

RENDERED: May 27, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000851-MR

TONYA OLIVER AND ROB OLIVER

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, SPECIAL JUDGE
ACTION NO. 99-CI-01816

THOMAS G. ABELL, M.D., P.S.C.,
D/B/A EYE INSTITUTE OF CENTRAL KENTUCKY
AND THOMAS G. ABELL, M.D.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MINTON AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

TACKETT, JUDGE: Tonya Oliver appeals from the denial of her motion under Kentucky Rule of Civil Procedure (CR) 60.02 for relief from the order setting aside the jury's award of \$1.7 million in her medical malpractice action against Dr. Thomas

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Abell. The order was set aside by this Court after it was disclosed that the trial judge, Hon. Rebecca Overstreet, was married to a partner in the firm representing Oliver, Herren & Adams. Oliver sought relief based on newly discovered evidence of an informal ethics opinion obtained by the judge regarding the possibility of conflict of interest in cases involving her husband's firm. The circuit court denied the motion. We affirm.

The underlying action for malpractice arose when Dr. Abell mistakenly performed LASIK surgery on the wrong axis of Oliver's eye, inadvertently doubling her astigmatism instead of correcting it. Subsequent attempts to remedy the mistake by surgery also failed, severely impairing Oliver's sight. This action came to trial and the jury awarded damages as described above. After the verdict but before the entry of judgment, Dr. Abell became aware of the relationship between the judge and Jerry Wright, the third member of the Herren & Adams firm. Wright does not participate in the medical malpractice cases the firm handles, but this Court held that the appearance of impropriety created by the relationship was sufficient to set aside the verdict and order a new trial.

On remand, Oliver moved for reinstatement of the verdict, using CR 60.02 to seek extraordinary relief. Oliver alleged that an informal ethics opinion sought by the trial

judge stated "as a general rule, you need not disqualify yourself in cases where your husband's law firm appears before you. Disqualification would be required where your husband has a substantial interest that would be affected by the outcome of the lawsuit." The opinion enclosed a copy of an existing, published ethics opinion the ethics committee believed to be dispositive of the question. On that basis, Oliver sought relief from the order of this Court requiring a new trial. The circuit court believed that it did not have the authority to grant the relief sought, and so denied the motion. This appeal followed.

A closer look at the ethics opinion brings the issue into clearer focus. The ethics opinion is dated December 18, 1990, and dealt with a then-hypothetical question of what the judge's responsibility toward her husband's firm would be when it appeared before her. Her husband was still a law student at the time. The opinion does not deal with this specific case, and as Abell correctly points out, the opinion merely points to another, published opinion which was available to the Appellant at the time this matter first came before this Court, but which the Appellant did not cite. This opinion in no way constitutes "newly discovered evidence" upon which relief could be granted. As this Court's prior holding is the law of the case, we will

not revisit its merits, and affirm the order of the Fayette
Circuit Court.

For the foregoing reasons, the order of the Fayette
Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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Charles C. Adams, Jr.
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BRIEF FOR APPELLEES:

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