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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002610-MR

CHARLES D. WILLIAMS AS
ADMINISTRATOR FOR THE ESTATE OF
LESLIE CAITLIN DUNAGAN; BOBBY
DUNAGAN; AND LORI DUNAGAN

APPELLANTS

v. APPEAL FROM BARREN CIRCUIT COURT
HONORABLE PHIL PATTON, JUDGE
ACTION NO. 04-CI-00636

PRIMARY CARE ASSOCIATES OF
SOUTHERN KENTUCKY, PLLC, D/B/A
GLASGOW PRIMARY CARE; JEFFREY D.
PURVIS, M.D.; AND LAURIE
BRANSTETTER, A.R.N.P.

APPELLEES

OPINION
REVERSING AND REMANDING
WITH DIRECTIONS

** ** * ** * ** *

BEFORE: TAYLOR AND THOMPSON, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

TAYLOR, JUDGE: Charles D. Williams, Administrator for the Estate of Leslie Caitlin Dunagan, Bobby Dunagan, and Lori Dunagan, bring this appeal from a Trial Order and Judgment entered by the Barren Circuit Court on November 7, 2006, pursuant to a jury verdict in a medical malpractice case in favor of Primary Care Associates of Southern Kentucky, PLLC, d/b/a Glasgow Primary Care, Jeffrey D. Purvis, M.D., and Laurie Branstetter, A.R.N.P. (collectively referred to as appellees). The Trial Order and Judgment was entered subsequent to an order granting a mistrial in the first trial of this case entered on February 20, 2006. We reverse and remand with directions.

On October 3, 2003, Leslie Dunagan was accidentally shot in the neck with a BB gun by her younger brother. Leslie was fourteen years of age at the time of this incident and otherwise was thought to be in good health. As a result of her injury, Leslie was taken to the emergency room at a Glasgow hospital where she was intubated and then immediately transported by helicopter to the University of Louisville Medical Center. After Leslie was extubated, she was discharged from the Louisville hospital on October 6, 2003.

Upon release from the hospital, Leslie's only complaint was soreness and irritation in her throat as a result of the BB gun incident. On the morning of October 7, 2003, Leslie awoke complaining of shortness of breath. Leslie's mother, Lori Dunagan, immediately took her to Glasgow Primary Care, where she came under the care of appellee, Laurie Branstetter, a licensed nurse practitioner, who was employed by

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

Glasgow Primary Care. In the course of her employment, Branstetter was under the supervision of appellee, Dr. Jeffrey D. Purvis. Branstetter's diagnosis of Leslie's condition centered upon her neck injury for which treatment was given and Leslie returned home. On the morning of October 8, Leslie again encountered serious breathing problems. She was taken to the emergency room at Caverna Hospital and was then transferred again to the University of Louisville Medical Center where she was determined to be brain dead upon arrival. On October 9, 2003, Leslie was taken off life support and died shortly thereafter. The cause of Leslie's death was related to an abdominal stress ulcer which was not diagnosed during her treatment at Glasgow Primary Care.

On August 27, 2004, appellants filed a medical malpractice action against appellees in the Barren Circuit Court. A jury trial commenced on February 14, 2006, and lasted four days. The jury was sequestered at approximately 1:30 p.m., on February 17, and deliberated for over eight hours before announcing their verdict at approximately 9:45 p.m. The verdict, though not unanimous, found Branstetter to be 100% liable for negligence in Leslie's death and found no liability against Dr. Purvis. The jury verdict awarded appellants \$8,877.50 for funeral expenses and \$38,195.69 in medical expenses, but “0” for the destruction of Leslie's power to earn money. Both parties objected to the verdict for the destruction of earning power. Appellees argued that the jury should be returned to consider the issue further, which the trial court so ordered. After deliberating for another twenty-five minutes,² the jury returned an additional verdict of \$800,000 for

² The trial court's order granting mistrial states that the jury was out for approximately twenty minutes before returning the final verdict. The circuit court's recording log indicated that the jury was sent back to deliberate at 9:57 p.m. and returned with their final verdict at 10:22 p.m., or twenty-five minutes after returning to deliberate.

Leslie's loss of earning power. Appellees then moved for a mistrial which the trial court granted from the bench, followed by a written order on February 20, 2006.

The case was subsequently scheduled for a retrial by jury that commenced in November, 2006. At the second trial, both the issue of liability and damages were retried. A verdict in appellees' favor for no liability was rendered, for which judgment was entered by the trial court for appellees. This appeal follows.

Appellants raise three arguments for our review in this appeal. First, appellants argue that the trial court abused its discretion in granting a mistrial after the jury had returned its final verdict at the close of the first trial. Second, the trial court erred by failing to restrict the second trial to the issue of damages only since a jury verdict for liability against Branstetter had been rendered by the jury in the first trial. And third, the judgment rendered in the second trial must be reversed due to various procedural and evidentiary errors by the trial court during the course of the second trial.

We begin our analysis by examining the order of mistrial entered by the trial court at the conclusion of the first trial and whether a mistrial was properly granted in this case. A mistrial is not directly provided for in the civil or criminal rules of procedure in Kentucky nor is there any statutory basis for its use. The roots of mistrial and its evolution as a trial tool are traced through the common law. The earliest reported case involving a mistrial was in *Dorsey v. Dougherty*, 1 A.K. Marsh. 182 (Ky. 1818), where a mistrial was declared when a trial occurred by less than the proper number of qualified jurors legally impaneled. The traditional mistrial occurs when a jury is hung and cannot legally reach a verdict. *Thomas v. Com.*, 30 Ky. L. Rptr. 1271, 101 S.W. 303

(1907); *Cornwell v. Com.*, 523 S.W.2d 224 (Ky. 1975). See also Kentucky Revised Statutes (KRS) 29A.320(2).

In BLACK'S LAW DICTIONARY 1018 (7th ed. 1999) a mistrial is defined as either one of two possible occurrences during a trial:

1. A trial that the judge brings to an end, without a determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings.
2. A trial that ends inconclusively because the jury cannot agree on a verdict.

There is a conflict of authority as to whether a mistrial can be declared after a jury verdict has been rendered. One view holds that a mistrial may not be declared after a valid verdict has been rendered, and the only remedy for alleged errors is a motion for a new trial or a motion for judgment notwithstanding the verdict. 88 C.J.S. *Trial* § 92 (2001).³ The other view is that the trial judge has the authority to declare a mistrial after the verdict has been rendered. *Id.*⁴ However, we can find no Kentucky case authority that follows this view. We believe the better position is that a mistrial contemplates some error during the trial that cannot be cured which prevents a jury from returning a verdict and thus precludes the court from entering a judgment. 58 Am. Jur. 2d *New Trial* § 7 (2002). In other words, a mistrial is equivalent to no trial thus making it inappropriate to grant a mistrial after the jury returns a verdict. *Id.*

³ The following are jurisdictions that apply this rule to mistrials: *Johnson v. Frazier*, 787 A.2d 433 (Pa. Super. 2001); *Howell v. Davis*, 278 S.C. 510, 299 S.E.2d 336 (1983); *Midwest Lime Co. v. Independence County Chancery Court*, 261 Ark. 695, 551 S.W.2d 537 (1977).

⁴ We can only find one cited case for this proposition, *Ed Ricke and Sons, Inc. v. Green, By and Through Swan*, 468 So. 2d 908 (Fla. 1985). However, in *Ricke*, a motion for mistrial was made during closing argument based upon improper conduct by counsel, which the trial court reserved ruling upon until the jury returned its verdict. This is obviously a different situation than that presented to our Court since the motion for mistrial in this case was not made until the jury completed its verdict. Nonetheless, such a procedure as that followed in *Ricke* would appear to be improper under Kentucky statutory and procedural requirements governing trial practice.

While we can find no Kentucky case authority that has directly addressed the impropriety of granting a mistrial after a jury has rendered a final verdict, we believe applicable statutes and procedural rules support the proposition that it is inappropriate for a trial court to grant a mistrial after the jury has completed its verdict. KRS 29A.320(3) sets out the procedure for rendering verdicts in Kentucky for both criminal and civil jury trials as follows:

- (3) The procedure for rendering the verdict shall be:
 - (a) When the jury have agreed on their verdict, the verdict shall be written and signed by the foreman.
 - (b) When a verdict is rendered by less than the whole jury, it shall be signed by all the jurors who agree to it.
 - (c) The foreman shall hand the verdict to the judge who shall read the verdict and then make inquiry of the jury as to whether it is their verdict.
 - (d) When the verdict is announced either party may require that the jury be polled, which is done by the judge asking each juror if it is his verdict.
 - (e) If more than the number of jurors required by KRS 29A.280, as appropriate to the type of case being tried, answers in the negative, the jury must be sent out for further deliberation.
 - (f) If no disagreement is expressed or, in an appropriate case, an insufficient number disagree, the verdict is complete and the jury shall be discharged from the case.

Inherent in this statute is the requirement that a trial court enter judgment in conformity with the verdict rendered. Kentucky courts have long held that if there is no defect in the verdict, it is the duty of the trial court to enter a proper judgment upon it.

Lykins v. Hamrick, 144 Ky. 80, 137 S.W. 852 (1911). The failure of a trial court to abide by this rule may be corrected upon appeal. *Id.*

Of course, a trial court in Kentucky has the discretion to not let a case go to the jury by granting a directed verdict pursuant to Ky. R. Civ. P. (CR) 50.01. Upon entry of judgment on a verdict, a trial court may, pursuant to CR 50.02, enter a judgment notwithstanding the verdict (JNOV) upon motion by a party who had previously moved for a directed verdict. Likewise, a motion for a new trial may be joined with a motion for JNOV under CR 50.02 and a new trial may be granted by the trial court based upon any of the grounds set forth in CR 59.01. Given that the trial court in this case granted a mistrial and did not enter a judgment on the verdict, these post-judgment trial procedures were not addressed below.

Accordingly, we conclude that declaring a mistrial by the trial court after a valid, final verdict had been rendered, was an abuse of discretion and reversible error. The only reasons given in the trial court's written order for declaring a mistrial were two earlier references to "insurance companies" by a witness for appellants, and that the jury deliberated too little time after being sent back on the issue of loss of earning power, which the trial court speculated in its written order may have been due to the reference to insurance during trial. Both of the reasons given by the trial court were insufficient to justify a mistrial for the reasons that follow, even if the mistrial had been declared before the jury returned its verdict.

In Kentucky, rigid, *per se* standards to justify granting a mistrial have been rejected by the Kentucky Supreme Court. *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734 (Ky. 1996). However, for a trial court to grant a mistrial, the record must reflect "a manifest necessity for such an action or an urgent or real necessity." *Skaggs v. Com.*, 694 S.W.2d 672, 678 (Ky. 1985), *vacated in part by Skaggs v. Parker*, 235 F.3d 261 (6th Cir.

2000). Although *Skaggs* is a criminal case, the Kentucky Supreme Court has held that its flexible standard is applicable to civil cases. *Gould*, 929 S.W.2d 734. In applying this standard as set forth in *Gould*, the trial court has broad discretion to determine when a mistrial is necessary. *Gosser v. Com.*, 31 S.W.3d 897 (Ky. 2000). Notwithstanding, the power to grant a mistrial should be used sparingly, with utmost caution, and for very obvious reasons. *Com. v. Scott*, 12 S.W.3d 682 (Ky. 2000).

As noted, the trial court set forth two reasons in its written order for declaring a mistrial. The primary reason appears to be based upon references to insurance made by one of appellants' experts, Dr. Larry Davis. One reference to "insurance companies" was made in response to a question regarding training for new doctors. Later in Dr. Davis's testimony, he was asked if he testified as an expert in medical malpractice cases on a regular basis. In response, Dr. Davis testified that he had given opinions in cases brought against his own "malpractice company." Dr. Davis did not use the word insurance in this response, but appellees objected nonetheless on the premise that the jury understood the witness was referring to insurance companies in general. In both instances, appellees moved for a mistrial which the trial court properly denied.

The admissibility of evidence regarding liability insurance in trials is now governed by Ky. R. Evid. (KRE) 411. This evidentiary rule provides that evidence of liability insurance is not admissible upon the issue of whether a defendant acted negligently or wrongfully. The challenged testimony in this case did not discuss or address liability insurance, and thus, KRE 411 on its face was not violated, and the trial court did not err in denying a mistrial when the issue was raised in the course of the trial.

Appellees make no showing that appellants intentionally injected insurance as an issue in the case and the references to insurance by the witness were inadvertent, at best. To the extent the testimony was not properly admitted, appellees could have sought an admonition under KRE 105. The trial court specifically offered to make an admonition to the jury which appellees declined. A jury is presumed to follow an admonition to disregard evidence which cures any error in its admission. *Boone v. Com.*, 155 S.W.3d 727 (Ky.App. 2004). By failing to accept or request an admonition, appellees may not complain on appeal except under the palpable error rule. KRE 105(a). Given that there were no direct references made to liability insurance by the witness, we conclude that no palpable error occurred in this case.

The insurance evidence led to the second reason given by the trial court for declaring a mistrial. That being, the jury returned too quickly with an \$800,000 verdict for Leslie's loss of earning power after the jury had been sent back for further deliberations. The jury was out for about twenty-five minutes in their second deliberation, after the original deliberation lasted over eight hours. The trial court concluded that "the jury was not deliberative in its final twenty minutes of consideration" and went on to speculate that the jury "may well have been influenced by the prior references to insurance companies and malpractice insurance." In the order, the trial court gives no explanation for these conclusions, and we cannot find any support for them in the record. Although we have concluded that the mistrial was improperly granted after the final verdict was returned, we also would note that declaring a mistrial based upon the jury's time spent deliberating in this case was an abuse of discretion on its face. In Kentucky, there is no minimum time that a jury must deliberate, and courts will

not customarily question the judgment of a jury on how much time is required to reach a verdict. *Kitts v. Kitts*, 315 S.W.2d 617 (Ky. 1958). In *Kitts*, the jury deliberated only four minutes. In *Beach v. Commonwealth*, 246 S.W.2d 587 (Ky. 1952), the jury reached a verdict in a murder case in about eight minutes. In *Beach*, our highest court held that trial courts cannot apply arbitrary rules when it comes to the time a jury must deliberate. *Id.* Given that the original instructions provided by the trial court to the jury on the issue of loss of earning power for Leslie stated that damages could be awarded up to \$2,304,280.00, and that the jury deliberated in total for almost nine hours, the verdict was not unreasonable or inconsistent with the evidence. We thus conclude that neither of the grounds stated in the trial court's order constituted a defect in the verdict sufficient to warrant a mistrial.

Likewise, neither the insurance testimony objection nor the objection regarding the time spent by the jury deliberating the damage award would sustain a motion for JNOV or new trial in this case in our opinion. On remand, we direct the trial court accordingly. In the event the trial court does determine that a new trial is warranted for any of the grounds provided for in CR 59.01, the trial will be limited to damages only as pertains to Leslie's loss of power to earn money. *Turfway Park Racing Ass'n. v. Griffin*, 834 S.W.2d 667 (Ky. 1992). A trial on damages only is consistent with *Nolan v. Spears*, 432 S.W.2d 425 (Ky. 1968), which we hold to be controlling precedent on this issue. As set forth in *Turfway Park*, if a new trial on damages is awarded, the jury should be informed of the other damages for funeral expenses and medical bills that were previously awarded by the jury. *Turfway Park Racing Ass'n.*, 834 S.W.2d 667.

As concerns appellants' remaining arguments pertaining to the second trial, and given our ruling heretofore, we hold that the second trial is a nullity, the Trial Order and Judgment is set aside, and all issues raised thereon are deemed moot.

Finally, we note that appellees have argued in their brief and at oral argument that alleged juror misconduct may have occurred in reaching the final verdict on damages for loss of power to earn money in this case. Since no cross-appeal was filed, this issue is not properly before this Court at this time and we will not address the same. However, we do note that a motion for new trial under CR 59.01 is the proper procedure for correcting alleged juror misconduct. *Ligon Specialized Hauler, Inc. v. Smith*, 691 S.W.2d 902 (Ky.App. 1985).

In summation, for the foregoing reasons, the Trial Order and Judgment of the Barren Circuit Court is set aside and the order granting mistrial is reversed, with this matter to be remanded to the trial court with directions to enter a judgment on the final verdict rendered by the jury in the first trial. Upon entry of the judgment, the case will proceed in accordance with all applicable post-judgment rules and proceedings, with all subsequent proceedings to be consistent with this opinion.

ALL CONCUR.

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