

RENDERED: FEBRUARY 4, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002373-MR

ELIZA GRIGSBY, ADMINISTRATRIX
OF THE ESTATE OF IBBIE COMBS

APPELLANT

v. APPEAL FROM PERRY CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 04-CI-00570

HAZARD NURSING HOME, INC.

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: Eliza Grigsby, administratrix of the estate of Ibbie Combs, filed this action against Hazard Nursing Home (HNN), alleging that HNN's negligence caused Ibbie Combs's death. A jury found that HNN did not breach any duties owed to Combs and a judgment was entered dismissing the estate's claims.

On appeal, the following issues are presented: (1) whether the trial court erred when it denied the estate's challenges for cause as to four jurors, which caused the estate to use all its preemptory challenges; (2) whether the trial court erred when it did not allow the estate to introduce the testimony of a social worker and to impeach a defense witness with the social worker's report; and (3) whether the trial court erred when it refused the estate's request to present evidence regarding prior falls sustained by Ibbie Combs.

Ibbie Combs became a resident of HNH in 2003 and, in December of that same year, fell from her wheelchair. Five days after the fall, she suffered a fatal cardiopulmonary arrest. The estate sought to establish that HNH's breach of its duty of care owed to Ibbie Combs caused her to fall which ultimately resulted in her death.

The estate's initial allegation of error is that the trial court erred when it failed to strike four potential jurors for cause at the close of voir dire. Specifically, the estate moved to strike for cause a juror because her husband had been employed by Appalachian Regional Hospital, an entity originally named as a party in the action but subsequently dismissed. Additionally, the estate requested that three potential jurors who had relatives that were residents in HNH be stricken, and two additional jurors because they had previously worked with a number of the defense witnesses. After the trial court denied the motions, the estate exhausted its preemptory strikes to remove the jurors who had worked with and knew the defense witnesses. Ultimately, two of the jurors who had family

members in HNH heard the case. The estate contends that the jurors' relationship with HNH created a "reasonable inference of prejudice" and, therefore, they should have been stricken for cause.

Kentucky continues to adhere to the rule that the trial court has wide discretion when ruling upon challenges of prospective jurors for cause. *Bowman v. Perkins*, 135 S.W.3d 399 (Ky. 2004). However, it is also the prevailing rule that "[a] trial court should presume the possibility of bias of a juror if said juror has 'a close relationship, be it familial, financial, or situational, with any of the parties, counsel, victims, or witnesses,' regardless of the answers said juror may give during voir dire." *Bowman*, 135 S.W.3d at 402 (quoting *Ward v. Commonwealth*, 695 S.W.2d 404, 407 (Ky. 1985)). When presiding over voir dire, a trial court's role in criminal and civil trials is to ensure that the case be tried by an impartial jury. *Id.* at 403. Because of its familiarity with the case, the circumstances, and the community, the trial court is in the best position to determine whether a particular juror can be impartial.

The courts have recognized that an impartial juror is not necessarily a juror that is without any relationship with the parties, counsel, victims, or witnesses. In *Altman v. Allen*, 850 S.W.2d 44 (Ky. 1992), the court held that former patients of defendants in a medical malpractice claim were not required to be stricken for cause. The court emphasized:

The jurors were carefully examined by counsel and the trial court. All noted their ability to render a fair and impartial verdict on the basis of the evidence. The

relationship between the jurors and the physicians was not so substantial as to require a finding that the jurors were biased and unable to afford the plaintiff a fair trial.

Id. at 46.

In this case, the trial court and counsel extensively questioned each juror who had a relative residing in the nursing home or relationship to HNH or its employees. During the voir dire process, the trial court excused numerous veniremen who expressed an inability to render a fair and impartial verdict. The jurors ultimately seated all stated that they would be impartial and consider all of the evidence. No juror disclosed a relationship or facts from which bias was required to be presumed. *See Ratliff v. Commonwealth*, 194 S.W.3d 258, 266 (Ky. 2006).

The estate's remaining arguments concern evidentiary issues. It contends that the trial court erred when it refused to permit the testimony of a social worker who investigated Ibbie Combs's fall and impeachment of a defense witness by reference to the social worker's report. The estate further contends that the trial court erred when it did not permit evidence that Ibbie Combs had fallen prior to her December 2003 fall. However, the evidence allegedly wrongfully excluded was not entered into the record by avowal.

Absent an admission of the proffered evidence by avowal, appellate review is precluded. “[A] party must offer an avowal *by the witness* in order to preserve for appellate review an issue concerning the exclusion of evidence.”

Commonwealth v. Ferrell, 17 S.W.3d 520, 525 (Ky. 2000)(emphasis original). In this case, we conclude that the alleged errors were unpreserved for our review.

For the foregoing reasons, the judgment and order of dismissal is affirmed.

ALL CONCUR.

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