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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000129-MR

KATHY D. PARTEE — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 04-CI-00674

GREGORY GAPP, M.D. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND WINE,[1] JUDGES; LAMBERT,[2] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Kathy D. Partee appeals from a judgment of the Christian Circuit Court entered on a jury verdict adverse to her claims of medical negligence against Gregory Gapp, M.D. For reasons that follow, we affirm.

[1] Judge Thomas B. Wine concurred in this opinion prior to his retirement effective January 6, 2012. Release of the opinion was delayed by administrative handling.

[2] Senior Judge Joseph E. 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 (KRS) 21.580.

On May 13, 2003, Appellant presented to the emergency department at Jennie Stuart Medical Center in Hopkinsville, Kentucky complaining of pain in her lower right abdomen near her ovaries. A subsequent pregnancy test returned a positive result, and Appellant had a human chorionic gonadotropin (hCG) hormone[3] level of 4208 milli-international units per milliliter (mIU/ml). However, despite the positive pregnancy test, a transvaginal ultrasound failed to reveal any signs of intrauterine pregnancy. Appellant also had a medical history of pelvic inflammatory disease associated with chlamydia. Because of these factors, Appellant was preliminarily diagnosed with an ectopic, or non-uterine, pregnancy and was admitted to the hospital.[4]

Appellant was first visited by Ann Williams, a registered nurse, and then by Appellee, who was the obstetrician/gynecologist on call at the time of her admission. Nurse Williams talked to Appellant about the possibility that her pregnancy was ectopic and presented her with two treatment options: (1) surgery to physically remove the non-uterine fetus; or (2) administration of Methotrexate, a drug that would terminate the pregnancy.

[3] Human chorionic gonadotropin is a hormone produced during pregnancy. Levels of this hormone are measured during early pregnancy in order to verify normal fetal development.

[4] According to medical testimony produced at trial, ectopic pregnancies occur in approximately one to three percent of all pregnancies and can be life-threatening if not addressed. As a non-uterine fetus grows, it can destroy or rupture the internal structure to which it is attached and cause a concealed hemorrhage. Doctors testified that an untreated ectopic pregnancy leads to death in approximately 50 percent of patients and that it remains the leading cause of pregnancy-related death in the first trimester.

Appellee also talked to Appellant about these options[5] after advising her that her pain complaints, hCG reading, and ultrasound results demonstrated an "overwhelming chance" of an ectopic pregnancy and that such a pregnancy could be life-threatening. Viewing her pain complaints as indicative of an imminent risk of rupture and hemorrhage, Appellee refused to discharge Appellant from the hospital or to allow her a few more days to consider her options. Appellee explained to Appellant that surgery could cause problems with fertility or with her ability to carry a child in future pregnancies, so she elected to be injected with Methotrexate to terminate the non-uterine fetus. Appellee told Appellant that she should experience bleeding in a couple of days.

Appellant returned to the hospital for a follow-up appointment on May 21, 2003, with Appellee's partner, Dr. Jerry Hart. She was no longer experiencing abdominal pain, but she had not begun bleeding at that point. Appellant returned for another follow-up visit on May 27, 2003, and this time a sonogram revealed the presence of a "well defined gestational sac within the endometrial canal," which corresponded to an intrauterine pregnancy of five weeks and six days. However, no fetal pole or fetal heart tones were identified. Appellant subsequently visited Dr. William Crump's office in Madisonville on May 29, 2003, and tests there confirmed that Appellant was pregnant and that the

[5] The medical records reflect that Appellee also physically examined Appellant and felt tenderness around her uterus, but she denies that this examination occurred.

pregnancy appeared to be intrauterine. Once again, no fetal pole or fetal heart tones were detected.[6] On May 30, 2003, Appellant miscarried.

Appellant subsequently filed the underlying medical negligence suit against Appellee on the grounds that he had deviated from the applicable standard of care and skill by negligently administering Methotrexate without taking further steps or allowing additional time to confirm that Appellant's pregnancy was actually ectopic. After a three-day trial, a jury determined that Appellee had not breached the applicable standard of care and found in his favor. This appeal followed.

On appeal, Appellant raises a number of grounds for reversal and a new trial – none of which was preserved below. While acknowledging this lack of preservation, Appellant nonetheless asks us to review her claims under the "palpable error" standard set forth in Kentucky Rules of Civil Procedure (CR) 61.02. That rule provides that "[a] palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." An error is palpable only when it is "easily perceptible, plain, obvious and readily noticeable." *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997). "Fundamentally, a palpable error determination turns on whether the court believes there is a 'substantial possibility' that the result would

[6] At least one of Appellee's expert witnesses opined that if the pregnancy was intrauterine, it was likely abnormal and non-viable.

have been different without the error." *Hibdon v. Hibdon*, 247 S.W.3d 915, 918 (Ky. App. 2007), *quoting Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). Even a cursory examination of Appellant's claims reveals that they lack merit under these standards, but we nonetheless address them individually.

Appellant first argues that the trial court committed palpable error by failing to *sua sponte* strike a juror for cause because his wife was a former patient of Appellee. As noted, Appellant failed to challenge inclusion of this juror on the jury panel prior to trial, which effectively waived any right to do so on appeal. *See Pelfrey v. Commonwealth*, 842 S.W.2d 524, 526 (Ky. 1992). We further note our doubt that this claim can even be examined for palpable error since such error "must result from action taken by the court rather than an act or omission by the attorneys or litigants." *Carrs Fork Corp. v. Kodak Min. Co.*, 809 S.W.2d 699, 701 (Ky. 1991); *see also Fischer v. Fischer*, 348 S.W.3d 582, 589 (Ky. 2011). The trial court's failure to act in this case is entirely attributable to an omission by Appellant's trial counsel.

Moreover, Appellant has provided us with no legal authority to support her position that the trial court was obligated to *sua sponte* strike the juror in question, as is required by CR 76.12(4)(c)(v). Indeed, she seems to assume that the juror should have automatically been struck for cause simply because his wife had been a patient of Appellee. However, the juror revealed that his wife had only seen Appellee on a few occasions in 2001 and 2004 while she was a patient of one of his partners. Appellee was not the wife's regular doctor, and he did not deliver

either of her children. Without more, we cannot say that there are grounds for an automatic presumption of bias that would have arguably merited a strike for cause in this instance – particularly applying the standard for palpable error. *See Altman v. Allen*, 850 S.W.2d 44, 45-46 (Ky. 1992); *Mackey v. Greenview Hosp., Inc.*, 587 S.W.2d 249, 253-54 (Ky. App. 1979). Therefore, this claim must fail.

In a related contention, Appellant asserts that the trial court should have *sua sponte* ordered a change in venue for the trial because "several people in the potential jury knew Dr. Gapp." Preservation issues aside, this bare contention does not support a claim of palpable error. Appellant appears to suggest that Appellee possessed "undue influence" in this case because some of the potential jurors knew him and that a change of venue was therefore necessary. *See* KRS 452.010(2). However, without further evidence on this point, merely having an "extensive acquaintance in the county" is not enough to constitute undue influence. *Louisville & N.R. Co. v. Nethery*, 160 Ky. 369, 169 S.W. 883, 884 (1914).

We further note that the three individuals placed on the jury who knew Appellee had tenuous connections to him, at best. One was the juror discussed above, the second was a short-term patient of Appellee in the 1990s, and the third formerly worked at the same hospital as Appellee and sometimes saw him. Appellant has not shown a sufficient basis to require a venue change under *any* standard, let alone the palpable error standard, so this argument also fails.

Appellant next argues that palpable error occurred in the fact that the defense was allowed to repeatedly tell the jury that she had a medical history of

pelvic inflammatory disease associated with chlamydia. Appellant contends that this could have led the jury to believe that "she was immoral or somehow at fault for her inability to bear children." We again question whether this claim can be examined for palpable error given that it bears no connection to an action taken by the trial court and instead resulted from inaction on the part of her trial counsel. With this said, Appellant explicitly acknowledges that this information "was pertinent to her medical diagnosis" because a history of pelvic inflammatory disease, including that caused by chlamydia, was shown to be a significant risk factor for an ectopic pregnancy. Appellant further admits that an objection to this evidence likely would have been overruled for this reason. Given these admissions, we fail to see how Appellant can claim palpable error in the fact that this information was provided to the jury. Therefore, this claim must also fail.

Appellant next raises a vague challenge to the racial composition of the jury. She contends that "there is no objection that can be made when a black plaintiff faces an all white jury, with a white doctor opposite her in the courtroom. You cannot even call this an error. But it is palpable. It is obvious. It has every capacity to affect the outcome." Frankly, it is difficult to ascertain exactly what argument Appellant is asserting here, given that she makes no complaint about Appellee's use of peremptory challenges and does not assert that they were racially-motivated. Instead, her concerns essentially amount to a bare observation that all of the selected jurors were white and an unsupported insinuation that this somehow affected the jury's decision. We fail to see how this questionable

intimation supports a claim of error, let alone palpable error. *See Clay v. Commonwealth*, 291 S.W.3d 210, 220 (Ky. 2008). Thus, this claim is also rejected.

Appellant finally argues that palpable error occurred because the jury verdict was flagrantly against the weight of the evidence and was indicative of passion or prejudice on the part of the jury. Appellant failed to challenge the sufficiency of the evidence to sustain the verdict by a motion for directed verdict, which effectively waived her right to challenge the sufficiency of the evidence by a motion for a new trial or on appeal. *Stewart v. Jackson*, 351 S.W.2d 53, 54-55 (Ky. 1961); *Smith v. Crenshaw*, 344 S.W.2d 393, 396 (Ky. 1961).

Furthermore, any claim of palpable error in this regard is unavailing. The evidentiary record reflects that both parties put on ample medical proof, including fact and expert witnesses, to support their competing theories of the case. Notably, Appellee presented multiple expert witnesses who testified that he had met the applicable standard of care and skill in this case. Therefore, there was clearly enough evidence to support the jury's verdict, and Appellant's claim of palpable error must again be rejected.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

Nancy E.S. Calloway
Elkton, Kentucky

BRIEF FOR APPELLEE:

E. Frederick Straub, Jr.
James R. Coltharp, Jr.
Paducah, Kentucky