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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000031-MR
AND
NO. 2010-CA-000126-MR

BLAIR SONNE, AS EXECUTRIX
OF THE ESTATE OF ALLAN
SCHMIDT, DECEASED — APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE IRV MAZE, JUDGE
ACTION NO. 06-CI-000147

COMMUNITY MEDICAL
ASSOCIATES, INC.; AND
H. LYNN SPEEVAK, M.D. — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; STUMBO, JUDGE; LAMBERT,[1] SENIOR JUDGE.

[1] Senior Judge Joseph Lambert 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.

TAYLOR, CHIEF JUDGE: This appeal is a medical malpractice action that arose from the alleged delay in the diagnosis of colorectal cancer. Blair Sonne, as executrix of the estate of Allan Schmidt (collectively referred to as appellant) brings Appeal No. 2010-CA-000031-MR and Community Medical Associates, Inc. and H. Lynn Speevak, M.D. (collectively referred to as appellees) bring Cross-Appeal No. 2010-CA-000126-MR from an October 26, 2009, judgment of the Jefferson Circuit Court upon a jury verdict in favor of Speevak and Community Medical Associates, Inc. We affirm Appeal No. 2010-CA-000031-MR and Cross-Appeal No. 2010-CA-000126-MR.

Allan Schmidt became a patient of internist H. Lynn Speevak in January 2002. Speevak was employed by Community Medical Associates, Inc. Speevak recommended that Schmidt undergo a colonoscopy to screen for colorectal cancer. To perform the colonoscopy, Speevak referred Schmidt to general surgeon C. Matthew Brown. Brown performed a colonoscopy upon Schmidt on November 4, 2002. The colonoscopy revealed a 3cm mass in Schmidt's mid rectum. Brown biopsied the mass by taking a small sample, and the biopsy revealed the mass to be an adenoma. Brown, however, did not remove the mass. The colonoscopy report and biopsy report was forwarded to Speevak.

Two years later, in September 2004, Schmidt presented to Speevak with complaints of constipation and pain. A second colonoscopy was then performed on Schmidt, and an 8cm mass was identified in his mid rectum. Upon a biopsy, the mass was determined to be cancerous and was specifically

adenocarcinoma. Schmidt underwent radiation and chemotherapy but eventually died as a result of the cancer on January 26, 2005, at age fifty-seven.

Appellant filed the instant medical malpractice action again, *inter alios*, appellees.[2] Appellant alleged that Speevak was negligent for failing to diagnose and refer Schmidt for removal of the precancerous mass after his colonoscopy in 2002. The matter was heard by a jury. The jury found that Speevak breached no duty of care to Schmidt and, thus, found in favor of Speevak. By final judgment entered October 26, 2009, appellant's complaint against appellee was dismissed. This appeal follows.

APPEAL NO. 2010-CA-000031-MR

Appellant contends that "tainted" jury instructions resulted in prejudicial error warranting a new trial. Kentucky Rules of Civil Procedure (CR) 59.01. Specifically, appellant claims that one juror, Juror 93416, received a copy of the jury instructions that were marked in favor of Speevak. In his appellant's brief, appellant recounts the particular events occurring at trial surrounding the completed jury instruction:

> [T]he trial court presented jury instructions to the parties. Four separate discussions between the trial court and counsel occurred regarding changes to the jury instructions, and new copies of the instructions were made with each change. Rather than recopy the entire instructions, it was agreed that the corrected page would be substituted into the packets for the jury. The parties worked to exchange that sheet into the packets. It

[2] Although not relevant herein, Blair Sonne, as executrix of the estate of Allan Schmidt, also named C. Matthew Brown as a defendant; however, all claims against Brown were resolved prior to trial.

should be noted that Appellees' attorney had marked a copy of the instructions for use by him during closing arguments. Somehow in the shuffle, the marked copy belonging to Appellees' Counsel made its way into the copies that were placed on the jurors' chairs. Juror 83416's[3] instructions were completed as follows:

INSTRUCTION NO. 2

It was the duty of H. Lynn Speevak, M.D., in his employment with Community Medical Associates, in his treatment of Allan Schmidt, to exercise that degree of care as would be expected of a reasonably competent physician practicing internal medicine, acting under the same or similar circumstances.

Do you believe from the evidence that H. Lynn Speevak, M.D., failed in his duty, and that such failure was a substantial factor in causing the injury complained of by the Plaintiff?

Yes: ____
No: ____ X _____

When the jury was called back into the courtroom prior to closing arguments, the trial court stated: "In your chair, you will find some instructions we have been working on and it is my duty to read these to you." The court then proceeded to read the instructions to the jury. While the court was reading the instructions to the jury, Juror 93416 raised his hand and his hand remained raised for a considerable period of time. The two jurors on either side of him were observed to be looking at him and his instructions.

After the case was submitted to the jury, Juror 93416 brought the form to the attention of the Sheriff. A discussion about the completed instructions occurred between the juror and the Sheriff. The court then convened the attorneys to discuss the juror's

[3] We observe that appellant mistakenly identified the juror number as 83416 when in fact the juror number is 93416.

> instructions. At that time, the court told the attorneys that he had already "sent [the sheriff] back to see if anyone else had a marked copy." The court told the attorneys he had given the jury a copy of the instructions with his, meaning the Judge's name, on it, and they had been instructed that was the original set of instructions.
>
> Plaintiff then moved for a mistrial. The trial court overruled the motion, stating the irregularity would be cured by virtue of the fact the juror was only given a copy of the instructions, and not the original. . . .

Appellant's Brief at 4-6 (citations and footnote omitted).

Appellant argues that the trial court committed error by denying a motion for a new trial. Specifically, appellant asserts that the jury reasonably assumed that the completed jury instruction was marked by the trial court and that the trial court believed the jury should find in favor of Speevek.

Under CR 59.01, a trial court may grant a motion for new trial based upon:

> (a) Irregularity in the proceedings of the court, jury, or an order of the court, or abuse of discretion, by which the party was prevented from having a fair trial.

And, it is within the sound discretion of the trial court to grant a motion for new trial. *Kaminski v. Bremner, Inc.*, 281 S.W.3d 298 (Ky. App. 2009). Generally, there must exist "very strong reasons for granting a new trial, and it must appear with reasonable certainty that injustice or wrong would result unless the relief be granted." *Gray v. Sawyer*, 247 S.W.2d 496, 498 (Ky. 1952).

In this case, the record reveals that the juror who received the completed jury instruction rendered a verdict in favor of appellant. Additionally, the

completed jury instruction was not the original jury instruction but was merely a copy. Upon being alerted of the problem, the trial court quickly replaced the completed jury instruction with an unmarked copy. Appellant merely speculates that the entire jury was somehow tainted by the completed jury instruction distributed to a single juror. It is just as reasonable to assume that the jury recognized that the completed jury instruction was erroneously distributed and did not represent the view of the trial court. Simply stated, appellant failed to demonstrate with reasonable certainty that injustice resulted by the mistaken distribution of a completed jury instruction to a single juror. Accordingly, we conclude that the trial court did not abuse its discretion by denying appellant's motion for new trial based upon an irregularity in the trial proceedings.

Next, appellant maintains that a new trial is warranted due to "multiple references to [Schmidt's] sexual orientation" and his intimate relationship with Victor Saho. In particular, appellant argues:

> During the cross-examination of Appellant's oncology expert, Dr. Dollinger, Counsel for Appellees directly violated the court's order. Appellees' Counsel first asked whether giving post-operative instructions to the Appellant or "his companion" was reasonable. Then Appellees' Counsel repeated the question, this time adding that Appellant's companion was "Mr. Saho." (Citations omitted.)

Appellant's Brief at 11-12.

Appellant points out that the trial court rendered a pretrial order ruling that references to Schmidt's sexual orientation was inadmissible. Through the above

questions of Dr. Dollinger, appellant believes that Speevak directly violated the pretrial order, thereby resulting in highly prejudiced references to Schmidt's sexual orientation being heard by the jury.

Appellant reminds this court that a segment of society views homosexuals negatively and holds deep biases against homosexuals. Specifically, appellant contends:

> However, Appellees' disregard of the trial court's ruling resulted in the jury being directly told that Victor Saho was Allan's companion. Thus, the jury's biases were triggered against Allan. This bias becomes even more important when viewed in the context of this case. Allan died of metastatic rectal cancer. While no expert testified or could testify that homosexual men are more likely to develop rectal cancer, the jury was free to draw such inferences itself from the fact Allan and Victor were lovers. . . .

Appellant's Brief at 14-15.

CR 59.01 provides that a new trial may be granted for "[m]isconduct of the jury, of the prevailing party, or of his attorney." As appellees' counsel was aware of the trial court's pretrial order limiting any references to Schmidt's sexual orientation, appellant maintains that appellees' counsel "knowingly violated the order" resulting in the highly prejudiced reference to Schmidt's sexual orientation. For this reason, appellant argues the trial court erred by denying the motion for new trial.

In the case at hand, appellees' counsel never affirmatively stated that Schmidt was a homosexual or was intimately involved with Saho. Appellees'

counsel merely stated that Saho was Schmidt's "companion." Such designation is ambiguous. Even if the jury inferred that Saho and Schmidt were intimate, any error was merely harmless. We are simply unable to conclude with reasonable certainty that an injustice resulted from the above limited reference to Saho as Schmidt's companion. *Gray*, 247 S.W.2d 496; CR 61.01. In sum, we do not believe that appellant was entitled to a new trial based upon appellees' counsel alleged misconduct.

Appellant also argues that the trial court erred by not declaring a mistrial due to references during trial to private medical insurance held by Schmidt that covered his medical expenses. In particular, appellant claims:

> In the present case, the word "insurance" as well as documents containing the insurance carrier's name, policy and co-pay amounts were displayed numerous times before the jury. Appellees' Counsel displayed the documents using the Elmo overhead projector, and the word "insurance" was referenced multiple times by Appellee Speevak himself. Appellee Speevak's mention of insurance came after he had been instructed by his Counsel to not mention it "ten times". [sic]
>
> Even after objection by Appellant's counsel and instruction by the trial court to avoid any further reference, the Appellee again made reference to insurance processing of medical claims. Further, the references to insurance directly included information that Allan was insured by Cigna and had a co-pay of $15.00 for office visits that cost $110.00. . . .

Appellant's Brief at 16-17 (citations omitted).

A mistrial "is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest

injustice." *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734, 738 (Ky. 1996); *Polk v. Greer*, 222 S.W.3d 263 (Ky. App. 2007). The decision to declare a mistrial is within the broad discretion of the trial court. *Perry v. Com.*, 652 S.W.2d 655 (Ky. 1983).

In the case *sub judice*, the record reveals that the jury found that Speevak was not negligent in his medical care of Schmidt, so the jury never reached the issue of damages. Accordingly, we view any possible prejudicial impact of evidence concerning Schmidt's medical insurance would have only resulted in a decreased award of damages. Considering that the jury never reached the issue of damages, we conclude that any error was harmless at best.

CROSS-APPEAL NO. 2010-CA-000126-MR

Considering our affirmance of Appeal No. 2010-CA-000031-MR, we view appellees' protective cross-appeal as moot.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

LAMBERT, SENIOR JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS.

BRIEFS FOR APPELLANT/
CROSS-APPELLEE:

Larry B. Franklin
Jennifer M. Barbour
Louisville, Kentucky

BRIEFS FOR APPELLEE/CROSS-
APPELLANTS:

Richard P. Schiller
Terri E. Kirkpatrick
Louisville, Kentucky