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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000686-MR
AND
NO. 2013-CA-000741-MR

RONALD G. EGGEMEYER — APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM MCCRACKEN CIRCUIT COURT
v. HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 10-CI-01085

TED H. JEFFERSON, D.O., C.S.C.S.; AND TED H. JEFFERSON, D.O., INC.; — APPELLEE/CROSS-APPELLANT

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; JONES AND J. LAMBERT, JUDGES.

LAMBERT, J., JUDGE: Ronald Eggemeyer appeals from the McCracken Circuit Court's denial of his motion for a new trial, to vacate or set aside judgment, and for default judgment on liability. After careful review, we reverse the trial court's order and remand this case for a new trial.

This is a medical malpractice case arising out of the underlying Defendant, Dr. Ted Jefferson's, alleged failure to properly repair Eggemeyer's broken arm by placing enough screws below the fracture site and by failing to diagnose a post-operative infection. The first trial in this case took place in August 2012. During that trial, Dr. Jefferson violated the court's instructions and orders by repeatedly referring to Eggemeyer's medical insurance. The trial court declared a mistrial and held Dr. Jefferson in contempt, but did not make a determination of the sanctions until after the second trial.

Prior to the second trial, Eggemeyer made a motion that the case be frozen and no new legal or medical evidence or theories be introduced. The trial court agreed with Eggemeyer and held that no new legal or medical theories, defenses, or issues would be introduced or utilized, given the small amount of time counsel would have to prepare for the second trial. The trial court confirmed this in its written order granting Eggemeyer's motion for sanctions, stating:

> Additionally, after the mistrial, the Court instructed counsel that the case would be retried as it now sits. There would be no new experts or theories or anything else that was not disclosed in the first trial. This was in an effort to keep the costs to a minimum and to shorten any delay in retrying the case.

Following the mistrial, Dr. Jefferson replaced attorney E. Frederick Straub with attorneys Scott Whonsetler and Jeffery Thompson. During a pretrial conference prior to the second trial, Eggemeyer's counsel renewed his motion that no new theories, legal defenses, or evidence be submitted to the jury. The court

again reiterated that no new legal or medical theories or defenses would be permitted in the second trial. The morning of the second trial, Eggemeyer's counsel *again* expressed concern over what Dr. Jefferson's counsel would attempt to do, and the court, for a third time, ruled and instructed the parties that no new theories of the case were to be introduced. Defense counsel stated that they would abide by this ruling.

Despite the trial court's three separate rulings and orders to Dr. Jefferson's counsel, Mr. Whonsetler raised over a dozen new medical defenses and theories in his opening statement to the jury. Eggemeyer's counsel objected and brought the issue to the court's attention. The court indicated that these sounded like new theories to the court also, and before ruling on the issue, ordered a hearing for the following morning. No admonition was given to the jury at that time.

During the hearing on the second day of trial, Eggemeyer's counsel submitted a brief memorandum addressing the twelve most egregious new, unsupported issues and testimony advanced by Jefferson's counsel in the opening statement. After hearing argument from both sides, the trial court determined that new issues were introduced which violated the court's order, and issued the following oral ruling to Dr. Jefferson and his counsel:

> And I mean not even get up and tiptoeing to the line. Because, this is a pretty egregious violation of the rules, and it's an ambush. And, particularly I think when we were sitting there yesterday talking about this and saying no new issues of legal liability in this case, I think you're sitting there and you knew that you were going to do this. And, we couldn't pull it out of you. And you stand up in

> front of that jury and tell them that, you completely went against the ruling of the Court, in doing that. And so, I don't know…I don't know what the outcome is going to be right now other than I'm going to be watching to make sure we don't get anywhere near any of that. And, Dr. Jefferson as well. Now, you may be asking some question and, if Dr. Jefferson believes he's going to bring that in, I have no problem at all with enforcing the Court Order by either a civil contempt, or a criminal contempt. And the civil contempt or criminal, either one can be by imposing fines or it can be jail. And, I don't tend to try this case another time. And so, ya'll [indicating Whonsettler and Dr. Jefferson] need to get your act together on this. And, if I hear anything, I don't have time to go through all of these things and say, "Ok, We can't do this. We can't do that." This is all stuff that should've been handled by reputable attorneys, ethical attorneys, a long time ago. That here's what this trial is going to be about, and we understand. Maybe I just have the luxury of dealing with attorneys who play fairly and by the rules, and I don't have these problems.

The court entered a written order addressing the twelve most pressing issues submitted in Eggemeyer's arguments and brief. The trial court again precluded Whonsetler from arguing or suggesting that Dr. Jefferson placed more than one screw below the fracture line, or that Eggemeyer might have suffered some trauma to his arm following the surgical repair by Jefferson, as well as several other theories, as there was no evidence in the record to support either theory.

Eggemeyer requested a strong admonition to the jury, but the trial court simply informed the jury that opening statements are not evidence, and that if the statements did not ultimately come through in the form of evidence, the jury was to disregard them.

Eggemeyer alleges that over the course of the trial, Dr. Jefferson and his counsel repeatedly introduced new opinions and testimony in violation of the court's orders, including testimony from Jefferson and his expert that Jefferson put three screws below the fracture line and that Eggemeyer might have suffered some trauma following Dr. Jefferson's surgical repair of his arm. Even though Eggemeyer objected to this line of questioning, the inferences and direct references to unsupported evidence and issues ruled inadmissible by the trial court did not stop, even after the final witness.

During closing arguments, Mr. Whonsetler again referenced Dr. Jefferson placing "three screws below the fracture line." Eggemeyer again objected and the trial court ruled from the bench, "And I just know now, again, you have violated a Court order in this case." The court admonished the jury to disregard the statement. Undeterred, Mr. Whonsetler immediately turned to the jury and said, "Ladies and Gentlemen, you will have the x-rays. Take a look and you will see that below the fracture line there are three screws that go from cortices to cortices. The cortices are the white portion of the bone, at either side of the bone and you will see that. You can measure it up against the original film and you will see that it is beneath the fracture line." Eggemyer objected again, and the objection was sustained; however, counsel was not permitted to approach and no admonition was given. The court stated, "Just go on to something else. I'll decide how we'll handle that." The court did not issue another admonition and did not take any remedial action for Jefferson's counsel's violation of the previous rulings of the

court or the court's instructions or admonition. Eggemeyer argues that the jury was presented with Dr. Jefferson's counsel's lay opinion, which was not supported by the evidence. The jury then returned a defense verdict. Eggemeyer moved for a judgment notwithstanding the verdict (JNOV) and then filed a written motion for a new trial or for a default judgment on liability. Those motions were denied by order entered April 1, 2013, and this appeal now follows.

On appeal, Eggemeyer argues that the trial court abused its discretion by denying his motion for a new trial, to vacate or set aside the judgment, and for default judgment on liability. Dr. Jefferson argues that the trial court properly denied Eggemeyer's motion for a new trial, or to vacate and set aside the judgment. Dr. Jefferson cross-appeals, arguing that the trial court's November 26, 2012, order granting sanctions against him was in error and that such sanctions were not warranted. That order granted Eggemeyer $58,858.82 in attorney's fees and stated that the court was awarding such fees because of Dr. Jefferson's direct defiance of its orders throughout the first trial. The trial court clearly and unequivocally stated that it was awarding the fees as sanctions because, instead of remedying his conduct as instructed by the court, Dr. Jefferson compounded that conduct in the second trial.

When this Court reviews a trial court's denial of a motion to alter, amend, or vacate, or set aside or vacate an order, an abuse of discretion is applied. We review the trial court's judgment to determine "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).

Eggemeyer urges this Court to consider Kentucky Rules of Civil Procedure (CR) 59.01, which provides that a new trial may be granted based on (b) misconduct of the jury, of the prevailing party, or of his attorney; or (c) accident or surprise which ordinary prudence could not have guarded against. Eggemeyer cites to this Court's previous opinion issued in *Horton v. Herndon*, 70 S.W.2d 975 (Ky. 1934), wherein we held that even a statement that "may" improperly influence the jury requires a new trial.

> The rule is that where an attorney makes a prejudicial statement of fact unsupported by the evidence, and the improper argument is brought to the court's attention, the court should promptly reprimand him and instruct the jury to disregard the statement and, if it be so prejudicial that it may improperly influence the jury, should set aside the verdict obtained by such attorney, and the failure of opposing counsel to ask that the jury be discharged is not a waiver of proper action by the court.

Id. at 977. Eggemeyer argues that Dr. Jefferson's counsel opened his case by arguing to the jury new, undisclosed, and unsupported theories. Counsel did this after being explicitly ordered by the court three separate times not to do so. Eggemeyer argues he was surprised by these new opinions and that he had not been informed or put on notice of them through written discovery, depositions, expert disclosures, or testimony in the first trial.

Eggemeyer notes that in Kentucky, the scope of opening statements is in fact limited to facts that are admissible and not prejudicial, citing *Polk v. Greer*, 222

S.W.3d 263 (Ky. App. 2007). In that case, an attorney used his opening statement to "smear" a defendant. This Court found this to be inappropriate, stating:

> The purpose of opening statements is to allow each party to summarize for the jury what its likely proof will be during the trial. And while the parties are given reasonable latitude during opening statements, their statement should not contain references to plainly inadmissible matters or to anything that may tend to unduly prejudice the opposing party.

Id. at 265. (Internal citations omitted). This Court reversed the trial court and granted the defendant a new trial due to the prejudice inflicted by the attorney's opening statements. Eggemeyer argues that in the instant case, the purpose of Dr. Jefferson's opening statement was to interject as many new, unsupported medical issues, opinions and defenses as possible to ambush and prejudice him and confuse the jury.

Eggemeyer further argues that the admonition given by the trial court was untimely and ineffective. In support of this, Eggemeyer cites to *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003), where the Supreme Court of Kentucky held:

> There are only two circumstances in which the presumption efficacy of an admonition falters: (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition *and* there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant; or (2) when the question was asked without a factual basis *and* was "inflammatory" or "highly prejudicial."

Eggemeyer argues that there is clearly an overwhelming probability that the jury was unable to follow the court's admonition. First, the admonition was not given until a day after Jefferson's counsel's misconduct during opening statements. The jury had all night to think about these unsupported medical theories and form opinions based upon them. When an admonition was finally offered the next day, the admonition did not tell the jury to disregard any of the new, unsupported medical theories and defenses offered by Jefferson's counsel in his opening. The admonition did not even state that Jefferson's counsel introduced new theories or made statements that were inadmissible and should be disregarded; in fact, it did not state Jefferson's counsel did anything wrong at all.

Dr. Jefferson argues that Eggemeyer is barred from requesting a new trial based on complaints of attorney misconduct and inadmissible evidence because he failed to contemporaneously ask the trial court for a mistrial, opting instead to ask only for jury admonitions, which he received. Dr. Jefferson argues that, having failed to preserve the issue, Eggemeyer cannot demonstrate that such error occurred.

In support of this argument, Dr. Jefferson argues that Eggemeyer never requested a mistrial during the second trial, and that the trial court consistently granted his requests for jury admonitions, and that Eggemeyer's counsel never argued that those admonitions were inadequate, incomplete, or ineffective. Dr. Jefferson relies on *Combs v. Commonwealth*, 198 S.W.3d 574, 581 (Ky. 2006), and *West v. Commonwealth*, 780 S.W.2d 600, 602 (Ky. 1989), for the proposition that

as a general rule, where an improper and prejudicial statement or argument is made to a jury, an objection thereto is sustained, and an admonition to disregard the objectionable matter is requested by the aggrieved party and given by the judge, the law will usually presume that the admonition cures the error. Dr. Jefferson argues that if a party believes an admonition will not cure the claimed error, it is incumbent upon that party to contemporaneously move for a mistrial. *Kinney v. Butcher*, 131 S.W.3d 357, 360 (Ky. App. 2004).

Dr. Jefferson argues that if Eggemeyer truly believed the events underlying his appeal were egregious enough to require a new trial, it was incumbent on him to contemporaneously request a mistrial, not merely an admonition. Instead, he argues, Eggemeyer elected to raise objections and seek admonishments, which he received, and he has thus failed to preserve any claim of entitlement to a new trial.

Eggemeyer argues that he was not required to ask for a mistrial contemporaneously with his objections and requests for admonitions, and argues that CR 59.01 is designed to prevent the exact type of conduct that occurred in this case. Eggemeyer contends that nowhere in the language of the civil rules does it state that a procedural prerequisite to a CR 59, 60, or 61 motion is to first make a motion for a mistrial. Eggemeyer argues that Dr. Jefferson's contention that in order to move for a new trial or to vacate a judgment, one must ask for a mistrial each and every time one objects and that objection is overruled is ridiculous and would not be tolerated by the court. Eggemeyer argues that such conduct would be

redundant and would necessarily prolong trials as each motion would have to be ruled upon at the bench.

We agree with Eggemeyer that CR 59.01 is absolutely designed to prevent the conduct that occurred in the instant case. The trial court clearly and unequivocally ruled, after first declaring a mistrial, that the second trial would not be an opportunity for the defense to present new theories or evidence. In fact, the trial court explicitly prohibited the defense from presenting the exact evidence and theories they attempted to get in during the first trial. While Dr. Jefferson attempts to couch this as an innocent mistake of the trial court's meaning in his brief to this Court, we are not persuaded. Instead, we agree with the trial court that defense counsel attempted to ambush Eggemeyer and directly violated specific repeated orders of the Court. The record reflects a clear intent by defense to proceed however they pleased, in direct contradiction of the trial court's instructions and in direct contradiction of the promises they made to the court prior to the beginning of the second trial.

To be clear, we hold that the trial court's failure to grant Eggemeyer a new trial was an absolute abuse of discretion, and we find palpable error under CR 61.02.

> Authorities discussing palpable error consider it to be composed of two elements: obviousness and seriousness, the latter of which is present when 'a failure to notice and correct such an error would seriously affect the fairness, integrity, and public reputation of the judicial proceeding.' A court reviewing for palpable error must

> do so in light of the entire record; the inquiry is heavily dependent on the facts of each case.

Ernst v. Commonwealth, 160 S.W.3d 744, 758 (Ky. 2005) (internal citations omitted). While Dr. Jefferson urges this Court not to find palpable error based on the fact that it was the attorney's conduct, and not the court's, that was egregious, we are again not persuaded. Here, the trial court failed to take adequate measures to reign in Dr. Jefferson and his counsel and the misconduct resulted in a defense verdict, which was not vacated, despite the trial court's numerous warnings and instructions to the contrary. The trial court's failure to act is the palpable error, not Jefferson's.

Because we agree that the trial court abused its discretion in not granting a new trial under CR 59.01, we will not address Eggemeyer's claims under CR 60.02.

On cross-appeal, Dr. Jefferson argues that the trial court abused its discretion in imposing sanctions against him through attorney's fees, as they were unjustified and excessive. Eggemeyer argues that the award of sanctions was appropriate, warranted, and not an abuse of discretion.

Dr. Jefferson urges this Court to consider the recent decision of the Supreme Court of Kentucky in *Bell v. Commonwealth*, 423 S.W.3d 742 (Ky. 2014). There, the Court held that the trial court could not lawfully impose attorney's fee sanctions on the Cabinet for Health and Family Services. The Court distinguished between attorney's fees being justified by statute or on a contractual basis and

situations such as the instant case, where attorney's fees are imposed as a sanction. The Court stated:

> This brings us to the question of whether attorney's fees can be awarded as a sanction in this case, in reference to the trial court's view that the Cabinet's conduct was "egregious." It is true that there are some instances in our case law where attorney's fees have been awarded and approved on appeal. However, the only appropriate award of attorney's fees as a sanction comes when the very integrity of the *court* is in issue. To that end, attorney's fees may be awarded under Civil Rule 11 for filing pleadings that are not "well grounded in fact," not "warranted by existing law or a good faith argument for the extension, modification or reversal of existing law," or that are filed for "any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Attorney's fees may also be ordered under Civil Rule 37.02 for failing to comply with a court order. Likewise, attorney's fees may be awarded in a contempt action, because the conduct undermined the authority of the court. *See Kentucky Retirement Systems v. Foster*, 338 S.W.3d 788, 803 (Ky. App. 2010). In these instances where attorney's fees are appropriate as a sanction, it is not for the benefit of the individual plaintiff, but because there has been an intrusion on the very power of the court. Any cases to the contrary are misguided, [] for only in this narrow use to support the integrity of the court may attorney's fees be awarded without subverting the "American Rule" of not awarding attorney's fees as costs.

Id. at 748-49. (Footnote omitted). The Court went on to hold that the integrity of the trial court was not at issue in *Bell*, and thus, while it understood the trial court's reasoning in awarding attorney's fees, the Court concluded that the award of fees was in error. *Id*. at 750.

In the instant case, we believe the integrity of the trial court was most definitely at issue, and in fact the trial court directly stated that it was holding Dr. Jefferson in civil contempt and awarding attorney's fees as sanctions. Given the repeated misconduct of Dr. Jefferson and his attorneys, we find the imposition of sanctions to be completely appropriate in this case.

To be sure, this Court recently held:

> The trial courts are afforded wide latitude in the use of their contempt powers to enforce their judgments and remove any obstructions to such enforcement. *Akers v. Stephenson*, 469 S.W.2d 704, 706 (Ky. 1970). Indeed, trial courts have almost unlimited discretion in exercising their contempt powers and we will not disturb a trial court's exercise of its contempt powers on appeal absent an abuse of that discretion. *Meyers v. Petrie*, 233 S.W.3d 212, 215 (Ky. App. 2007).

Lanham v. Lanham, 336 S.W.3d 123, 128 (Ky. App. 2011). In the instant case, we cannot say that it was an abuse of discretion for the trial court to grant sanctions against Dr. Jefferson. The trial court repeatedly emphasized that neither party was to present new medical or defense theories at the second trial, and both Dr. Jefferson and his defense counsel did just this. Furthermore, the trial court notes in its order that sanctions were warranted by Dr. Jefferson's conduct in the first trial alone, and we agree. After being warned numerous times not to mention insurance, Dr. Jefferson continued to discuss insurance in his testimony. We find no abuse of discretion in the trial court's imposition of attorney's fees as sanctions, and will not disturb that ruling on appeal.

Dr. Jefferson argues that the amount of sanctions was excessive, contending that Eggemeyer's counsel was likely paid on a contingency basis. A review of the record indicates that the trial court considered the amount of sanctions and lowered the amount from that originally requested by Eggemeyer. We do not find the sanctions to be excessive and will not disturb them on appeal.

Finding that the McCracken Circuit Court abused its discretion by failing to grant a new trial after repeated disregard for its admonitions and rulings by defense counsel and Dr. Jefferson, we reverse the trial court's order and remand for a new trial. Finding no abuse of discretion with regard to the sanctions imposed against Dr. Jefferson for his and his defense counsel's behavior throughout both trials, we affirm the trial court's November 26, 2012, order imposing said sanctions.

JONES, JUDGE, CONCURS AND FILES SEPARATE OPINION.

JONES, JUDGE, CONCURRING: I join in the majority opinion, but write separately because I do not believe that it was necessary for the majority to engage in a palpable error review. The palpable error standard is reserved for review of unpreserved errors. I believe that Eggemeyer preserved the new trial issue making palpable error review unnecessary.

Eggemeyer objected throughout the trial to argument and evidence concerning the new theories. Despite being repeatedly instructed to avoid those issues, defense counsel persisted in inserting those issues into the trial from the beginning to the end of the trial. While each isolated incident may not have been enough to warrant a new trial, the cumulative effect of repeatedly hearing those

theories referred to throughout trial, without a stronger admonition from the court, cannot be ignored. Indeed, the statements so infected the trial one wonders whether any admonition would have been effective to cure the prejudice.

In any event, I believe that Eggemeyer preserved the issues by objecting to the statements at the time they were made and moving for a new trial based on their cumulative effect in accordance with CR 59.01.[1] "This court has condemned, in every instance when it has been brought to its attention, statements made by counsel not supported by the record, and where such statements are persisted in, and a party recovers a verdict when it is reasonably inferable that the improper statements affected the minds of the jury, the judgment should not be allowed to stand." *Connecticut Fire Ins. Co. v. Colker*, 16 S.W.2d 761, 762 (Ky. 1929).

ACREE, CHIEF JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ACREE, CHIEF JUDGE, DISSENTING: Respectfully, I dissent; I would affirm the trial court's denial of Eggemeyer's motion for a new trial.

It is a fact, and a strange and noteworthy one, that the rule this Court here addresses, CR 59.01, was adopted by our highest court while Henry Clay was

[1] This is distinct from moving for a mistrial based on a single egregious statement. In this case, the gist of Eggemeyer's motion for a new trial was that the repeated insertion of this type of argument and evidence deprived him of a fair trial.

still alive.[2] Clay himself might have opened his law book and read these very words from the 1851 Code:

> ARTICLE V.
> *New Trials.*
>
> § 381. A new trial is a re-examination in the same court of an issue of fact after a verdict by a jury or a decision by the court. The former verdict or decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes affecting materially the substantial rights of such party:
>
> 1. Irregularity in the proceedings of the court, jury, or prevailing party, or any order of court or abuse of discretion, by which the party was prevented from having a fair trial.
> 2. Misconduct of the jury or prevailing party.
> 3. Accident or surprise which ordinary prudence could not have guarded against.
> 4. Excessive damages, appearing to have been given under the influence of passion or prejudice.
> 5. Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract or for the injury or detention of property.
> 6. That the verdict or decision is not sustained by sufficient evidence, or is contrary to law.
> 7. Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at trial.
> 8. Error of law occurring at the trial, and excepted to by the party making the application.

M.C. Johnson et al, eds., *Code of Practice in Civil Cases for the State of Kentucky* 81-82, § 381 (1851). Now, compare that rule to the version we apply today and see how little has changed:

[2] Henry Clay died at 11:17 AM on June 29, 1852. Robert V. Remini, *Henry Clay: Statesman for the Union* 781 (1991).

Rule 59. New trials – Amendment of judgments.
Rule 59.01. Grounds.

A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:

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

(b) Misconduct of the jury, of the prevailing party, or of his attorney.

(c) Accident or surprise which ordinary prudence could not have guarded against.

(d) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court.

(e) Error in the assessment of the amount of recovery whether too large or too small.

(f) That the verdict is not sustained by sufficient evidence, or is contrary to law.

(g) Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at trial.

(h) Errors of law occurring at the trial and objected to by the party under the provisions of these rules.

CR 59; CR 59.01.

For at least 160 years, the coursing stream of evolving procedural rules has bypassed this unique Kentucky provision that continues to flourish in its own deep eddy. When Kentucky abandoned its other procedural rules in favor of following the modern trend set by the Federal Rules of Civil Procedure after the Second World War, this rule survived. I believe we chose to cling to this rule to preserve the substantial and well-established body of case law interpreting it.

Part of that case law is a very longstanding and stubborn reluctance to reverse a trial judge's decision either granting or denying a new trial. "These grounds for a new trial give the court not an arbitrary, but a *wide legal, discretion*." *Louisville & N.R. Co. v. Coniff's Adm'r*, 16 Ky.L.Rptr. 296, 27 S.W. 865, 865 (1894) (emphasis added). For as far back as Kentucky has had its own jurisprudence, the reviewing "court has always required that cause should be very clearly shown to justify the reversal of a judgment for refusing a new trial." *King v. Walker*, 1 A.K.Marsh. 313, 314, 1818 WL 1378, *1 (Ky. 1818). Simply put, "[c]ircuit courts have a wide discretion in passing on motions for a new trial, and, unless that discretion is abused, their action will not be disturbed on appeal." *Clark v. Bean*, 267 Ky. 238, 101 S.W.2d 930, 931 (1937).

As stated somewhat more recently:

> In determining whether the judgment should be reversed, we must bear in mind the double burden with which the appellants come, together with the attitude of all courts to look with disfavor upon the granting of a retrial of a case otherwise finally determined where the parties have had a fair day in court. *There must be very strong reasons for granting a new trial*, and *it must appear with reasonable certainly that injustice or wrong would result unless the relief be granted* and another opportunity allowed to relitigate the same issues.

Gray v. Sawyer, 247 S.W.2d 496, 498 (Ky. 1952) (emphasis added). Nothing in our jurisprudence suggests we are today less reluctant to find abuse of a trial court's discretion on this issue. That discretion is my touchstone.

Take first Eggemeyer's claim that he should be granted a new trial because of "[a]ccident or surprise which ordinary prudence could not have guarded against." CR 59.01(c). I am hard-pressed to find accident or surprise here.

During a pretrial conference, before the second trial, the circuit court granted Eggemeyer's motion to prohibit Dr. Jefferson's reference to certain evidence and defense theories. Eggemeyer enumerated the evidence and theories in twelve distinct paragraphs and the trial court did likewise in a written order.[3] According to Eggemeyer's brief to this Court, these issues were discussed twice more before trial. The matters Eggemeyer now claims as accident or surprise are plainly listed among those twelve items. Having fervently and repeatedly expressed a fear that Dr. Jefferson would present these subjects at the second trial, I cannot conclude that, when that happened, it was an "accident or surprise which ordinary prudence could not have guarded against." The fact is that Eggemeyer *did* guard against it. In my opinion, CR 59.01(c) cannot be a basis for granting a new trial.

However, Eggemeyer had arguably better grounds for relief under CR 59.01(b) – "[m]isconduct . . . of the prevailing party, or of his attorney[.]" The analysis can be undertaken in steps.

As the record shows, Dr. Jefferson's counsel repeatedly referred to evidence excluded by the circuit court's order. Where an attorney "'deliberately go[es] outside the record in the jury argument and make[s] statements, directly or

[3] The motion was made and granted in open court but the order was entered on November 19, 2012, after the jury deliberated following the second trial.

inferentially, which are calculated to improperly influence the jury,' . . . prejudice . . . may be presumed." *Smith v. McMillan*, 841 S.W.2d 172, 175 (Ky. 1992) (quoting *Louisville & N.R. Co. v. Gregory*, 144 S.W.2d 519, 522 (Ky. 1940)). But what, in practice, does this "presumed prejudice" mean?

Prejudice varies by degree. Even a wholly proper closing argument will work a prejudice against the other party – it is designed and intended to influence the jury in just that way. It is not objectionable at all. Rather, the harm our jurisprudence will not allow to go uncured is argument intended to "*improperly* influence the jury[.]" *Id.* (emphasis added).

Skilled practitioners make use of the variability of presumed prejudice as part of their trial strategy. While a counsel's reference to facts not in evidence occurs accidentally from time to time,[4] it would be naïve to presume it is never the result of counsel's conscious decision and intentional act. How far to push this envelope is trial strategy. How opposing counsel reacts is also trial strategy.

While all improper argument will justify sustaining an objection to it, the offense may be so slight that opposing counsel, as a matter of trial strategy, will choose not to object[5] or, if she does object, will choose not to follow up by requesting an admonition.[6] Counsel must weigh both the effectiveness and

[4] No doubt this is why CR 59.01(c) references "*accident or* surprise."

[5] Merely objecting and then "[f]ailing to request an admonition is generally regarded as trial strategy, and therefore waives the issue on appeal." *Sullivan v. Commonwealth*, 2008 WL 4691944 (Ky. Oct. 23, 2008)(2006–SC–000930–TG),*3 (citing *Ernst v. Commonwealth*, 160 S.W.3d 744, 759 (Ky. 2005); *Hall v. Commonwealth*, 817 S.W.2d 228, 229 (Ky. 1991)).

[6] *Gaither v. Commonwealth*, 2013 WL 3013579 (Ky. App. June 14, 2013)(2010-CA-002300-MR), *3 presents such an example:

impropriety of an argument before requesting an admonition, knowing that the admonition will repeat and even showcase it.

On the other hand, opposing counsel may believe the prejudice of the improper argument is so great that it must be addressed so that the strategy is not only to object but, additionally, to ask the court to admonish the jury to disregard it. The admonition gives rise to another presumption; "the law *presumes* that the jury obeys the admonition and instructions of the court, and it is generally the rule that the admonition of the court cures such errors as improper argument of counsel." *Standard Sanitary Mfg. Co. v. Brian's Adm'r*, 224 Ky. 419, 6 S.W.2d 491, 494 (1928) (emphasis added); *see also Mayo v. Commonwealth*, 322 S.W.3d 41, 55 (Ky. 2010) ("An admonition is presumed to cure improper comments, and a jury is presumed to follow such an admonition.") *and Dept. of Highways v. Hess*, 420 S.W.2d 660, 662 (Ky. 1967) (citation to criminal cases for guidance on jury admonitions is proper because "the reason for the rule applies equally, if not more strongly, in a civil trial" (also citing *Standard Sanitary*, 6 S.W.2d at 493)).

> Trial counsel . . . did not seek an admonition or mistrial following his objection to the Commonwealth's [improper and prejudicial statement during closing argument] because he did not want to highlight or bring further attention to the remark and did not believe it rose to the level justifying a mistrial. He felt his objection had been sufficient as the jury had previously been informed that statements made by counsel were not evidence; he believed in the intelligence of the jurors; and the trial court's instruction . . . properly explained the law on the issue. Counsel unequivocally stated that his decision was a strategic one he carefully considered against the backdrop of a nine-day trial.

I do not cite *Gaither* as authority, but only to demonstrate that some improper argument may be so mildly prejudicial that it is deemed by opposing counsel as unworthy of notice.

At this point, again, strategy comes into play. Counsel objecting to the improper closing must decide whether to move for a mistrial, *i.e.*, ask the trial court to discharge the jury before a verdict is ever reached. However, doing so has an effect similar to objecting or seeking an admonition – it brings further attention to the improper comments. Counsel must then undertake an analysis similar to that just outlined.

But Dr. Jefferson argues there is another grave consequence to *declining* to move for a mistrial – waiver of *any* claim of error. He argues the consequence of declining to move for a mistrial waives the right to subsequently claim the admonition was ineffective.[7] I disagree. While, in a practical sense, not asking for a mistrial waives the right to be granted a mistrial, this does not erase all hope of curing the prejudicial effect of an improper argument.

As noted, not asking for a mistrial after an admonition only creates a *presumption* that the admonition succeeded in its intended purpose. Where an improper closing argument, whether or not "made for the purpose of influencing the jury [nevertheless] had that effect, . . . a mistrial should have been ordered [before the case was given to the jury] or at least a new trial granted *after the effect was manifested by the verdict*." *Kaufman-Straus Co. v. Short*, 311 Ky. 78, 223 S.W.2d 367, 368 (1949) (emphasis added). In other words, the verdict itself could *rebut the presumption* that the admonition was sufficient to cure the impropriety of

[7] It is not clear whether the majority agrees with Dr. Jefferson on this point, but its review for palpable error implies that it does.

the argument. Our jurisprudence entrusts that assessment to the trial court, exercising its discretion, when confronted with a motion for a new trial under CR 59.01. If, *after considering the verdict*, the trial judge is convinced that the improper conduct of an attorney during closing argument was not cured by the court's admonition, the judge "should set aside the verdict[8] obtained by such attorney, and the *failure of opposing counsel to ask that the jury be discharged is not a waiver of proper action by the court*." *Horton v. Herndon*, 254 Ky. 86, 70 S.W.2d 975, 977 (1934) (emphasis added) (reaffirmed in *Risen v. Pierce*, 807 S.W.2d 945, 949-50 (Ky. 1991)). Therefore, Dr. Jefferson is wrong; failing to move for a mistrial does not preclude a motion for a new trial following an adverse verdict.

This all reaffirms that, after a verdict is returned, the trial judge must assess whether the presumption of the curative effect of his admonition was sufficiently rebutted by a verdict so contrary to the evidence that it could only have been the product of improper conduct by the prevailing party's counsel. In the case before us, the trial court concluded it was not and denied the motion for a new trial. *See Peacher v. Commonwealth*, 391 S.W.3d 821, 849 (Ky. 2013) (counsel has a responsibility to "not argue facts that are not in evidence or reasonably inferable from the evidence [but] [c]ounsel's breach of that responsibility . . . is not

[8] Setting aside the verdict is the relief sought by a motion for new trial, not a motion for mistrial which, if granted, ends the trial before a verdict is reached. Clearly, the Court in *Horton* was stating that failing to move for a mistrial does not preclude a motion for a new trial.

necessarily reversible"). Again, I rely on the touchstone of the trial judge's discretion.

When a party's new trial motion is based on "the ground of misconduct of his attorney during the trial of the case and in his argument to the jury[,]" our highest court has often said in substance: "Certain it is that the trial court was in a better position to determine the propriety of granting a new trial, having heard the evidence and arguments, of which we have only the substance, than are we." *Clark v. Bean*, 267 Ky. 238, 101 S.W.2d 930, 931 (1937). It takes a lot for a reviewing court to overcome the decision of a trial judge, steeped as it is in this wide discretion. *See Peacher*, 391 S.W.3d at 849.

Though the case before us may be closer than others, I simply do not see "very strong reasons for granting a new trial [or] reasonable certainty that injustice or wrong would result" by affirming the trial court's exercise of discretion here. *Gray v. Sawyer*, 247 S.W.2d 496, 498 (Ky. 1952). Clear it was that the trial court did not appreciate the liberties taken and indiscretions exercised by Dr. Jefferson's counsel. That is evident from the trial court's rebukes and admonitions. But while the trial court sanctioned Dr. Jefferson by a separate order, the court did not sanction counsel for improper conduct. Because the trial judge was in a better position to make the determination whether a new trial was justified, and because this is not a case clearly justifying reversal of that determination, I would affirm.

Therefore, and for the foregoing reasons, I dissent.

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