2011 IL App (1st) 110174-U
No. 1-10-1741

SIXTH DIVISION
July 22, 2011

IN THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

NATALIA TWARDZICKA, as Special Administrator of the Estate of Artur Grobelny, Deceased, Plaintiff-Appellant,	)	Appeal from the Circuit Court of Cook County
v.	)	06 L 01252
GEORGE NISSAN, M.D., Betsy Pepper, M.D., and Diamond Headache Clinic, Ltd., Defendants-Appellees.	)	Honorable Daniel J. Lynch, Judge Presiding

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Garcia and Justice Cahill concurred in the judgment.

O R D E R

HELD: Special administrator of minor's estate appealed from judgment based on jury verdict, contending trial judge improperly sustained objection to closing arguments, however, appellant's failure to provide complete record of trial proceedings prevented appellate review and necessitated summary affirmance.

¶ 1 Natalia Twardzicka, as special administrator of the estate of her son Artur Grobelny, filed a multi-count suit which included allegations of medical negligence against two physicians and the medical clinic that employed them, indicating that inadequate treatment of her teenaged son's headache pain in 2004 caused him to commit suicide. A jury trial was commenced in the circuit court of Cook County on January 25, 2010, and resulted in a verdict against the plaintiff

on February 3, 2010. Twardzicka appeals, contending the trial judge improperly sustained an objection to her attorney's closing arguments and erred in denying her post-trial motion regarding that ruling.

¶ 2 Twardzicka testified that on an unspecified date in early 2004, she telephoned the defendant headache clinic, but "didn't want to leave messages with the receptionist," so she stated she was calling about "a serious matter," asked if she could have the doctor's "beeper or any private number," and the receptionist would not give her the information. Instead, because her son's treating physician was on vacation, a different doctor called her back. At that point, Twardzicka was "screaming," "frustrated," and "panicking" when she asked for an evaluation by the most senior doctor at the clinic, and the caller hung up on her. Twardzicka gave conflicting testimony as to whether these phone calls were exchanged before or after her son tried to kill himself. Depending on which time line was correct, the phone calls occurred either a couple of weeks or six weeks before he committed suicide. It is undisputed, however, that Twardzicka never told either doctor that her son had attempted suicide. She only asked the receptionist to divulge the physician's private contact information and then had a fruitless conversation in which she was "hysterical" and "furious." Nonetheless, her attorney argued in closing that these phone calls were indications that Artur was not "properly monitored" and that it was "reasonably foreseeable that he would commit suicide." When Twardzick's attorney argued, "there's some evidence that she called the clinic after this [unsuccessful] suicide attempt," the doctors' attorney objected and stated, "This is completely mischaracterizing [the mother's] testimony." Comments on the evidence during closing arguments are proper only if supported by direct evidence or

consist of reasonable inferences from the established facts. *Copeland v. Stebco Products Corp.*, 316 Ill. App. 3d 932, 947, 738 N.E.2d 199, 212 (2000). The trial judge sustained the objection and stated, "Ladies and gentlemen [of the jury], you are to consider the evidence that you heard."

¶ 3 We cannot adequately describe the rest of the trial because Twardzicka omitted most of the trial record from the volumes she tendered for our review. She failed to file either a report of proceedings or a bystander's report pursuant to Supreme Court Rule 323 (134 Ill. 2d R. 323) of any of the testimony given by the two defendant physicians and at least two independent and retained expert witnesses. It is unclear to this court how many witnesses testified. Twardzicka declares in her opening brief that the missing transcripts "are not necessary for the issues on appeal." Thus, the record does not disclose everything the jury heard before rendering its verdict.

¶ 4 Twardzicka asks us to conclude not only that the objection and court ruling were improper, but also that a single remark and ruling during a multi-day trial deprived her of a fair trial. Even if we could conclude from the limited transcripts that the objection and ruling were improper, we would be hindered from completing our review because we could not evaluate the comments in the context of the entire trial. *Ramirez v. City of Chicago*, 318 Ill. App. 3d 18, 26, 740 N.E.2d 1190, 1197 (2000) (considering improper statements within overall trial); *Kass v. Resurrection Medical Center*, 316 Ill. App. 3d 1108, 1114, 738 N.E.2d 158, 163 (2000) (same). Improper comments during closing arguments justify a new trial only where the comments have caused substantial prejudice to the challenging party. *Ramirez*, 318 Ill. App. 3d at 26, 740 N.E.2d at 1197; *Kass*, 318 Ill. App. 3d at 1114, 738 N.E.2d at 163. The trial judge is thought to be in the best position to evaluate the effect that improper remarks and any curative instructions

have on the jury, and a trial judge's ruling will be reversed only if the record discloses a clear abuse of discretion. *Kass*, 316 Ill. App. 3d at 114, 738 N.E.2d at 163.

¶ 5 These principles are illustrated by *Ramirez*, in which the plaintiff pedestrian contended she fractured her knee because she tripped on an uneven city sidewalk and the defendant municipality contended she instead slipped because it had been drizzling and the sidewalk was wet. *Ramirez*, 318 Ill. App. 3d at 26, 740 N.E.2d at 1197. During closing argument and again during rebuttal argument the pedestrian's attorney commented that the city failed to call as witnesses the police officers who took the accident report. *Ramirez*, 318 Ill. App. 3d at 26, 740 N.E.2d at 1196. The appellate court agreed that the comments constituted error because it is improper to point out the opposing party's failure to call a witness when that witness is equally available to both parties. *Ramirez*, 318 Ill. App. 3d at 26, 740 N.E.2d at 1196-97. The city argued the improper comments made it appear that the police officers would have testified that the injured woman tripped, but after considering the rest of the trial evidence, the court rejected the city's conclusion that it had been substantially prejudiced by the improper comments. *Ramirez*, 318 Ill. App. 3d at 26, 740 N.E.2d at 1197. There were numerous medical records in evidence indicating the woman stated she slipped rather than tripped, and her husband testified that at the time of the accident he did not understand the difference between the English words slip and trip and had used both words when speaking with emergency room personnel. *Ramirez*, 318 Ill. App. 3d at 26, 740 N.E.2d at 1197.

¶ 6 In *Kass*, the plaintiff's attorney made repeated appeals for juror sympathy and the lawyer for one of the defendants, anesthesiologist Dr. Ewa Zabruda, seemed to try to counter this

by commenting that the jury's decision would affect her " 'professionally and personally,' " which was considered an improper appeal to the jury's passion and prejudice. *Kass*, 316 Ill. App. 3d at 1114, 738 N.E.2d at 163. The trial judge struck the comment and the appellate court agreed that the comment "went too far." *Kass*, 316 Ill. App. 3d at 1113, 738 N.E.2d at 162. Even so, it considered the offending remark in context:

> "Here, it was a brief remark coming at the end of defense counsel's argument. *** The jury heard 9 days of trial testimony from 16 witnesses, 11 of them medical experts, including the two defendant doctors. While there was enough evidence to find in favor of the plaintiff, defendants mounted a strong defense.
>
> We find it difficult to see how defense counsel's offending remark could have been enough to tip the scales. After all, the jury found in favor of the hospital, [the doctor, and the anesthesiologist]. The remark referred only to Dr. Zaburda, against whom the evidence was far from persuasive." *Kass*, 316 Ill. App. 3d at 1114, 738 N.E.2d at 163.

¶ 7 The lack of a complete record here prevents us from performing a similar analysis to those described in *Ramirez* and *Kass*.

¶ 8 Furthermore, generally, in the absence of an adequate record, a challenged ruling is summarily affirmed based on the presumption that the determination of the circuit court conformed with the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92, 459 N.E.2d 958, 959 (1984).

> " 'Where the record is incomplete, a reviewing court will indulge every reasonable presumption favorable to the judgment, order or ruling appealed from. It will presume that the missing portion contained that which justified the action of the court. Any doubt arising from the incompleteness of the record will be resolved against the appellant. (Citations.) A party prosecuting an appeal must furnish a record sufficient to establish reversible error. (Citation.)' " *Kwak v. St. Anthony DePadua Hospital*, 54 Ill. App. 3d 719, 725, 369 N.E.2d 1346, 1351 (1977) (where plaintiff failed to file transcript or bystander's report) (quoting *Sandberg v. American Machining Co.*, 31 Ill. App. 3d 449, 452, 334 N.E.2d 246, 248 (1975)).

¶ 9 Since the record tendered consists of only part of the trial proceedings, we must presume that the missing parts of the record indicate that the judge properly sustained the defense objection to Twardzicka's closing argument and was also correct in denying Twardzicka's motion to grant a new trial on the basis of that ruling. The circuit court is affirmed.

¶ 10 Affirmed.