Defendant.

ORDER DISCIPLINING
MARIA P. SPERANDO,
ATTORNEY FOR PLAINTIFF

This matter is before the Court on remand from the North Carolina Supreme Court and pursuant to an Order of the Chief Justice assigning the case to the undersigned judge for purposes of assessing sanctions against Maria P. Sperando, counsel for the plaintiff. The Court entered a written Order signed January 5, 2000, setting the remanded issue for hearing on February 9, 2000, and the matter came on to be heard in the Durham County Courthouse on that date. Present were the plaintiff and other relatives of the deceased child; Keith Bishop, Maria Sperando, and Willie Gary, counsel for the plaintiff; Vance Barron, counsel for Ms. Sperando; and James B. Maxwell, counsel for the defendants.

The Court has reviewed the decision of the North Carolina Supreme Court, 351 N.C. 92 (1999), and the Court of Appeals, 133 N.C. App. 93 (1999), which decisions are attached hereto and incorporated herein. The Court has heard the evidence offered on behalf of Ms. Sperando and heard from counsel. The Court has reviewed the file, including the briefs, portions of the trial transcript, and affidavits tendered. Based on this record, the evidence, and the arguments of counsel, the Court finds by clear and convincing evidence and concludes as follows:

BACKGROUND

1. Maria P. Sperando graduated from Georgetown University School of Law in 1979. She was admitted to practice law in New York in 1980 and in Florida in 1987. She has engaged in the active practice of law during those years as a trial lawyer. She heretofore has not been disciplined by the relevant bar authorities in

New York or Florida and has essentially practiced law without serious ethical or professionalism questions arising.

2. Upon motion, Ms. Sperando was admitted *pro hac vice* to appear on behalf of the plaintiff in this case pursuant to N.C.G.S §84-4.1. In her motion she agreed to submit to the jurisdiction and disciplinary authority of this Court and to comply with all applicable rules, procedures, and laws.

3. During closing argument on behalf of the plaintiff during the trial of this medical negligence case, Ms. Sperando expressed to the jury her personal opinion about the veracity of defense witnesses, saying that they were liars and otherwise repeatedly used the words "lie," "lies," or "lied" in connection with defense witnesses. These were not indirect references; in fact at one point Ms. Sperando said to the jury "So you see, when I say a lie, okay, I want the record to reflect I mean a lie." Trial transcript at page 1775. At another point she said, "[A]ll of these physicians came up here and told lies. In your face lies." Trial transcript at page 1770. She also expressed her opinion that defense counsel had knowingly offered false testimony during the trial, calling this a "heavy accusation."[1] As the Supreme Court said, Ms. Sperando's argument "included at least nineteen explicit characterizations of the defense witnesses and opposing counsel as liars." Couch v. Duke University, 351 N.C. at 93. Defense counsel made one objection to Ms. Sperando's closing argument, which objection was overruled.

4. After a verdict in plaintiff's favor, the defendants appealed. The North Carolina Court of Appeals reversed as to one defendant ("PDC") on an unrelated issue and affirmed the verdict as to defendant Duke University ("Duke"). However, all three of the judges on the panel expressed concern over Ms. Sperando's closing argument. Neither of the two judges voting to affirm concluded that the arguments were proper or appropriate, and one judge dissented, calling Ms. Sperando's argument "grossly improper."

5. Duke appealed to the North Carolina Supreme Court, where the only issue related to Ms. Sperando's closing argument. All six justices participating found that Ms. Sperando's argument was grossly improper and all six justices agreed that the trial court erred by not sustaining the defendant's objection and by not intervening

[1] Among other things, Ms. Sperando said "[T]his is not a criminal trial where when you have a client and you need to put him up on the stand as a witness and you know he is going to perjury himself, you have to put him there. . . . This is a civil trial. You're not obligated to put on that stand anybody that you know is going to lie. And we have taken all the depositions of these people and everything that they have said on that stand and all the lies that they've told and they knew before they put their hands on the Bible that they were going to tell those lies and they put them up anyway. That's heavy." Trial transcript at page 1770.

ex mero motu. Three justices concluded the error was prejudicial and voted to remand the case for a new trial; three justices concluded the error was not prejudicial and voted to affirm. The decision of the Court of Appeals was therefore left undisturbed but without precedential value. The Supreme Court further unanimously remanded the cause to the trial court for the determination of an appropriate sanction for Ms. Sperando's violation of Rule 12 of the General Rules of Practice and the Rules of Professional Conduct.

6. Upon remand, the case was assigned to the undersigned judge by the Chief Justice. The Court thereafter issued a written Order giving Ms. Sperando and all other interested parties notice of the date and place of the hearing it would conduct before imposing sanctions. At the hearing, Ms. Sperando was given a full opportunity to present such evidence as she wished and she and her attorney and her partner were given an opportunity to be heard, as were other attorneys for the plaintiff and the attorney for the defendant.

APPROACH TO THE ISSUES

7. In evaluating the evidence and imposing the requirements made herein, the Court is acting pursuant to the Supreme Court's remand and its inherent authority and duty to discipline attorneys, to protect itself from impropriety, to protect the public, and to safeguard the administration of justice. See, e.g., In Re Hunoval, 294 N.C. 740, 744 (1977); State v. Spivey, 213 N.C. 45 (1938); In re Paul, 84 N.C.App. 491, 499-500, cert. denied, 319 NC 673 (1987), cert. denied, 484 US 1004 (1988). The Court's inherent power is not limited or bound by the technical precepts contained in the Rules of Professional Conduct. Swenson v. Thibaut, 39 N.C.App. 77, 109 (1978), cert. denied and appeal dismissed, 296 N.C. 740 (1979). The Court has therefore considered all relevant matters. The Court further considers the question of sanctions to be in large part discretionary and has weighed and balanced the facts in its discretion. Finally, the Court notes that out of state attorneys do not have a right to practice in this state's courts without meeting the state's bar admission requirements; rather it is a privilege and is subject to the sound discretion of the Court. In re Smith, 301 N.C. 621, 629 (1981); N.C.G.S. §84-4.2.

8. The Court has considered the character and clarity of the rules Ms. Sperando violated; the repeated number of the violations; whether the violations were intentional, knowing, reckless, negligent, or inadvertent; the fact that defendant's one objection was overruled by the trial court; Ms. Sperando's duty to be familiar with applicable laws and procedures; her lack of other disciplinary or ethical problems; other aspects of Ms. Sperando's conduct at the trial of this matter; the

nature, extent and credibility of Ms. Sperando's remorse for her conduct as expressed by her testimony before the Court on February 9, 2000 and the Court's observations of her during that testimony; the actual and potential harm to the parties resulting from Ms. Sperando's conduct; the actual and potential harm to the justice system from Ms. Sperando's conduct; the risk of and need to protect the public, the court system, witnesses, and litigants from future violations by Ms. Sperando; the damage to Ms. Sperando's reputation already imposed by the appellate decisions in this case, and all other facts found from the evidence as reflected in this Order.[2]

9. In January 1997 when this case was tried, attorneys in North Carolina were bound by the Rules of Professional Conduct (hereinafter "RPC"). Those Rules were substantially reorganized in July 1997 with the adoption of the Revised Rules of Professional Conduct (hereinafter "RRPC"), but the substance of the Rules related to this matter remained, for the most part, the same.

10. The Court does not discipline or sanction attorneys lightly and has made every effort to evaluate appropriate sanctions fairly. There is no advocate against Ms. Sperando's position. Counsel for the defense made clear at the February 9 hearing that the defendant never filed a motion for sanctions and never sought sanctions. The Court has undertaken a substantial amount of its own research and has prepared its own Order.

FINDINGS REGARDING MISCONDUCT

11. Calling witnesses liars in closing argument has long been prohibited by the North Carolina courts. E.g., State v. Locklear, 294 N.C. 210, 217 (1978). Counsel may not employ closing argument as a device to place before the jury incompetent and prejudicial matters by expressing his or her own knowledge, beliefs and opinions. State v. Allen, 323 N.C. 208 (1988), *vacated on other grounds*, 494 U.S. 1021 (1990). This conduct was grossly improper, Couch v. Private Diagnostic Clinic, 351 N.C. 92 (1999), and violated, inter alia, Rule 12 of the Rules of Practice and RPC 7.6(c) and RPC 1.2(d).

12. Counsel may not attack the integrity of defense counsel in closing argument. State v. Vines, 105 N.C. App. 147 (1992). "A trial attorney may not make uncomplimentary comments about opposing counsel, and should 'refrain from

[2] It may or may not be appropriate to consider the prophylactic effect sanctioning Ms. Sperando might have on inappropriate conduct by other lawyers. To the extent that is appropriate, it is a goal that has already been fully met by the Supreme Court's decision. This Court therefore has not considered this in any way.

abusive, vituperative, and opprobrious language, or from indulging in invectives.'" State v. Sanderson, 336 N.C. 1, 10 (1994). Indeed, the Supreme Court has held that an attorney who merely implies in closing argument that opposing counsel knowingly put forth false testimony should be sanctioned. State v. Rivera, 350 N.C. 285, 290-291 (1999)("This Court shall not tolerate, and our trial courts must not tolerate, comments in court by one lawyer tending to disparage the personality or performance of another. Such comments tend to reduce public trust and confidence in our courts and, in more extreme cases, directly interfere with the truth-finding function by distracting judges and juries from the serious business at hand. We admonish our trial courts to take seriously their duty to insure that the mandates of Rule 12 are strictly complied with in all cases and to impose appropriate sanctions if they are not.") Ms. Sperando's conduct in expressing during closing argument her opinion that defense counsel had knowingly offered false testimony during the trial was grossly improper, Couch v. Private Diagnostic Clinic, 351 N.C. 92 (1999), and violated, inter alia, Rule 12 of the Rules of Practice, RPC 7.2(a)(1) and 7.6(c), and RPC 1.2(d).

13. By making these closing arguments, Ms. Sperando further violated RPC 6(a) [RRPC 1.1]. The Court recognizes that a lawyer who makes a good-faith effort to be prepared and to be thorough will not generally be subject to professional discipline for a simple mistake, and that a single error made in good faith is not usually indicative of a violation of the duty to represent a client competently. Comment 7 to RRPC 1.1; see Comment 5 to RRPC 1.3 ("Conduct sufficient to warrant the imposition of professional discipline is typically characterized by the element of intent or scienter manifested when a lawyer knowingly or recklessly disregards his or her obligations."). The trial judge testified that Ms. Sperando's conduct at trial was generally acceptable and unremarkable, and the Court's review of the record before it reflects that plaintiff's counsel presented a case well-prepared on the merits. It is clear that in many ways Ms. Sperando is a talented advocate.

14. Nonetheless, there are several facts that reflect a serious lack of thoroughness and preparation. First, when Ms. Sperando accepted representation in this case, she had a duty to provide competent representation and to adequately prepare. RPC 6(a); see, e.g., Rorrer v. Cooke, 313 N.C. 338, 341 (1985). "Competent representation means the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation," RPC 6(a)(1), and assumes a basic level of familiarity with applicable rules, statutes, and case law. Any attorney admitted to practice *pro hac vice* in the trial of a case should make at least some basic inquiry into the state's rules and practices. All of the evidence suggests that Ms. Sperando

made no inquiry at all into the propriety of her closing argument before she undertook it and the Court so finds.[3]

15. Second, even without making any inquiry, a competent attorney reasonably should have known that the argument Ms. Sperando made about opposing counsel was almost certainly improper. As to those comments, the Court does not accept Ms. Sperando's testimony that she acted "in good faith." No lawyer should ever make such personal and totally irrelevant accusations about opposing counsel in closing argument. This is the case whether the accusation is true or false, whether it is supported by the evidence or not, whether opposing counsel objects or not, whether the trial court intervenes or not, and whether the lawyer truly believes it or is just grandstanding. There is nothing credible before the Court that would justify a belief that such remarks about opposing counsel were appropriate. While it is not as "bad" to unknowingly break a rule as it is to knowingly break a rule and the Court has given that some weight, ignorance of the law is no real excuse. A competent and ethical attorney who gave the matter even passing attention would have suspected that such an argument was almost certainly improper even without researching the issue. Ms. Sperando said what she meant to say, knowing it was a "heavy accusation," to use her own words. This misconduct was reckless.

16. As to Ms. Sperando's comments about witnesses, the Court accepts Ms. Sperando's testimony that she did not intentionally violate her professional and ethical responsibilities. The Court further recognizes that a lawyer is allowed to argue the facts about a witness's credibility to the jury. Nonetheless, the rules she broke in this case are well-established and well-publicized in North Carolina. Moreover, in her home state of Florida, cases have been reversed when prosecutors went too far in calling witnesses liars during closing argument.[4] The Florida Rules of Professional Conduct are quite similar in relevant part to the North Carolina Rules. For example, Florida Rule 4-3.4(e) states that a lawyer shall not state a personal opinion as to the justness of a cause or the credibility of a witness. While this failure to prepare is not as egregious as the violation concerning her opinions of defense counsel, she nonetheless should have made some inquiry into North

[3] If she had made such an inquiry, she would have known the arguments were improper, and then the sanction would be for knowing or intentional misconduct.

[4] The Court has not attempted an exhaustive review of relevant Florida authorities. A survey does reveal that while Florida takes a slightly different approach to this issue than North Carolina, there are limits and constraints on calling a witness a liar in closing argument. See, e.g., Ruiz v. State, 743 So.2d 1, 5-6 (Fla.S.Ct. 1999); Craig v. State, 510 So.2d 857, 865 (Fla.S.Ct. 1987); Mills v. State, 507 So.2d 602 (Fla.S.Ct. 1987); Pacifico v. State, 642 So.2d 1178, 1183-84 (Fla.App. 1994); Bass v. State, 547 So.2d 680 (Fla.App. 1989).

Carolina practice before undertaking her argument and she should have known that her closing argument was improper. Her failure to do so was reckless.

17. Third, it appears that the issue decided by the Court of Appeals against the plaintiff (the "PDC issue" as reflected at 133 N.C.App. at 102-104) also arose as a result of Ms. Sperando's lack of familiarity with North Carolina law. The Court of Appeals found that she "misunderstood the legal consequences" of taking a dismissal against PDC and that she "should have been on notice of the pitfalls."

18. Finally, in her closing argument Ms. Sperando referred to medical doctors who testified as expert witnesses as " my girl" and "girlfriend," language that would offend many people and is generally improper. See Rule 12, General Rules of Practice; see State v. Sanderson, 336 N.C. at 12 (improper during cross-examination to refer to a female expert witness as a "gal").

19. While Ms. Sperando's comments about defense witnesses might not, and her problems with the dismissal of PDC and her demeaning language concerning expert witnesses would not, alone be sufficient to support a finding of lack of adequate preparation, when considered together with each other and with the egregious violation related to her remarks about defense counsel, the Court is convinced there has been a violation of RPC 6(a)(2).

20. Ms. Sperando did not report defense counsel to the State Bar for allegedly knowingly offering false testimony. To knowingly offer false testimony violates the Revised Rules of Professional Conduct, see RPC 7.2(a)(5) [RRPC 3.3(a)(4)], and is among the most serious of violations, subjecting an attorney to disbarment or suspension of his license. See State Bar v. DuMont, 304 N.C. 627, 629 (1982); State Bar v. Talman, 62 N.C.App. 355, 366 (1983). A lawyer who has knowledge of such serious misconduct and fails to report it does herself violate RPC 1.3(a) [RRPC 8.3].

21. Ms. Sperando did not violate RPC 1.3(a) by her failure to report defense counsel. The record before the Court indicates that defense counsel did not offer false testimony. The Court has reviewed plaintiff's appellate briefs. In these briefs Ms. Sperando explained in detail the evidence she claimed supported her statements in closing argument.[5] The Court has reviewed those briefs and all attached pages of the trial transcript and is satisfied that the evidence presented at trial does not justify Ms. Sperando's vituperative claim that defense counsel knowingly offered false

[5] Ms. Sperando stated at the February 7 hearing that she was responsible for the appellate briefs in this case.

testimony. The record reflects that defense counsel called expert witnesses to the stand who had different opinions from experts presented by the plaintiff; defense counsel called fact witnesses to the stand who recalled things differently from fact witnesses called by the plaintiff; and defense counsel called witnesses to the stand who were impeached about various parts of their testimony. The same can be said of plaintiff's counsel and indeed is true in most trials that take place – conflicting evidence and credibility issues are the reasons for trials. Without more, this is not even "offering false testimony," much less "knowingly offering false testimony." Based on this record Ms. Sperando did not have knowledge that false testimony had been offered. She may have believed it, but she did not "have knowledge" of it, as required by RPC 1.3(a) before reporting is necessary.[6]

22. The Court finds no violation of RPC 1.3(a) and thus will not sanction Ms. Sperando for violating that RPC. That said, Ms. Sperando's comments concerning opposing counsel were obviously reprehensible. The comments themselves, her other inaction, and her testimony on February 9 about this issue raise several concerns.

23. While the Court does not doubt that Ms. Sperando actually holds the opinion she expressed, the Court is disturbed by her willingness to attribute malignant and corrupt motives to defense counsel based on the record in this case. It shows an unfortunate readiness to demonize opposing counsel rather than to treat opposing counsel with respect as a fellow professional.

24. It is also disturbing that she was willing to make such a "heavy accusation" in closing argument, where defense counsel could not ethically respond, and has not been willing to make the accusation in a forum where defense counsel could respond. For example, she could have objected outside the presence of the jury to the admissibility of the supposedly perjured testimony. She could have but did not report defense counsel to the State Bar. Under either scenario, defense counsel could respond to the accusation and the merits of the accusation could be decided.[7]

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[6] The fact that the trial judge did not, to the Court's knowledge, report defense counsel to the State Bar or himself take any disciplinary action is further support, if any is needed, for the conclusion that the accusation was unfounded. Neither did the appellate courts take any action against defense counsel, though Ms. Sperando repeatedly argued to them that defense counsel had called witnesses to testify whom he knew would not tell the truth. E.g., Plaintiff Appellee's Brief to the Supreme Court at p. 14-15.

[7] The Rules of Professional Conduct do allow an attorney with knowledge of another lawyer's violation to report the conduct to "other appropriate authority." RPC 1.3(a); cf., RRPC 8.3 (attorney may report a violation to "the court"). Arguably Ms. Sperando did this by making her accusation in the judge's presence. The Court would have difficulty finding that making this kind of accusation in closing argument to the jury constitutes informing the Court, especially when Ms. Sperando did not offer this as the reason she did not report defense counsel to the State Bar. In any event, the Court is not finding a violation of this Rule.

25. Finally, Ms. Sperando gave as her reason for not reporting defense counsel to the State Bar that she "just wouldn't do that" and that she did not wish to get another lawyer "in trouble." This testimony is troubling in a number of ways. First, it reflects a fundamental failure to recognize her obligations as a member of a self-governing profession. See RPC 0.1, ¶¶14-16 and RRPC 0.1, ¶¶13-15; Lunsford, "Rookie of the Years," North Carolina State Bar Journal, Vol. 5, Issue 1, at page 33 ("Self-regulation is a cornerstone of our profession. It is the key to our independence as a practicing bar.") Second, it demonstrates an unwillingness to comply with the Rules of Professional Conduct. Finally, her testimony on this issue was not credible on its face and Ms. Sperando was not credible when she offered this testimony. A lawyer who publicly accuses defense counsel in open court in front of a jury and judge of knowingly offering false testimony almost by definition is willing to get that lawyer in trouble. The Court thinks it much more likely that Ms. Sperando did not report defense counsel because it did not occur to her or because she knew the accusation was not supported by the evidence. Either way, the Court is concerned by Ms. Sperando's lack of candor with the Court on this topic. As a result of all of these concerns, the Court does not have confidence in Ms. Sperando's ability to "exercise sensitive professional and moral judgment guided by the basic principles underlying the Rules [of Professional Conduct]." RPC 0.1 ¶13.

26. Ironically enough, rejecting Ms. Sperando's opinion on this point works in Ms. Sperando's favor, in the Court's view. Had the Court agreed with Ms. Sperando's opinion and otherwise found that Ms. Sperando did violate RPC 1.3(a) by failing to report defense counsel when she should have, more serious sanctions would be required, possibly including a long term or even permanent prohibition against representing clients in North Carolina *pro hac vice*. "A code of silence may be appropriate for organized criminals and malpracticing professionals in other disciplines, but [lawyers] cannot survive it." Lunsford, "Rookie of the Years," North Carolina State Bar Journal, Vol. 5, Issue 1, at page 33.

27. The Court has read the appellate briefs written by Ms. Sperando on behalf of the plaintiffs. The Court has considered those briefs as reflected in this Order. Because the Court perceives the remand from the Supreme Court to direct that the Court sanction Ms. Sperando for her conduct before the Superior Court, the Court has not specifically considered whether in the appellate briefs Ms. Sperando committed additional violations of the Revised Rules of Professional Conduct or otherwise behaved unprofessionally. As to this question, the Court makes no findings one way or the other.

28. The Court has considered the fact that defense counsel objected only once during Ms. Sperando's closing argument and that the trial court overruled the objection. While these facts have some mitigating value, they have little to do with whether Ms. Sperando violated her ethical and professional responsibilities. This is not a case where an attorney was goaded into an ethical violation by an adversary's unethical conduct or by a judge's bias. Lawyers are obligated to follow the rules governing professional conduct at all times, and the fact that a lawyer is not "caught" or stopped the first time she violates those rules does not excuse a second violation. Perhaps in the world of sports it is acceptable for an athlete to commit a foul in "reliance" on a referee's tendency not to call fouls, all toward the ultimate goal of winning the game, but that is not acceptable for lawyers. A lawyer has a duty to do more than "win the game." Lawyers hold a special public trust and have a duty to uphold the administration of justice. They are required to "play fair." This duty cannot be avoided by failing to be familiar with the rules or by blaming the referee or the other side for not stopping the violation. See RPC 0.1, ¶16 ("Every lawyer is responsible for observance of the Rules of Professional Conduct."); RPC 0.2, ¶2 ("Compliance with the rules. . . depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings."); E.g., Dondi Properties Corp. v. Commerce Savings and Loan Association, 121 F.R.D. 284, 287 (N.D.Tex. 1988). It was Ms. Sperando's duty and responsibility to be sure she follows North Carolina ethical and professional requirements while she is in a North Carolina courtroom. This is not a duty that she can delegate, nor can she rely on someone else to stop her when she goes too far.

HARM RESULTING FROM MS. SPERANDO'S CONDUCT

29. Closing arguments like the one made by Ms. Sperando in this case have serious negative consequences. They reduce public confidence in the legal system by encouraging public perceptions that lawyers are nothing more than name-callers and playground bullies and by encouraging public perceptions that lawyers are corrupt. They encourage disrespectful behavior in the courtroom. They undermine public confidence in jury verdicts. They victimize witnesses who are unable to respond and are unable to hold the speaker accountable for the accusations. They distract juries from the seriousness of their duties. They place opposing counsel in a position of choosing between violating ethical and professional rules himself by responding to irrelevant personal accusations or seeming to accept slanderous accusations detrimental to his client by failing to respond. They are unfair to the opposing party.

30. As noted by the Supreme Court of Hawaii in Office of Disciplinary Counsel v. Breiner, 969 P.2d 1285 (Haw. 1999), "Courts are places for the dispassionate examination of evidence and the neutral consideration of arguments regarding the requirements of the law. They are our society's alternative to the brute force of the police state, the street brawl, and the violence of a domestic dispute. When we speak of maintaining the integrity of the legal profession and the dignity of the courts, we do not intend that attorneys be reduced to obsequious sycophants in order to avoid offending the fragile sensibilities of judges. To the contrary, we merely require that the members of a learned profession, who are privileged to serve as officers of the court, act in accordance with the time-honored traditions that experience has taught us are necessary to protect the office of the court and the process of justice from devolving into the barroom brawl." Ms. Sperando's conduct undermined the dignity of the courts and the integrity of the legal profession.

31. In this case, Ms. Sperando's conduct has affected her own client. Her client testified at trial that the case was not about money; it was about holding the defendant accountable. Yet because of the conduct of Ms. Sperando, four appellate court judges have stated in published decisions that the defendant did not get a fair trial, thus at least partially depriving plaintiff of the vindication she sought from the jury's verdict. Moreover, the appeal to the Supreme Court was based exclusively on Ms. Sperando's misconduct, resulting in a delay in final resolution of this case which can be laid solely at Ms. Sperando's feet. The potential harm to her client was even greater; the case came perilously close to having to be retried, solely because of Ms. Sperando's misconduct.

32. Ms. Sperando's misconduct also caused harm to the defendant and defense counsel. Counsel could not ethically and professionally respond in kind to Ms. Sperando's accusations, possibly leaving an implication that defense counsel agreed with or accepted the accusations, to his client's possible detriment and in damage to his own reputation. It casts a pall over the fairness of the verdict and caused the defendant to incur significant expense to pursue an appellate remedy. It may well have prevented the defendant from raising other issues on appeal.

REMORSE

33. In open court and under oath at the February 9 hearing, Ms. Sperando acknowledged her errors and apologized to the Court, to the citizens of North Carolina, and to Judge Tillery, the trial judge. Upon inquiry from the Court she apologized to her clients. Upon further inquiry from the Court and with hesitation

using careful language, she apologized to defense counsel "for the way in which I said what I said."

34. Ms. Sperando appears to be sincerely remorseful for her grossly improper conduct in repeatedly expressing during closing argument her opinion that defense witnesses lied.

35. The Court is not satisfied that Ms. Sperando is sincerely remorseful for her grossly improper conduct in accusing defense counsel of knowingly offering false testimony during closing argument.

36. Remorse is obviously a factor entitled to some weight. It is important primarily, however, because a person who is remorseful understands her mistakes and is unlikely to commit future violations. In this case, as in many situations, statements of remorse unaccompanied by action are not particularly meaningful. To put it in the vernacular, it is not enough to talk the talk; one must walk the walk. In this case, Ms. Sperando has done little to nothing to walk the walk. The Court knows of no actions Ms. Sperando has taken to reduce the possibility of future violations; there is no evidence, for example, that she has on her own initiative attended continuing legal education courses or otherwise attempted to educate herself about North Carolina law and practice. Moreover, the briefs filed with the appellate courts written by Ms. Sperando reflected no recognition of any problems at all with Ms. Sperando's conduct and are almost militantly defiant. For example, in her brief to the Supreme Court, Ms. Sperando stated: "[I]t was COUCH's duty to apprise the jury that DUKE was deliberately trying to mislead them." Plaintiff-Appellee's Brief filed September 8, 1999, at p. 30 (emphasis in original). There are numerous other similar kinds of statements in which Ms. Sperando defended her closing argument. Ms. Sperando did not even apologize to defense counsel until the day of the hearing on sanctions, and then only halfheartedly. Ms. Sperando's remorse appeared when the case was remanded for a hearing on sanctions by the Supreme Court – that is, when she had no real choice. The appellate briefs alone would support a finding that Ms. Sperando is not remorseful one bit.

ANALYSIS OF POSSIBLE SANCTIONS

37. "[A] Superior Court, as part of its inherent power to manage its affairs, to see that justice is done, and to see that the administration of justice is accomplished as expeditiously as possible, has the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it. Sanctions available include citations for contempt, censure, informing the North Carolina State Bar of the

misconduct, imposition of costs, suspension for a limited time of the right to practice before the court, suspension for a limited time of the right to practice law in the State, and disbarment." In re Robinson, 37 N.C. App. 671, 676 (1978). An out-of-state attorney's *pro hac vice* admission is subject to the discretionary authority of the trial court at all times. N.C.G.S. 84-4.2.

38. N.C.G.S. §84-28 provides that an attorney admitted to practice pursuant to N.C.G.S. § 84-4.1 is subject to discipline by the State Bar if she violates the Rules of Professional Conducted in force at the time of the act. The legislature thus expects an attorney admitted *pro hac vice* who has violated the Rules to be disciplined. The statute further discusses five forms of discipline and the standards for imposition of each kind of discipline. These requirements are binding on the State Bar when it imposes discipline. While the Court's inherent authority is not limited by the standards of this statute, see Beard v. North Carolina State Bar, 320 N.C. 126, 129-130 (1987), the statute does provide some guidance.

39. An admonition, which Ms. Sperando contends is appropriate, is imposed "in cases in which an attorney has committed a minor violation of the Rules of Professional Conduct." NCGS §84-28(c)(5). A reprimand is issued in "cases in which the attorney's conduct has caused harm or potential harm to a client, the administration of justice, the profession, or members of the public." NCGS §84-28(c)(4). A censure is issued when an attorney has violated one or more Rules and "has caused significant harm or potential harm to a client, the administration of justice, the profession or members of the public, but the protection of the public does not require suspension of the attorney's license." NCGS §84-28(c)(3). Suspension and disbarment, by implication, are reserved for those cases where protection of the public is needed. The statute further authorizes the State Bar to stay a suspension upon reasonable conditions and to impose reasonable conditions precedent to reinstatement.

40. The Court has considered many possible sanctions in this case, some mentioned in this Order and others not. The Court has weighed those sanctions in light of all of the evidence and the Court's duty to protect the public and the administration of justice. The Court has considered whether lesser sanctions and shorter time frames would be sufficient and has determined that they would not. The Court has further considered additional sanctions and longer time frames but in view of Ms. Sperando's apology in open court, the serious effect the decisions of the appellate courts have no doubt already had on her reputation and career, the other mitigating factors reflected in this Order, and the other requirements of this Order, the Court finds that further sanctions would be unduly harsh and would serve no

reasonable purpose. The Court has further considered a different mix of sanctions and time frames and finds that the sanctions imposed, taken together, are appropriate under all the circumstances.

41. The Court has considered whether an admonition is a sufficient sanction and finds that it is not, under all the facts and circumstances.

42. The defendants have suggested that Ms. Sperando be required to pay their attorneys' fees on appeal. The Court has reviewed the affidavit submitted by the defendant concerning its fees. There is no evidence before the Court that these fees were not incurred or that they were unreasonable. The Court finds that the attorneys' fees incurred by the defendant on appeal of this case were reasonable; those fees total almost $190,000. A substantial issue before both the Court of Appeals and the only issue before the Supreme Court was whether Ms. Sperando had broken the rules in her closing argument, which Ms. Sperando did not concede and indeed strenuously contested, and, if she did, whether the defendant should receive a new trial. Thus, most of defendant's attorneys' fees on appeal were incurred as a direct result of Ms. Sperando's unethical and unprofessional behavior. As a result of the defendant's work on appeal, serious violations of North Carolina's ethical and professional requirements were brought to the Court's attention, which is in the public interest.

43. The Court finds it appropriate to require Ms. Sperando to reimburse the defendant for its attorneys' fees for the appeal to the Supreme Court and, in part, on remand. The Court will require Ms. Sperando to pay to the defendant the sum of $53,274.50, which the Court finds to be the minimum amount spent by the defendant on attorneys' fees related to proceedings before the Supreme Court and this Court in connection with Ms. Sperando's misconduct.[8] While it might well be appropriate to order Ms. Sperando to pay some of the defendant's attorneys' fees related to post trial motions and the subsequent appeal to the Court of Appeals, the

[8] The Court has reviewed the affidavit of Niccolo Ciompi and attached bills. As to the bill of Maxwell, Freeman & Bowman, the Court has included those fees incurred after May 4, 1999 which are clearly associated with the appeal and has excluded all fees incurred before that date and those fees after that date which are not clearly associated with the issues raised by Ms. Sperando's conduct. As to the bill of Robinson, Bradshaw, & Hinson, the Court has only included the fees from May, June, and July 1999 associated with preparing the appellate briefs at the Supreme Court level. For other months, the bills do not allow the Court to easily determine the fees associated with Ms. Sperando's misconduct as opposed to fees incurred related to other issues. Therefore the Court has not included any of those fees. In other words, the Court has not included any fees related to issues such as post-judgment interest, execution on the judgment, and other matters that would have occurred even absent Ms. Sperando's misconduct and has not included any fees which the Court could not easily and clearly determine were related to Ms. Sperando's misconduct.

Court in its discretion will not do so, in light of other sanctions and requirements imposed by this Order and in view of the substantial sum the Court is ordering her to pay. The Court has also considered further reducing the amount it requires Ms. Sperando to pay because the defendant only objected once at trial and did not ultimately prevail on its argument for a new trial. Under all the circumstances, however, the Court finds Ms. Sperando should pay the amount set forth above.

44. Ms. Sperando was aware before the hearing that defendant was asking for its attorneys' fees and did not offer any evidence of her personal financial situation. The Court therefore has not been able to take that into account in requiring Ms. Sperando to pay some of defendant's attorneys' fees. If Ms. Sperando wishes the Court to re-examine this part of its Order in light of her personal financial situation, she may submit an affidavit detailing her liabilities, assets, income, fees received or to be received as a result of this case, and any other relevant financial information no later than April 28, 2000. The affidavit shall be filed with the Clerk with a copy to the Court in chambers and to all parties. Upon filing such affidavit, that part of the Order requiring Ms. Sperando to pay part of the defendant's fees will be stayed pending further Order of the Court but the rest of the Order will remain in effect.

45. It also seems appropriate to the Court that Ms. Sperando should be responsible to her client for all costs associated with the appeal to the Supreme Court. The plaintiff in this case has not made any suggestions regarding an appropriate sanction and has not asked for anything. Nonetheless, it is obvious that the plaintiff is one of the victims of Ms. Sperando's conduct and the Court has considered possible sanctions in this light. Other than requiring Ms. Sperando to personally pay the plaintiff's costs related to the appeal to the Supreme Court, under all the circumstances no other sanction related to the plaintiff will be imposed.

46. Because the Court is requiring Ms. Sperando to reimburse the defendant for some of its expenses and to reimburse the plaintiff for some of her costs and because those costs and expenses are substantial, the Court will not impose a fine or any other financial sanction.

47. This Order constitutes an Order of Discipline and Ms. Sperando shall report it as such when asked or required by rule or law.

48. The Court has the authority to advise other courts of disciplinary action taken against an attorney. See State v. Spivey, 213 N.C. 45, 48 (1938). It is appropriate to notify the State Bar of Florida and the State Bar of New York of the Supreme Court's decision and of this Order.

49. The Court has no reason to think that Ms. Sperando will again call witnesses liars or accuse defense counsel of knowingly offering false testimony during her closing argument, so the Court is not concerned that the particular violations which occurred in this case will occur in the future. However, the Court does have serious concerns about Ms. Sperando's continued representation of clients in North Carolina. As noted above, she repeatedly and recklessly violated clear North Carolina rules without any inquiry into whether her conduct was appropriate. She has not passed the bar exam in North Carolina or made any other sort of showing that she has a basic familiarity with North Carolina law. She has shown by her conduct that she does not adequately educate herself about North Carolina law before representing clients in a North Carolina courtroom. Presence of North Carolina co-counsel did not prevent the violations. There is nothing before the Court to show that she has taken any steps on her own initiative to prevent future violations, inadvertent or otherwise. The appellate briefs reflect that even after Ms. Sperando was aware of North Carolina law governing expressions of opinion in closing argument, she did not acknowledge even a potential problem with her conduct, giving rise to a concern that she in the future will disregard North Carolina rules when she does not agree with them or when it does not suit her purposes to follow them. She is hesitant to comply with RPC 1.3(a), now RRPC 8.3, and does not appreciate her obligations as part of a self-governing profession. Her testimony and her conduct further demonstrate that she does not fully understand or appreciate the problems caused by improperly accusing another lawyer of corrupt behavior and that she does not treat opposing counsel with respect.

50. This Court has the inherent power and duty to discipline lawyers for unprofessional conduct. In Re Hunoval, 294 N.C. 740, 744 (1977). This power is "based upon the relationship of the attorney to the court and the authority which the court has over its own officers to prevent them from, or punish them for, committing acts of . . . . impropriety calculated to bring contempt upon the administration of justice." In re Burton, 257 N.C. 534, 542-43 (1962); N.C.G.S. §84-4.2.

51. The statutory requirements an out of state attorney must meet for admission *pro hac vice* are minimal. She must file a motion containing or accompanied by her name, address, bar membership number and "status as a practicing attorney in another state" which grants reciprocal privileges to North Carolina attorneys, a statement by the client, a statement that the attorney will represent the client until the matter is concluded, will be "subject to the orders and amenable to the disciplinary action" of the General Court of Justice and the North Carolina State Bar, and has associated with a North Carolina attorney who will also appear in the

case. N.C.G.S. §84-4.1. The out-of-state attorney does not have to pass the bar exam or indeed make any showing of competence in or knowledge of North Carolina law. Essentially, North Carolina is willing to accept an out-of-state attorney on trust and willing to presume the attorney will meet her professional and ethical obligations. By her conduct, Ms. Sperando has violated that trust and rebutted that presumption.

52. In this case, the Court finds that a short-term but complete suspension of Ms. Sperando's ability to practice law in North Carolina is appropriate as a sanction and that it is also necessary to prevent future acts of impropriety, to protect the public and to safeguard the administration of justice. In view of all the facts and circumstances and after weighing lesser sanctions and alternatives, the Court believes Ms. Sperando should not be representing clients in North Carolina courts at this time and for a period of one year.

53. The permission previously granted to Ms. Sperando to represent the plaintiff in this case should be revoked. N.C.G.S. §84-4.2. This will not prejudice the plaintiff as there are virtually no disputed issues left in the case and she has other counsel of record available to protect her interests. Ms. Sperando is hereafter prohibited from appearing on behalf of the plaintiff in this matter.

54. Ms. Sperando has filed an affidavit reflecting that she presently represents parties *pro hac vice* in three cases pending in North Carolina state court. It is appropriate to require her to provide a copy of this Order and attachments to her clients in those pending cases. It is further appropriate to require Ms. Sperando to move to withdraw from representation in those cases and to prohibit her from offering anything in opposition to her motion.

55. Normally a party has a right to have competent counsel of his or her own choosing, and under certain circumstances when an attorney is admitted *pro hac vice*, the client has a substantial right affected when the attorney is thereafter disqualified. Goldston v. AMC, 326 N.C. 723, 726-727 (1990). There is no such right, however, when counsel is not competent or has otherwise acted in a manner inconsistent with his or her ethical and professional duties. In this case the highest authority in the state, the North Carolina Supreme Court, has unanimously declared that Ms. Sperando violated the Rules of Professional Conduct and made a grossly improper closing argument. Moreover, the Goldston standard is to be applied by an appellate court in deciding if an interlocutory appeal is appropriate and is not particularly apt when an attorney is before the Court for discipline or when the Court is acting pursuant to N.C.G.S. §84-4.2. Cf., State Industries, Inc. v. Jernigan,

No. 5D99-3352 (Fla.App. January 28, 2000).[9] Finally, the Court doubts that any judge who had been aware of Ms. Sperando's misconduct in this case would have granted a discretionary motion to appear *pro hac vice* in the first place.

56. In any event, assuming that the clients do have a substantial right at issue here, it is not an unqualified right that must be observed to the exclusion of all other concerns and issues of importance and it is not a right that handcuffs the Courts from removing attorneys who have violated ethical and professional rules or who present a risk of future violations. The State Bar, for example, routinely disbars and suspends attorneys for violation of ethical rules without regard to the potential negative effect on clients. See Rules and Regulations of the North Carolina State Bar, Section .0124. Indeed, one of the reasons for suspension or disbarment is the protection of clients, potential clients, and the public. A Court in a judicial disbarment can order an attorney disbarred immediately and is not even required to give the attorney time to wind down her practice. In Re Delk, 336 N.C. 543, 549 (1994). Even assuming that the clients in these three cases would want Ms. Sperando to continue to represent them once they are aware of Ms. Sperando's misconduct and the findings and terms of this Order, the right of a party to counsel of choice does not outweigh the interests of the court system in protecting itself from impropriety, in the fair and efficient administration of justice, in the protection of the public, and in the enforcement of its own rules and laws. No party has a right to have counsel who will not follow the rules and who cannot be relied upon to comply with our state's ethical requirements. By her own conduct, Ms. Sperando has shown that she has forsaken the trust without which an unlicensed out-of-state attorney cannot appear in our courts.

57. Despite the Court's view that it does not have to make an individual determination in each case as to the need for withdrawal, the Court has considered the information available. As to one of these cases, Ms. Sperando has clearly been only tangentially involved[10] and there are several other attorneys involved in the

[9] In State Industries, Inc. v. Jernigan, the Florida Court of Appeal for the Fifth District affirmed the trial court's revocation of the authority of an Illinois attorney to appear on behalf of a defendant in a product liability case. During a deposition, the Illinois attorney repeatedly called plaintiffs' counsel a liar. The appellate court stated that "The decision as to whether to grant pro hac vice status to an out-of-state attorney is within the sound discretion of the trial court. . . . .Likewise in our view is the decision to revoke the privilege once given." The Court further held that "It is not necessary that in order to revoke pro hac vice credentials that a trial judge find that the conduct in question amounted to an ethical violation under the Florida Rules of Professional Conduct. Nor must the court await conduct that would require a mistrial or justify a reversal on appeal in order to act. A trial court may revoke the status of pro hac vice whenever it appears that counsel's conduct during any stage of the proceeding . . . adversely impacts the administration of justice." The Court concluded that calling opposing counsel a liar on the record does adversely affect the administration of justice.

[10] She has been involved so little she initially forgot to inform the Court about this case.

case so that her client is unlikely to be prejudiced by her withdrawal. In the other two cases, Ms. Sperando's clients do have other counsel of record. The Court also notes that the North Carolina attorney involved in each of those two cases pursuant to N.C.G.S. §84-4.1(5) is the same attorney as in this case and that the involvement of this attorney did not prevent the violations at issue here; it therefore cannot be presumed that his involvement would prevent violations in other cases. The courts before which those cases are pending can continue the case if necessary or otherwise deal with any issues arising from Ms. Sperando's withdrawal. Finally, Ms. Sperando is a member of a firm with several attorneys, at least one of whom has experience in medical negligence cases.

58. Balancing the myriad of factors supporting temporary suspension against the right of individual litigants to counsel of choice and assuming such a right exists in this case, the Court is convinced that a temporary suspension is appropriate and necessary.

59. From today's date until one year after the date the last motion to withdraw is allowed or Ms. Sperando's representation of clients in North Carolina courts otherwise ceases, Ms. Sperando shall not appear in a North Carolina state court on behalf of a client except to the extent necessary to withdraw. For the same period of time she shall not move to appear *pro hac vice* in a North Carolina case.

60. After this suspension is over, she shall, for the next five years, attach to any Motion to be admitted *pro hac vice* filed in North Carolina state court a copy of this Order and its attachments and an affidavit showing compliance with this Order. She shall further not attempt to have any such Motion heard in chambers and shall arrange for the Motion to be heard in open court with notice to other parties.

61. Before filing any motion in North Carolina state court to be admitted *pro hac vice*, Ms. Sperando shall complete at least twenty-four hours of continuing legal education specifically related to trials and litigation in North Carolina and at least twelve hours of continuing legal education specifically related to ethics and/or professionalism in a litigation practice in North Carolina.

In the Court's discretion, it is therefore ORDERED that:

1. Maria P. Sperando is hereby censured for grossly improper conduct during a trial that violated the General Rules of Practice and the North Carolina Rules of Professional Conduct.

2. This Order is an Order of Discipline against Maria P. Sperando and she shall report it as such when asked or when required by law or applicable rule.

3. The permission previously granted to Maria P. Sperando to represent the plaintiff in this case is hereby revoked.

4. Maria P. Sperando shall pay to the defendant Duke University the sum of $53,274.50 within sixty days of the date of this Order as a sanction and to partially reimburse Duke for the fees it incurred as a result of her unprofessional and unethical conduct.

5. Maria P. Sperando shall pay to the plaintiff, Finesse Couch, Administratrix, the costs incurred by the plaintiff in defending the appeal of this case in the North Carolina Supreme Court within sixty days of the date of this Order.

6. Maria P. Sperando shall move to withdraw as soon as practicable from any cases pending in North Carolina state court in which she represents clients. She shall attach to each Motion a copy of this Order and its attachments and provide a copy to her clients. She shall not speak to the Court in opposition to the Motion.

7. Maria P. Sperando is prohibited from representing clients in North Carolina courts from today's date until one year after the date the last motion to withdraw is allowed or her representation of clients in North Carolina state court otherwise ceases. During this time she shall not move to appear *pro hac vice* in a North Carolina case.

8. At the end of this period of suspension, Maria P. Sperando may move to represent clients in North Carolina courts *pro hac vice*, subject to the requirements of NCGS §84-4.1 and upon compliance with the following additional terms: She shall attach to any such Motion filed for the next five years a copy of this Order and its attachments and an affidavit showing compliance with all aspects of this Order, and she shall before filing such a motion complete twenty-four hours of continuing legal education specifically related to trials and litigation in North Carolina and twelve hours of continuing legal education specifically related to ethics or professionalism in a litigation practice in North Carolina. She shall further not attempt to have any such Motion heard in chambers and shall arrange for the Motion to be heard in open court with notice to other parties.

9. The Clerk of Court of Durham County shall provide a certified copy of this Order and its attachments to the State Bar of North Carolina, the State Bar of Florida and the State Bar of New York.

10. Maria P. Sperando shall file an affidavit with supporting documentation showing compliance with every term of this Order by May 31, 2000. Such supporting documentation shall be detailed and specific and shall include copies of checks, letters, certified mail receipts, filed Motions and Orders, etc. The original affidavit and supporting documents shall be filed with the Clerk and Ms. Sperando shall provide a copy to the Court. For those actions required by this Order that cannot be completed by May 31, 2000, Ms. Sperando shall set forth the status of her efforts to comply in her affidavit and she shall file supplemental affidavits every thirty days until compliance is total.

11. The Court retains jurisdiction of this matter to enter such Orders as may be necessary to ensure compliance and enforcement. Failure to comply with the terms of this Order could result in further sanctions and in civil and/or criminal contempt proceedings.

12. Should Maria P. Sperando or any other party file Notice of Appeal from this Order or any other Order related to the issue remanded by the Supreme Court, the appealing person shall provide a copy of the Notice of Appeal to the Court in chambers. The Court will then consider appointment of counsel to defend its Order.

13. The Trial Court Administrator in Durham County is directed to provide a filed copy of this Order to Maria Sperando, to other counsel of record for the plaintiff, to counsel of record for Ms. Sperando, and to counsel of record for the defendant.

This 31st day of March, 2000.

Catherine C. Eagles
Superior Court Judge Presiding

Based on the foregoing and the entire record in this case, we cannot conclude as a matter of law that the sentence of death was excessive or disproportionate. We hold that defendant received a fair trial and capital sentencing proceeding, free of prejudicial error.

NO ERROR.

Justice FREEMAN did not participate in the consideration or decision of this case.

FINESSE G. COUCH, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF CARNELL SIMMONS COUCH v. PRIVATE DIAGNOSTIC CLINIC AND DUKE UNIVERSITY

No. 255A99

(Filed 5 November 1999)

Trials— argument of counsel—characterizations of witnesses and counsel as liars—gross impropriety

The trial court erred by not sustaining defendant's objection and by failing to intervene ex mero motu to correct the grossly improper jury argument by plaintiff's counsel that included nineteen explicit characterizations of the defense witnesses and opposing counsel as liars. However, where one Justice did not participate in the consideration or decision of this case, and the remaining six Justices are equally divided on the issue of whether this error was prejudicial to the appealing defendant, the decision of the Court of Appeals is left undisturbed and stands without precedential value.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 133 N.C. App. ——, 515 S.E.2d 30 (1999), affirming in part and reversing in part a judgment entered 3 March 1997 by Tillery, J., in Superior Court, Durham County. Heard in the Supreme Court 13 October 1999.

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Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sperando, by Maria P. Sperando, pro hac vice; and Keith A. Bishop, for plaintiff-appellee.

Maxwell, Freeman & Bowman, P.A., by James B. Maxwell; and Robinson, Bradshaw & Hinson, P.A., by Everett J. Bowman, Lawrence C. Moore, III, and John M. Conley, for defendant-appellant Duke University.

PER CURIAM.

Justice Freeman did not participate in the consideration or decision of this case. The remaining six members of the Court are of the opinion that plaintiff's counsel, Ms. Maria P. Sperando, engaged in a grossly improper jury argument that included at least nineteen explicit characterizations of the defense witnesses and opposing counsel as liars. The trial court did not sustain defendant's initial objection to this jury argument, nor did the trial court thereafter intervene *ex mero motu* to correct the grossly improper argument.

All members of the Court are of the opinion that the trial court erred by not sustaining defendant's objection and by not intervening *ex mero motu*. Justices Lake, Martin, and Wainwright believe that the error was prejudicial to the appealing defendant and would vote to grant a new trial. Chief Justice Frye and Justices Parker and Orr are of the opinion that the error was not prejudicial to the appealing defendant and would vote to affirm the result reached by the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See, e.g., Hayes v. Town of Fairmont*, 350 N.C. 81, 511 S.E.2d 638 (1999); *James v. Rogers*, 231 N.C. 668, 58 S.E.2d 640 (1950).

Furthermore, this Court, being of the opinion that plaintiff's counsel's conduct violated Rule 12 of the General Rules of Practice for the Superior and District Courts and was not in conformity with the Rules of Professional Conduct, remands this cause to the trial court for the determination of an appropriate sanction.

The decision of the Court of Appeals is affirmed without precedential value.

AFFIRMED.

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136 F.2d 562, 563 (5th Cir. 1943)).
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FINESSE G. COUCH, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF CARNELL SIMMONS COUCH, PLAINTIFF v. PRIVATE DIAGNOSTIC CLINIC AND DUKE UNIVERSITY, DEFENDANTS

No. COA97-1540

(Filed 4 May 1999)

1. Trials— argument of counsel—veracity of witnesses—no prejudicial error

There was no prejudicial error in a medical malpractice action where plaintiff's counsel argued that defense witnesses were lying. The only objection was to a reference which was not alone sufficiently prejudicial to entitle defendants to a new trial and, although the statements may have been improper and the court should have given a cautionary instruction, the statements were not of such gross impropriety as to entitle defendants to a new trial. Given the convincing evidence presented at trial supporting defendants' negligence, any effect on the jury's verdict was harmless.

2. Agency— hospital and doctors—substantial evidence

The trial court did not err in a medical malpractice action by denying defendant-Duke University's motion for JNOV on the issue of whether any of the treating physicians was an agent of Duke. Considering the evidence in the light most favorable to the nonmoving party, there was substantial evidence of the existence of an agency relationship.

3. Trials— Rule 60 motion—excusable neglect—voluntary dismissal—willful act

The trial court erred in a medical malpractice action by allowing plaintiff's counsel to reinstate the Private Diagnostic Clinic as a defendant on a Rule 60 motion following a voluntary dismissal based upon plaintiff's counsel's mistaken belief that an employer-employee relationship existed between all treating physicians and defendant-Duke. The voluntary dismissal was a carefully considered decision, a trial strategy, and thus constitutes a deliberate willful act precluding relief under Rule 60. The fact that the legal consequences of the action were misunderstood by plaintiff's attorney is not material.

Judge WALKER concurring.

Judge GREENE concurring in part and dissenting in part.

Appeal by defendants from judgment entered 3 March 1997 by Tillery, J., in Superior Court, Durham County. Heard in the Court of Appeals 22 September 1998.

Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sperando, by Maria P. Sperando and Keith A. Bishop, for plaintiff-appellee.

Maxwell, Freeman & Bowman, P.A., by James B. Maxwell, and Robinson Bradshaw & Hinson, P.A., by Everett J. Bowman, Lawrence C. Moore, III, and John M. Conley, for defendants-appellants.

WYNN, Judge.

Defendants Duke University and the Private Diagnostic Clinic appeal from a jury determination that their medical practice negligence caused the death of ten-year-old Carnell Simmons Couch—son of plaintiff Finesse G. Couch.

Individually and as administratrix of Carnell's estate, Ms. Couch initiated this action against Duke, the Private Diagnostic Clinic, and Dr. Delbert R. Wigfall—an Assistant Professor of Pediatric and Acting Chief of the Division of Nephrology at Duke. She alleged that those medical providers negligently: (1) failed to examine, assess, and treat Carnell in an appropriate and timely manner and, (2) failed to appropriately diagnose the extent and urgency of Carnell's condition.

In her complaint, Ms. Couch characterized Duke as a private university operating a private hospital for the treatment of persons in need of medical care and attention and the Private Diagnostic Clinic as a professional organization of physicians who practice medicine at Duke. The complaint further alleged:

> At all times relevant to this action Dr. Wigfall, the attending physician and all other physicians under his control, supervision and guidance who rendered treatment, were agents of Duke [and the Private Diagnostic Clinic] and that all acts and omissions of Dr. Wigfall and all other physicians rendering treatment . . . were performed within the scope of their agency as agents and representatives of Duke [and the Private Diagnostic Clinic].

Although defendants denied in their answer that Dr. Wigfall and all other physicians were acting within the course and scope of an agency relationship with Duke at the time they rendered treatment to

Carnell, they admitted that the Private Diagnostic Clinic is a professional organization of physicians who practice medicine at Duke. Moreover, defendants admitted that Dr. Wigfall is a member of the Private Diagnostic Clinic practicing at Duke "and as such is employed by [Duke] to carry out those duties."

The day following the commencement of trial on 6 January 1997, Ms. Couch "by and through her . . . attorney of record" filed a written "Notice of Voluntary Dismissal with Prejudice" against Dr. Wigfall and the Private Diagnostic Clinic. Five days into the trial after six witnesses had testified, Ms. Couch's counsel attempted to have it stipulated "that the doctors who read the x-rays, and who treated Carnell on the 4th through the 15th [of December], and before, were employees of . . . [Duke]."

Defendants' counsel responded that these physicians "were . . . partners in the Private Diagnostic Clinic, at Duke practicing medicine at the medical center." Further, he stated that the physicians were employed as professors or faculty members in the Department of Pediatrics at Duke. However, he would not stipulate that the physicians were employed by Duke "as treating physicians."

Concerned that she had prematurely dismissed the Private Diagnostic Clinic as a defendant, Ms. Couch's counsel orally moved under Rule 60(b) for relief from the judgment in order to reinstate the Private Diagnostic Clinic. In support of this motion, counsel explained that she thought that only Dr. Wigfall was an employee of Duke at the time they rendered treatment to Carnell. Ms. Couch's counsel admitted that "it was a mistake, it was an honest mistake that we made," based on the statements of defendants' counsel and the allegation in the answer, that these physicians were employees of Duke. At another point in the record, Ms. Couch's counsel told the trial court that she entered the dismissal "because I wanted to just have everything real clean and have one defendant."

Despite defendants' objection to Ms. Couch's motion, the trial court reinstated the Private Diagnostic Clinic as a defendant. In its written order allowing the reinstatement of the Private Diagnostic Clinic, the trial court found that in dismissing the Private Diagnostic Clinic, Ms. Couch's counsel "acted in the good faith belief that an employer-employee relationship between all treating physicians and [Duke]" existed. Additionally, it found that: (1) Duke and the Private Diagnostic Clinic had not been prejudiced and (2) "the plaintiff was not at fault . . . and played no role in her counsel's decision to remove

[the] Private Diagnostic Clinic as a named defendant." Therefore, the trial court concluded that "the belief of counsel relative to the admissions of [Duke] was an inadvertent mistake and the actions taken . . . were excusable neglect."

At trial, the evidence showed that on 4 December 1991, Ms. Couch brought Carnell, who previously had been diagnosed with nephrotic syndrome[1] with minimal change disease, to Duke's emergency room after he began experiencing symptoms including swelling, decreased urine output, and shortness of breath. After performing a number of tests on Carnell, including a chest x-ray, the medical personnel diagnosed his condition as a relapse of his nephrotic syndrome, treated him with several drugs, and discharged him to the care of his parents.

On 10 December 1991, Carnell was again brought to Duke's emergency room complaining of a shortness of breath, coughing, and vomiting. This time, however, he was admitted to the hospital and given numerous tests including chest x-rays and two electrocardiograms ("EKGs"). An initial x-ray on 10 December 1991 led to a diagnosis of pneumonia, but the second x-ray on 14 December 1991 was reported to reveal that his lung anomaly had begun to resolve.

Further, the first EKG on 13 December 1991 was characterized as "a very strange looking EKG" suggesting that this test be repeated. The second, however, was interpreted as normal. Thereafter, on 15 December 1991, Carnell was discharged from Duke.

While at home on 13 February 1992, Carnell died. An autopsy established the cause of death as *in situ* pulmonary artery thrombosis, meaning that one or more blood clots had developed and blocked the main artery leading from the heart to the lungs. Some of the blood clots were determined to be months old, while others were years old.

At the close of all of the evidence, Duke moved for a directed verdict on the grounds that there was insufficient evidence of negligence on its part. The Private Diagnostic Clinic's motion was based in part on the trial court reinstating it as a defendant. The trial court denied both motions.

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1. Generally characterized, nephrotic syndrome is a condition in which the kidneys leak protein that would normally stay in the blood stream and as a result there is a tendency for fluid to accumulate abnormally within the body. The condition is further characterized by intervals of remission punctuated by flare-ups or swelling of the abdominal and genital areas, and associated discomfort.

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Subsequently, the jury determined that the medical doctors who treated Carnell were agents of Duke and that Carnell's death was caused by the negligence of both the Private Diagnostic Clinic and Duke. Damages were assessed at $2,501,150.00. Defendants moved for judgment notwithstanding the verdict (JNOV) which the trial court denied.

On appeal, defendants contend that the trial court committed reversible error by: (1) permitting Ms. Couch's counsel to engage in a grossly improper jury argument during trial, (2) denying Duke's Motion for Judgment Notwithstanding the Verdict, and (3) allowing Ms. Couch's counsel to reinstate the Private Diagnostic Clinic as a defendant. We address each of these seriatim.

I.

[1] First, defendants assert that the trial court abused its discretion in allowing the jury argument of Ms. Couch's counsel which contained various references to the veracity of defense witnesses. Specifically, defendants point to counsel's comments that: (1) "There is nothing worse than a liar because you can't protect yourself from a liar. . . . [T]hese people, and all the doctors that they paraded in here who told you lie, after lie, after lie"; (2) "They lied to your face, blatantly. They didn't care. They tried to make fools of everybody in the courtroom"; (3) "In your face lies"; (4) " . . . they knew before they put their hands on the Bible that they were going to tell those lies and [Defendants' attorney] put them up anyway. That's heavy. That's a heavy accusation"; (5) "Well, I don't know what you call it but that's a lie. That's not even—that's not shading the truth . . . How is that not a lie? How is that not a lie?"; (6) "So you see, when I say a lie, okay, I want the record to reflect that I mean a lie"; (7) "Now let me ask you this, how do you think that they intend to get out from under all these lies?"; (8) "This is another blatant lie"; (9) "When they parade these witnesses in one after another and lied to your face. I mean, they were not even smooth about it."

It is well established in North Carolina that "[c]ounsel have wide latitude in making their arguments to the jury." *State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 346 (1967). Further, the control of counsel's arguments "must be left largely to the discretion of the trial judge," *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979), because the trial judge

> 'sees what is done, and hears what is said. He is cognizant of all the surrounding circumstances, and is a better judge of the lati-

tude that ought to be allowed to counsel in the argument of any particular case.'

State v. Thompson, 278 N.C. 277, 283, 179 S.E.2d 315, 319 (1971) (quoting *State v. Barefoot*, 241 N.C. 650, 657, 86 S.E.2d 424, 429 (1955)). Therefore, "the appellate courts ordinarily will not review the exercise of the trial judge's discretion [regarding jury arguments] unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations." *Johnson*, 298 N.C. at 369, 259 S.E.2d at 761; *see also Thompson*, 278 N.C. at 283, 179 S.E.2d at 319 (stating "[i]t is only in extreme cases of the abuse of privilege by counsel, and when this is not checked by the court, and the jury is not properly cautioned, [the appellate courts] can intervene and grant a new trial.").

"Jury argument, however, is not without limitations." *State v. Sanderson*, 336 N.C. 1, 15, 442 S.E.2d 33, 42 (1994). " 'The trial court has a duty, upon objection, to censor remarks not warranted by either the evidence or the law, or remarks calculated to mislead or prejudice the jury.' " *Id.* (quoting *State v. Britt*, 288 N.C. 699, 712, 220 S.E.2d 283, 291 (1975)). Moreover, " '[i]f the impropriety is gross it is proper for the court even in the absence of objection to correct the abuse *ex mero motu*.' " *Id.* (quoting *Britt*, *supra*).

Defendants in the case *sub judice* objected only to the first of these arguments which was: "There is nothing worse than a liar because you can't protect yourself from a liar. . . . [T]hese people, and all the doctors that they paraded in here who told you lie, after lie, after lie." This comment alone is not sufficiently prejudicial to entitle the defendants to a new trial. Therefore, we must determine whether counsel's other references to defense witnesses' veracity constituted gross improprieties entitling defendants to a new trial because of the court's failure to correct them *ex mero motu*.

In North Carolina, "[i]t is improper for a lawyer to assert his opinion that a witness is lying." *State v. Locklear*, 294 N.C. 210, 217, 241 S.E.2d 65, 70 (1978). However, the mere fact that counsel makes such an argument does not automatically establish that the argument is grossly improper so as to require a new trial when the trial court does not intervene *ex mero motu*. *See State v. Solomon*, 340 N.C. 212, 218-20, 456 S.E.2d 778, 782-84 (1995) (holding that the trial court did not abuse its discretion by failing to intervene *ex mero motu* to prevent closing argument by the prosecutor that the defendant lied during his testimony); *State v. Noell*, 284 N.C. 670, 696, 202 S.E.2d 750.

767 (1974) (holding that solicitor's statement during closing that defense witnesses have lied was merely a question which was submitted to the jury for its determination when it made its findings and returned its verdict), *vacated in part on other grounds*, 428 U.S. 902, 96 S.Ct. 3203, 49 L.Ed.2d 1205 (1976); *State v. Jordan*, 49 N.C. App. 561, 569, 272 S.E.2d 405, 410 (1980) (holding that prosecutor's statements regarding his opinion as to the truthfulness of a defense witness, considering the evidence against the defendant, did not reach the level of the grossly improper statements which would require the trial court to correct them *ex mero motu*).

In fact, the existence of overwhelming evidence supporting the jury's verdict notwithstanding improper characterizations regarding the veracity of witnesses' statements has been sufficient in some cases to prevent the imposition of a new trial. *See e.g. State v. Sexton*, 336 N.C. 321, 444 S.E.2d 879 (1994) (holding that statements to the jury made by the prosecutor asserting that a defense witness was lying was improper, but considering all the facts and circumstances revealed in the record which showed overwhelming evidence against the defendant, such statements did not constitute a prejudicial error); *Thompson*, 278 N.C. at 277, 179 S.E.2d at 315 (holding that solicitor's statements to the jury that the defense witnesses were lying were not sufficient to warrant a new trial in view of the overwhelming evidence of guilt against the defendant). Therefore, to determine whether counsel's argument in this case was grossly improper, we must examine the argument in the context in which it was given and in light of the factual circumstances to which it refers. *See State v. Ocasio*, 344 N.C. 568, 580, 476 S.E.2d 281, 288 (1996).

Here, several trial witnesses (including some of Duke's witnesses) testified that the x-rays on December 11th and 14th revealed an enlarged pulmonary trunk and pulmonary arteries. Nonetheless, Duke neither reported nor evaluated this diagnosis.

Further, one month prior to the filing of this suit, Dr. Chen, a Duke cardiopulmonary radiologist, along with three other Duke physicians wrote a published article concluding that at the time of the x-rays, Carnell more likely suffered from a blood clot rather than pneumonia. Additionally, there was other evidence presented that Carnell's lung difficulties were not related to pneumonia, but instead due to a blood clot.

Given the convincing evidence presented at trial supporting the defendants' negligence, we find that the jury argument had a harmless

effect, if any on the jury's verdict. Although these statements may have been improper to the extent that the trial court should have given a cautionary instruction, we are unable to conclude that they were of such gross impropriety to entitle the defendants to a new trial. *See State v. Vines*, 105 N.C. App. 147, 412 S.E.2d 156 (1992) (holding that the prosecutor's argument attacking the integrity of defense counsel was of such gross impropriety as to justify *ex mero motu* correction; however, in light of the strong and convincing case against the defendant we could not hold that the prosecutrix's improper comments were sufficiently prejudicial as to require a new trial). Thus, we reject defendants' first assignment of error.

II.

[2] Next, Duke argues that the trial court erred in denying its motion for JNOV because there was no competent evidence that "any of the treating physicians alleged to have been negligent was an agent of Duke."

A motion for JNOV is treated as a renewal of the motion for directed verdict. *See Maintenance Equip. Co. v. Godley Builders*, 107 N.C. App. 343, 353, 420 S.E.2d 199, 204 (1992); N.C. Gen. Stat. § 1A-1, Rule 50(b)(1) (1990). Thus, a movant cannot assert grounds on a motion for JNOV that were not previously raised in the directed verdict motion. See *Lassiter v. English*, 126 N.C. App. 489, 492-93, 485 S.E.2d 840, 842 (1997) (holding that a party must have made a directed verdict motion at trial on the specific issue which is the basis of the JNOV).

Because Duke never asserted this agency argument as a grounds for its motion for directed verdict, it has no standing to raise this issue in its motion for JNOV. *See id.* However, we will address the merits of its argument on this point.

Preliminarily, it is noted that we do not read the Supreme Court's holding in the *Smith* case to mean that all physicians who practice medicine at the Duke Medical Center do so as agents of the Private Diagnostic Clinic. *See Smith v. Duke Univ.*, 219 N.C. 628, 14 S.E.2d 643 (1941) (physicians employed by Duke University, as professors, are not necessarily employees of Duke University at the time they render treatment to a patient at the university hospital). Instead, the relationship between the Private Diagnostic Clinic, Duke, and the physicians at the Medical Center is subject to change and must necessarily be determined based on the evidence presented in each case.

The trial court in deciding a JNOV motion must determine whether the evidence in the light most favorable to the non-moving party is sufficient to take the case to the jury. *See Norman Owen Trucking, Inc. v. Morkoski*, 131 N.C. App. 168, 506 S.E.2d 267, 270 (1998). "The motion should be denied if there is more than a scintilla of evidence supporting each element of the non-movant's claim." *Id.* (citing *Ace Chemical Corp. v. DSI Transports, Inc.*, 115 N.C.App. 237, 242, 446 S.E.2d 100, 103 (1994)). In other words, the motion should be denied if there exists substantial evidence or " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Cobb v. Reitter*, 105 N.C. App. 218, 220 , 412 S.E.2d 110, 111 (1992) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)).

Admittedly, the testimony in the subject case is somewhat conflicting as to the exact relationship between Duke and those persons employed as professors, who also treat patients (including the reading of x-rays) at the Medical Center. There is some testimony that would support the conclusion that all such persons are rendering treatment as agents of the Private Diagnostic Clinic, not Duke, but that conclusion is not mandated on this record.

As previously stated, Duke admitted in its answer that the Private Diagnostic Clinic is a professional organization of physicians who practice medicine at the Medical Center and that Dr. Wigfall is a member of the Private Diagnostic Clinic practicing at Duke "and as such is employed by [Duke] to carry out those duties."

Moreover, witness testimony at trial supports the existence of an agency relationship between Duke and some of the persons rendering treatment to Carnell, including those who evaluated his x-rays. For instance, Dr. Cindy Miller, who interpreted the 14 December 1991 x-ray, testified she was employed by Duke as an Assistant Professor of Pediatric Radiology and in that capacity, she assisted "the clinicians and residents in the interpretation of [x-rays]." Dr. Mark Kliewer testified that he was employed by Duke as an Associate Professor of Radiology in its Department of Pediatric Radiology and in that capacity, "read and interpret[ed] some x-rays" of Carnell which had been taken on 14 December 1991.

Dr. Catherine Wilfert-Katz testified that she was "employed by [the] Medical Center" and "associated with" the Private Diagnostic Clinic at the Medical Center. Dr. Wilfert further testified that "within the framework of the Medical Center," she serves "as a consult for

infectious disease problems," and in this capacity, she received a consultation request from Dr. Wigfall regarding Carnell.

Considering this evidence in the light most favorable to the Ms. Couch, the nonmoving party, we conclude that there was substantial evidence of the existence of an agency relationship between Duke and Carnell's treating physicians. Accordingly, the trial court did not err in denying Duke's motion for JNOV.

III.

[3] Finally, the Private Diagnostic Clinic contends that the trial court erred in allowing Ms. Couch to reinstate Private Diagnostic Clinic as a defendant, when her counsel, as a trial strategy, deliberately dismissed the Private Diagnostic Clinic as a defendant. We agree.

Rule 60(b)(1) of the North Carolina Rules of Civil Procedure provides that upon a proper showing, "a court may relieve a party or his legal representative from a final judgment, order, or proceeding . . . [because of a] [m]istake, inadvertence, surprise, or excusable neglect." N.C. Gen. Stat. § 1A-1, Rule 60 (b)(1) (1990). A voluntary dismissal with prejudice constitutes a final judgment within the meaning of this Rule. *See Carter v. Clowers*, 102 N.C. App. 247, 252-53, 401 S.E.2d 662, 665 (1991); *but see* Wright, Miller and Kane, *Federal Practice and Procedure: Civil 2d § 2858* (voluntary dismissal does not give rise to relief under Rule 60(b)).

Whether conduct constitutes "excusable neglect" presents a conclusion of law, fully reviewable on appeal. *See Jones-Onslow Land Co. v. Wooten*, 177 N.C. 248, 98 S.E. 706 (1919); *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 425, 349 S.E.2d 552, 555 (1986). If "excusable neglect" exists, it is within the discretion of the trial court to allow or deny the Rule 60(b)(1) motion and that decision will not be disturbed on appeal unless the trial court has abused its discretion. *See id.*

Although negligence and carelessness can support Rule 60(b)(1) relief, it is only when such neglect or carelessness is excusable. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 113 S.Ct. 1489 123 L. Ed.2d 74 (1993) (construing a federal statute using the term "excusable neglect"). The determination of whether a particular act of negligence or carelessness is "excusable" requires consideration of any relevant circumstance, including: (1) "the danger of prejudice to the adverse party"; (2) "the length of any delay caused by the neglect and its effect on the proceedings"; (3)

"the reason for the neglect, including whether it was within the reasonable control of the moving party"; and (4) "whether the moving party acted in good faith." *12 Moore's Federal Practice*, 3rd, § 60.41[1][a]; *see McInnis*, 318 N.C. at 425, 349 S.E.2d at 555.

Deliberate or willful conduct cannot constitute excusable neglect, *12 Moore's Federal Practice*, 3rd, § 60.41[1][c][ii], at 60-88, 60-89 (3d ed. 1998), nor does inadvertent conduct that does not demonstrate diligence, *Id.* at § 60.41[1][c][ii], at 60-89. Thus, mistakes of legal advice or mistakes of law are not within the contemplation of Rule 60(b)(1). *See Phifer v. Travellers' Ins. Co.*, 123 N.C. 405, 31 S.E. 715 (1898); *Engleson v. Burlington Northern R.R. Co.*, 972 F.2d 1038 (9th Cir. 1992); *Federal Practice and Procedure § 2858* ("ignorance of law" is not grounds for Rule 60(b) relief).

In this case, the trial court granted Rule 60(b)(1) relief on the basis that Ms. Couch's counsel's "inadvertent mistake" in dismissing the claim against the Private Diagnostic Clinic, constituted "excusable neglect."[2] Our review of the record reveals that the voluntary dismissal of the Private Diagnostic Clinic and Dr. Wigfall was a carefully considered decision, a trial strategy, and thus constitutes a deliberate willful act precluding relief under Rule 60 (b)(1). The fact that the legal consequences of the action were misunderstood by Ms. Couch's attorney is not material. *See Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 575 (10th Cir. 1996). In any event, if the dismissal were held to constitute neglect, it would not be "excusable" because (1) Duke never admitted (in its answer or otherwise) that Carnell's treating physicians were its agents for the purpose of rendering treatment; and (2) Ms. Couch had signed a hospital form wherein she acknowledged that the treating physicians were not acting as employees of Duke, but as independent contractors.

Furthermore, Ms. Couch's attorney should have been on notice of the pitfalls of proceeding against Duke based on a claim that its professors were Duke's agents at the time they were treating patients at the hospital. *See Smith*, supra, 219 N.C. at 628, 14 S.E.2d at 643. Therefore, the voluntary dismissal of the Private Diagnostic Clinic,

2. Historically, it has been the excusable neglect of the party, not the attorney, which justifies relief under Rule 60(b)(1). *See Kirby v. Asheville Contracting Co.*, 11 N.C. App. 128, 131, 180 S.E.2d 407, 409 (1971). Nonetheless, attorney neglect can also constitute grounds for relief under Rule 60 (b)(1), if the client has been diligent in communicating with his attorney and is not otherwise at fault. *See Norton v. Sawyer*, 30 N.C. App. 420, 424, 227 S.E.2d 148, 152 (1976); *Pioneer, supra*, 507 U.S. at 396, 123 L. Ed.2d at 90 (attorney negligence can constitute excusable neglect).

was not subject to being set aside under Rule 60(b)(1) and the trial court erred, as a matter of law, in reinstating the Private Diagnostic Clinic into the lawsuit.[3]

In summary, the granting of Ms. Couch's Rule 60 motion is reversed and judgment entered, against the Private Diagnostic Clinic pursuant to the jury verdict, is vacated. Because there was substantial evidence that Carnell's treating physicians were agents of Duke and these physicians were in fact negligent, the trial court's denial of Duke's motion for JNOV is affirmed.

Private Diagnostic Clinic—Reversed.

Duke—Affirmed.

Judge WALKER concurs in a separate opinion.

Judge GREENE concurs in part and dissents in a separate opinion.

Judge WALKER concurring.

My research indicates that the majority of cases to reach our appellate courts regarding arguments of counsel which referred to the veracity of witnesses were criminal cases. In most of these cases, our courts have held that counsel's arguments regarding a witness lying was not sufficiently prejudicial to warrant a new trial. I would decline to impose a standard more restrictive in civil cases than in criminal cases. While I express my concern that counsel's argument may have violated our Rules of Professional Conduct, our Supreme Court has stated that ethical transgressions by counsel do not always constitute "legal error" and "legal error" does not entitle a defendant to a new trial unless it is prejudicial. *State v. Sanders*, 303 N.C. 608,

3. This Court's holding in *Carter, supra*, 102 N.C. App. at 247, 401 S.E.2d at 662 does not require a different result. In that case, the attorney dismissed, with prejudice, his complaint against Clowers and Deeney. *Id.* The attorney had intended to dismiss Clowers with prejudice and Deeney without prejudice. In effect, the attorney never intended to dismiss the action against Deeney with prejudice. *Id.* The trial court found that the attorney had entered the Deeney dismissal by "mistake and inadvertence" and allowed an amendment of the notice of dismissal. *Id.*

By contrast, in the *case sub judice*, Ms. Couch's attorney intended to dismiss the claim against the Private Diagnostic Clinic and made that decision after some deliberation.

281 S.E.2d 7, *cert. denied*, 454 U.S. 973, 70 L. Ed. 2d 392 (1981). I agree the trial judge did not commit prejudicial error in overruling defendant's lone objection and in not intervening *ex mero motu* in the remainder of the argument.

Judge GREENE concurring in part and dissenting in part.

I believe Plaintiff's closing jury argument contained grossly improper comments, and therefore would grant Duke a new trial.

In jury argument, a lawyer is not to determine matters of credibility and announce that opinion to the jury, as that is the prerogative of the jury. *State v. Locklear*, 294 N.C. 210, 218, 241 S.E.2d 65, 70 (1978). Thus a lawyer's expression of her opinion to a jury that a witness is lying is a "step out of bounds" and the trial court is obliged to act *ex mero motu* and immediately "correct the transgression." *Id.*; *State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 345 (1967) (improper for lawyer to assert his opinion that a witness is lying); *cf. State v. Noell*, 284 N.C. 670, 202 S.E.2d 750 (1974) (district attorney's argument that "I submit to you, that they have lied to you" was proper), *vacated on other grounds*, 428 U.S. 902, 49 L. Ed. 2d 1205 (1976); *State v. Davis*, 291 N.C. 1, 229 S.E.2d 285 (1976) (argument that "The State would argue and contend to you that [defendant's] testimony was nothing but the testimony of a pathological liar," was proper); *State v. Solomon*, 340 N.C. 212, 456 S.E.2d 778 (statement that defendant was "lying his head off" was not improper because witness had admitted on the stand that he had lied), *cert. denied*, 516 U.S. 996, 133 L. Ed. 2d 438 (1995); *State v. Tyler*, 346 N.C. 187, 485 S.E.2d 599 (statement that defendant put his "hand on the Bible and told about 35,000 whoppers" did not require trial court to intervene *ex mero motu* because comment does not "equate to the type of specific, objectionable language referring to defendant as a liar"), *cert. denied*, — U.S. —, 139 L. Ed. 2d 411 (1997).

In this case, Plaintiff's counsel repeatedly expressed her unequivocal opinion that various witnesses for defendants had lied on the witness stand. She even suggested that defendants' counsel knew they were going to lie before they were placed on the witness stand and "they put them up anyway. That's heavy. That's a heavy accusation." Indeed it is! These comments were grossly improper and the trial court erred in overruling defendants' objection to them. To the extent there was no objection, the trial court erred in not intervening to immediately and *ex mero motu* stop the argument. The magnitude

of this error entitles Duke to a new trial. *See Locklear*, 294 N.C. at 218, 241 S.E.2d at 70 (granting defendant a new trial).

I fully concur with the remainder of the majority's opinion.

SWAN QUARTER FARMS, INC., PLAINTIFF v. ROGER A. SPENCER AND WIFE, DOROTHY C. SPENCER; BENJAMIN CAHOON AND WIFE, MELANIE S. CAHOON; AND JEFFREY D. GIBBS AND WIFE, JENNIFER S. GIBBS

No. COA98-740

(Filed 4 May 1999)

1. Estoppel— piercing corporate veil—clean hands

The trial court did not err by refusing to pierce the corporate veil in an action to determine possession of a tract of land where defendant contended that the trial court should have disregarded plaintiff's corporate form to determine the true nature of the parties and their interests and should not have granted summary judgment for plaintiff. Defendants were aware of the defects in the title when they purchased the property, used the defects in the title as leverage in negotiations, and may not resort to equitable principles. Equity is for the protection of innocent persons and is a tool used by the court to intervene where injustice would otherwise result.

2. Deeds— real property—bona fide purchaser for value

The trial court did not err in an action concerning possession of land by determining that one of defendants' predecessors in title was not a bona fide purchaser for value without notice of any defects in the chain of title where a 1969 deed was presumptively invalid on its face and an inquiry by the purchaser would have disclosed that the conveyance was not open and above board.

3. Adverse Possession— ejectment claim—determined in prior action

An ejectment action was not barred by an adverse possession claim where the issue of adverse possession had been raised, argued, and determined by the Court of Appeals in a prior action.