

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000347-MR

TONY N. TUTTLE, AS ADMINISTRATOR
OF THE ESTATE OF CHRISTOPHER A.
TUTTLE, DECEASED; AMANDA DURAIL
TUTTLE, AN INFANT; TONY N. TUTTLE,
INDIVIDUALLY; AND NANCY
TUTTLE, INDIVIDUALLY

APPELLANTS

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN D. MINTON, JR., JUDGE
ACTION NO. 98-CI-00512

FRANK A. PERRY, M.D.;
RONALD A. BERRY, M.D.;
AND WOBEGONE, INC.

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: DYCHE, GUIDUGLI, AND SCHRODER, JUDGES.

DYCHE, JUDGE: Tony Tuttle, as administrator of the estate of Christopher Tuttle and individually, Amanda Durail Tuttle, and Nancy Tuttle (collectively, "Tuttle") appeal from a trial order and judgment entered by the Warren Circuit Court following a jury trial. Having examined the record and applicable law, we affirm.

Christopher Tuttle went to the emergency room at Greenview Hospital on April 29, 1997, where he was treated by Dr. Frank Perry for chest pain. An EKG and a chest x-ray were

performed; Dr. Perry prescribed a GI cocktail, diagnosed Christopher with gastritis of unknown origin, and Christopher was discharged with medication and instructions to see his family physician.

On May 3, 1997, Christopher went to an Urgentcare walk-in medical facility, again complaining of chest and abdominal pain, and was treated by Dr. Ronald Berry. Dr. Berry was informed of Christopher's recent tests from Greenvue, and did not repeat any of the tests. Based on the previous test results, his own examination, and what he was told by the patient, Dr. Berry diagnosed Christopher with gastritis or dyspepsia, and scheduled him for a gall bladder ultrasound and a series of upper GI tests at The Medical Center in Bowling Green for May 6.

Christopher did not go to The Medical Center on May 6, and was telephoned by someone at Urgentcare on May 7 and asked to return for a follow-up visit. He went that day and was treated by Dr. Richard Larson. Christopher was complaining of chest pain and shortness of breath, and Dr. Larson ordered an EKG and a chest x-ray. After the x-ray, which was abnormal, Christopher collapsed walking back to the examination room. He died shortly thereafter due to a ruptured dissecting thoracic aortic aneurysm. This lawsuit was filed seeking damages for negligence and

malpractice.¹ Following a jury trial, an 11-1 verdict was returned in favor of appellees, and this appeal ensued.

Three procedural issues form the basis of this appeal. Tuttle argues that the trial court erred by not permitting the parties to cross-examine expert witnesses concerning compensation; by allowing the depositions of two defense experts, who were not permitted to testify at trial, to be read to the jury; and by excluding three fact witnesses called by appellants.

The trial court granted Dr. Perry's motion *in limine* precluding either party from cross-examining the other's experts as to the details of their compensation. Tuttle claims that Underhill v. Stephenson, Ky., 756 S.W.2d 459, 461 (1988), allows a party to cross-examine an expert witness "on all matters relating to every issue," that "[e]vidence to show bias of an expert witness is relevant," and the trial court erred by preventing counsel from inquiring of the experts their rate of compensation for testifying at this trial. We are not persuaded.

Since the adoption of the Kentucky Rules of Evidence (KRE) in 1990, the Supreme Court has not ruled specifically on the issue of questioning expert witnesses about their rate of compensation for testimony at trial. However, in Current v.

¹ The original defendants in this case were Greenview Hospital; Dr. Perry; Urgentcare; Dr. Berry; Dr. Larson; Dr. Samuel Parish, a doctor working through Urgentcare; and Wobegone, Inc., the corporation providing emergency room service at Greenview. Claims against Larson were dismissed by agreed order on March 17, 1999. Claims against Parish were dismissed by agreed order on June 28, 1999. Claims against Urgentcare and Greenview were dismissed by agreed order on August 10, 1999.

Columbia Gas of Kentucky, Inc., Ky., 383 S.W.2d 139 (1964), its predecessor court wrote:

It is true, as conceded by the parties, that it is proper to show that the witness is being compensated. However, we feel that, in the absence of unusual circumstances, the better rule is to limit the showing to the fact that payment is being made. To permit details of the compensation injects collateral matter into the trial. It is generally recognized that inquiries of this type rest largely within the discretion of the trial court, and absent a showing of abuse of discretion, the limitation of such questioning will not constitute reversible error.

Id. at 143-44. See also Commonwealth, Department of Highways v. Cecil, Ky., 465 S.W.2d 250, 252 (1971) ("The matter of an expert's being compensated may be brought out, with certain limitations.").

In granting the motion *in limine*, the trial court indicated that the parties could inquire of the experts as to whether they were being compensated and the number of trials they testified in each year, but excluded questions concerning the amount being paid for this trial. Current was not overruled by Underhill (also a pre-KRE case). Underhill stated the general rule; Current dealt with this specific situation. It is sufficient to show an expert's bias by asking whether the expert is being compensated. Inquiring about the amount injects a collateral issue that does not assist the trier of fact in determining the ultimate issue. Because this ruling is entirely consistent with the Kentucky law, the trial court can not be said to have abused its discretion.

On the literal eve of trial, August 9, 1999, Berry's counsel sent a fax to Tuttle's counsel indicating that two of Berry's expert witnesses, Dr. William Stoney and Dr. Harry Page, had read the depositions of the principals in this case after being deposed by Tuttle's counsel. Tuttle made a pretrial motion to exclude these witnesses, since their testimony would now be that reading the depositions confirmed their previously formed opinions, and Tuttle would have no opportunity to re-depose the witnesses prior to trial. The trial court granted this motion and ordered that the experts would not be allowed to testify. On August 11, Perry's counsel made a motion to read selected portions of the experts' depositions to the jury, and the court granted this motion in an effort to ameliorate the drastic remedy of exclusion of expert witnesses. Tuttle asserts that this was error.

Kentucky Rule of Civil Procedure (CR) 32.01 states:

At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applies as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

. . . .

(c) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds the witness:

. . . .

(vi) is a practicing physician, dentist, chiropractor, osteopath, podiatrist or lawyer

.

(Emphasis added.)

We do not believe the trial court abused its discretion in allowing portions of the depositions to be read to the jury. The decision was clearly permissible under CR 32.01, and was an attempt to, in the words of the court, "soften the blow" of the exclusion of two of Berry's expert witnesses. Further, we discern no prejudice to Tuttle as a result of the ruling. Tuttle's objection to allowing the witnesses to testify was premised on his inability to depose them after they had been provided with the depositions of the key players in this litigation, and the fact that they might use those depositions to buttress their previously formed opinions. Counsel argued before the trial court that he had prepared his case based on the depositions of the experts. Allowing portions of those depositions to be read to the jury was therefore not a surprise, and not an abuse of discretion.²

Finally, Tuttle claims the trial court erred by excluding three fact witnesses. The witnesses were not listed in Tuttle's answers to interrogatories, nor were they listed in the pretrial compliance. They were mentioned in Nancy Tuttle's deposition, but not identified as witnesses until July 22, 1999, three weeks before trial, in a supplemental pretrial compliance.

² The notices of deposition stated that the depositions would "be used for all purposes consistent with the Kentucky Rules of Civil Procedure." It is of small significance, if any, that Tuttle attempts to distinguish this as a "discovery" deposition as opposed to an "evidentiary" deposition.

The court determined this was not a timely notification, and excluded the lay witnesses from testifying.

"[A]n alleged error in the trial court's exclusion of evidence is not preserved for appellate review unless the words of the witness are available to the reviewing court."

Commonwealth v. Ferrell, Ky., 17 S.W.3d 520, 524 (2000). Tuttle did not submit an avowal to the court, so the words of these witnesses are not before us. As such, the alleged error is not preserved for our review. Even if the error were preserved, we can not say that the trial court abused its discretion in excluding witnesses that appellees did not have time to depose due to the late notification by Tuttle.

The judgment of the Warren Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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Bowling Green, Kentucky

BRIEF FOR APPELLEE
RONALD A. BERRY, M.D.:

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