RENDERED: APRIL 3, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000286-MR

MYRTLE TAYLOR, ADMINISTRATRIX
OF THE ESTATE OF JUNE GRIFFIN
AND TRAVIS GRIFFIN, INDIVIDUALLY — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 08-CI-007009

LAWRENCE R. WILLIAMS, M.D.,
JERRY DAVIS, M.D., AND
ANESTHESIOLOGY ASSOCIATES
OF LOUISVILLE, P.S.C. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE, CAPERTON[1] AND VANMETER, JUDGES.

[1] Judge Caperton dissented and did not file a separate opinion in this opinion prior to Judge Debra Lambert being sworn in on January 5, 2015, as Judge of Division 1, Third Appellate District. Release of this opinion was delayed by administrative handling.

VANMETER, JUDGE: Litigants are entitled to a fair and impartial jury, composed of jurors who are not biased towards either party. When a juror's qualifications are challenged on a claim of bias, a trial court is to weigh the totality of a juror's responses and demeanor in making a determination as to whether that juror has demonstrated a probability of bias. The primary issue we must decide in this case is whether the Jefferson Circuit Court abused its discretion in denying the plaintiffs' motion to strike two prospective jurors for cause and subsequently denying their motion for a new trial. We hold that the trial court did not abuse its discretion, and affirm its judgment on that issue, as well as the other issues presented.

I. Factual Background

Myrtle Taylor, Administratrix of the Estate of June Griffin, deceased, and Travis Griffin ("Plaintiffs") filed this medical malpractice action against two anesthesiologists, Dr. Lawrence Williams and Dr. Jerry Davis, and their practice group, Anesthesiology Associates of Louisville (jointly "Defendants"). Plaintiffs claimed Defendants breached the standard of care in providing anesthesia to patient June Griffin over a two-day period in 2007, resulting in Ms. Griffin's death.

Plaintiffs also named Norton Hospitals, Inc., along with other parties, as defendants in the complaint. Prior to trial, these other parties were dismissed and Plaintiffs entered into a confidential settlement with Norton. After an eleven-

day trial, the jury returned verdicts in favor of Defendants.[2] The trial court subsequently entered a judgment consistent with the verdict.

Following entry of the court's judgment, Plaintiffs timely filed[3] a motion for a new trial. They alleged denial of a fair trial based on the court's failure to excuse two jurors for cause, and defense counsel's impermissible comments regarding Norton in violation of a pre-trial order. Defendants filed a bill of costs pursuant to CR 54.04, asserting entitlement to recover the original deposition costs totaling $1,532.84. The court clerk endorsed the requested costs in the full amount on the judgment on the same day that Plaintiffs filed exceptions to the bill of costs. Plaintiffs challenged costs on the bases that procedurally the clerk had endorsed the costs prior to expiration of the five-day exceptions period, and that substantively an award of costs would be unjust under the circumstances considering the insolvency of the decedent's estate, Travis Griffin's loss of his only parent, and Travis's age, 16 years-old, when the action was filed.

Both motions were denied. This appeal follows. Additional facts from the trial court proceedings will be addressed below.

II. Issues on Appeal

[2] The verdict in favor of Dr. Davis and Anesthesiology Associates was unanimous. The verdict in favor of Dr. Williams was 11 to 1.

[3] The trial court's judgment was entered November 13, 2012. Under Kentucky Rules of Civil Procedure ("CR") 59.02, "[a] motion for a new trial shall be served not later than 10 days after the entry of the judgment." In this case, the 10th day was the Friday following Thanksgiving, a court holiday. Thus, Plaintiffs' motion filed on Monday, November 26, 2012 was timely. CR 6.01.

Plaintiffs make three arguments on appeal: (1) the trial court erred by failing to excuse two jurors for cause; (2) defense counsel made comments at trial regarding Norton's status that violated the court's pre-trial order; and (3) the trial court erroneously entered Defendants' bill of costs pursuant to CR 54.04. Defendants' responses center on the trial court's discretion in ruling on those matters. We address the arguments of the parties in turn.

A. Juror Selection. As their first basis for appeal, Plaintiffs argue that the trial court erred when it failed to excuse two jurors for cause. On this issue, we review the decision of a trial court on whether to excuse a juror for cause for an abuse of discretion. *McDaniel v. Commonwealth*, 341 S.W.3d 89, 92 (Ky. 2011). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). A trial court, furthermore, enjoys wide discretion in ruling upon challenges of prospective jurors for cause. *Bowman v. Perkins*, 135 S.W.3d 399, 402 (Ky. 2004). In exercising its discretion in determining whether a juror should be excused for cause, a trial court weighs the probability of bias or prejudice based on the entirety of the juror's responses and demeanor. *McDaniel*, 341 S.W.3d at 92; *see also Rankin v. Commonwealth*, 327 S.W.3d 492, 496 (Ky. 2010) (stating that the totality of circumstances, not the response to any single question, reveals impartiality or the lack thereof).

Two situations may arise to constitute reasonable grounds to excuse a prospective juror for cause. First, a juror may be excused whenever he or she expresses or shows an inability or unwillingness to act with entire impartiality. *Rankin*, 327 S.W.3d at 496. Second, a juror may be excused when "the prospective juror's relationship with some aspect of the litigation, be it familial, financial, or situational, with any of the parties, counsel, victims, or witnesses, is such that it is highly unlikely that the average person could remain impartial under the circumstances." *Id.* at 496-97 (internal quotation and citation omitted).

With respect to Juror 214, Plaintiffs argue his "bias, favoritism and partiality" was so well-demonstrated that not granting a strike for cause was clearly an abuse of the trial court's discretion. The trial court heard the following from Juror 214:

> Juror 214: . . . I believe that everybody has a responsibility, and a good doctor has a responsibility, as long as he – he's put the best practice on saving you and moving you along, then I think he's done the right kind of job. We all make mistakes and – and he knows – he knows where his limits are and he should know that. If he steps outside of his limits, then – then he's wrong . . . .
>
> I hope – I hope all these people right here [referring to the veniremen] will determine the facts and I can then decide whether I think he's wrong or not. . . .
>
> [I]f he [the physician] made a mistake and you [referring to Plaintiffs' counsel] can convince us of that, then – then he should be held accountable. . . .
>
> I don't give him [the physician] the benefit of the doubt, but I give doctors good credence because most of them are pretty good.

When asked whether he held physicians "up on a higher level[,]" Juror 214 answered: "Not a higher level. I just respect them."

As to Juror 802, Plaintiffs argue that he indicated bias by an admission that his own finances would be negatively affected by a plaintiff's verdict. The exchange involving Juror 802 began with counsel stating a presumption that the jurors should "agree if you thought what you did here would affect your own pocketbooks, that would influence your decisions here; right? . . . because you think eventually you would pay; right?" Juror 802 explicitly disagreed, stating: "No. No. I think – I believe that there – there is a – there is a need for compensation if there's error . . . ." Juror 802 thereby clearly rejected counsel's premise. His answer in no way indicates an inability to determine liability impartially. He finished his answer, however, with: "but a lot of these lawsuits go absolutely crazy." The juror thus changed the focus to damages awards which prompted a different track from Plaintiffs' counsel.

Counsel then asked Juror 802 if he believed in a damages cap for medical malpractice cases. Juror 802 said: "I don't know what the answer is." When Juror 802 was further pressed regarding his ability to assess a large damages award in this case, a case in which a life was lost, the juror said he would "[l]isten to the information and make a good decision." Counsel asked Juror 802 about "his belief as to how many [medical malpractice] lawsuits . . . , like a percentage-wise,

would be justified[?]" But Juror 802 kept the focus on *this* lawsuit and answered: "If there was a mistake made, then it would be justified."

Defense counsel, in turn, asked the jury pool, including both challenged jurors:

> Can everyone follow the Court's instructions and find against the doctors if you find that they did not act as reasonably competent anesthesiologists? Can I have a show of hands about that? Conversely, is there anybody who won't be able to follow that instruction if the facts of the case or the evidence of the case justified it?

Neither of the challenged jurors – in fact, no juror – responded in any way indicating an inability to set aside any notion of bias, favoritism or partiality so as to disqualify him or her as a proper juror.

In *Mabe v. Commonwealth*, 884 S.W.2d 668 (Ky. 1994), the Kentucky Supreme Court noted the following:

> It is well to remember that the lay persons on the panel may never have been subjected to the type of leading questions and cross-examination tactics that frequently are employed, and that were evident in this case. Prospective jurors represent a cross section of the community, and their education and experience vary widely. Also unlike witnesses, prospective jurors have had no briefing by lawyers prior to taking the stand. Jurors cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this, and under our system it is that judge who is best suited to determine the competency to serve impartially. The trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading.

Id. at 671 (quoting *Patton v. Yount*, 467 U.S. 1025, 1038-39, 104 S.Ct. 2885, 2892-93, 81 L.Ed.2d 847 (1984)). Given that discretion, and considering the statements of these jurors, we hold that the trial court properly exercised its discretion in refusing to strike these two jurors for cause.

B. Violation of Pre-trial Order. Plaintiffs' second basis for appeal is the trial court erred in denying their motion for a new trial based upon defense counsel's repeated references to Norton as a defendant to this action, in violation of the court's ruling on Plaintiffs' motion in limine to exclude mention of Norton's settlement with Plaintiffs and its involvement in this action. The trial court admonished the jury that Norton was not a party to this action.

Plaintiffs assert that despite the court's instructions to the contrary, defense counsel repeatedly informed the jury that Plaintiffs had sued Norton and that Norton was "the defendant not present in this courtroom." Plaintiffs argue that these references caused unfair prejudice by creating a plain inference that Norton was at fault, and had paid a settlement to Plaintiffs accordingly.

In response, Defendants argue the trial court properly denied the motion for a new trial since defense counsel's comments concerning Norton were proper and in accordance with the court's rulings. Defendants argue they had the right to assert the negligence of another party as a defense, and made no mention of any settlement.

Upon review of the record, we agree with the trial court that defense counsel stayed within its stated guidelines with respect to the issue of settling

parties. As our courts have held, matters involving settlement are generally not relevant to issues being tried. *Green River Elec. Corp. v. Nantz*, 894 S.W.2d 643 (Ky. App. 1995). Further, as provided by KRE[4] 408, evidence concerning settlements and compromises are not admissible to prove liability for, or invalidity of, the claim or its amount. This court has held "that neither the fact nor the amount of the settlement should be communicated to the jury that tries the issue of the nonsettling tortfeasor's liability." *Simmons v. Small*, 986 S.W.2d 452, 454 (Ky. App. 1998) (internal quotation and citation omitted). On the other hand, Defendants, in an effort to minimize their potential liability, were entitled to put on proof of an absent tortfeasor's potential fault for purposes of apportionment of damages. In fact, KRS[5] 411.182 requires a jury instruction apportioning damages among parties to the action, third-party defendants, and persons who have been released.[6]

In this case, none of the parties at trial revealed to the jury that Norton and Plaintiffs had settled. No settlement amount was revealed. The court admonished the jury that Norton was simply not participating at trial, and we find that defense counsel's comments were in accordance with the trial court's instructions and admonishments. Plaintiffs argue those comments create an inference of settlement, but an equally likely inference is that Norton was

[4] Kentucky Rules of Evidence.

[5] Kentucky Revised Statutes.

[6] The trial court gave an apportionment instruction. The jury did not complete that instruction since it did not find that Defendants had breached the standard of care.

dismissed for any number of reason unrelated to any settlement. Accordingly, we find that the trial court was within its discretion and did not err in denying Plaintiffs' motion for a new trial on this basis.

C. Bill of Costs. Plaintiffs' final argument addresses relief from Defendants' bill of costs, totaling $1,532.84. They argue that the trial court should have exercised its discretion, pursuant to CR 54.04(1), not to assess costs because: (1) the Estate of June Griffin had no assets with which to pay any such costs; and (2) Plaintiff Travis Griffin, Ms. Griffin's son, was a minor when this litigation was filed, now attends a community college, and works a low-paying job with no benefits. In other words, an award of costs is unjust.

CR 54.04(1) provides that "[c]osts shall be allowed as of course to the prevailing party unless the court otherwise directs[.]" This court has previously affirmed an award of costs against indigent parties. *Cummins v. Cox*, 763 S.W.2d 135 (Ky. App. 1988). We believe that the award of costs is ultimately left to the sound discretion of the trial court. We are unable to say that the trial court abused its discretion in upholding the assessment of costs.

III. Conclusion

The Jefferson Circuit Court's judgment is affirmed in all respects.

ACREE, CHIEF JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS AND WILL NOT FILE A SEPARATE OPINION.

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