

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000892-MR

ROGER OSBORNE, ADMINISTRATOR OF
THE ESTATE OF RICHARD WILLIS;
ROGER OSBORNE, GUARDIAN FOR
MADYSEN WILLIS; AND TANNER WILLIS

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 09-CI-01950

PAULA D. BAILEY, M.D. AND
STEVEN SHEDLOFSKY, M.D.

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: KRAMER,¹ TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: Roger Osborne, as Administrator of the Estate of Richard Willis and as Guardian for Madysen Willis; and Tanner Willis, individually,²

¹ Judge Joy A. Kramer, formerly Joy A. Moore.

² Roger Osborne served as Guardian for Tanner Willis in the trial court proceedings. Tanner has now reached the age of majority.

(hereinafter collectively referred to as “the Estate”) appeal from the February 27, 2013, judgment of the Fayette Circuit Court dismissing their medical malpractice claims filed against Dr. Paula Bailey and Dr. Steven Shedlofsky. For the following reasons, we affirm.

Richard Willis died on March 24, 2008 of complications from liver and kidney disease. He is survived by two children, Madysen and Tanner. On April 10, 2009, the Estate filed this medical malpractice action against Dr. Bailey, the attending hospitalist at the time Richard voluntarily left UK Chandler Medical Center three days before his death, and Dr. Shedlofsky, the last hepatologist (i.e., liver specialist) to evaluate Richard before he left the Medical Center. The case proceeded to trial and at the close of the Estate’s evidence the trial court directed a verdict in favor of the defendant doctors on the Estate’s claims for medical expenses, pain and suffering, and punitive damages. The Estate’s remaining claims relating to whether Drs. Bailey and Shedlofsky used the degree of care and skill expected of a reasonably competent physician under similar circumstances were submitted to the jury. After the jury returned a unanimous verdict in favor of the defendant doctors, the trial court entered a judgment accordingly and dismissed the Estate’s claims. The Estate filed a CR³ 59.05 motion to alter, amend or vacate, and a CR 59.01 motion for a new trial, both of which the court denied after conducting a hearing. The Estate now appeals.

³ Kentucky Rules of Civil Procedure.

In general, a trial court has unlimited power to alter, amend or vacate its judgments pursuant to CR 59.05. *Bowling v. Kentucky Dep't of Corr.*, 301 S.W.3d 478, 483 (Ky. 2009). Grounds for relief under CR 59.05 are limited to those established by its federal counterpart, Federal Rule of Civil Procedure 59(e). *Id.*

There are four basic grounds upon which a Rule 59(e) motion may be granted. First, the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based. Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice. Serious misconduct of counsel may justify relief under this theory. Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law.

Id. A trial court's ruling on a motion to alter, amend or vacate a judgment is reviewed for an abuse of discretion. *Id.* "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles." *Woodard v. Commonwealth*, 147 S.W.3d 63, 67 (Ky. 2004) (quotations and citation omitted).

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

CR 59.01. The trial court must first determine whether grounds for a new trial exist, which will be reviewed for clear error, and if such circumstances exist, the decision whether to grant a new trial lies within the sound discretion of the trial court. *Gibson v. Fuel Transport, Inc.*, 410 S.W.3d 56 (Ky. 2013).

On appeal, the Estate presents three claims of error for our review. First, the Estate argues the trial court abused its discretion by denying its motion to continue the trial date due to the unavailability of its medical expert to appear at trial. We review a trial court's ruling on a continuance for an abuse of discretion. *Gray v. Commonwealth*, 203 S.W.3d 679, 688 (Ky. 2006).

Whether a continuance is appropriate in a particular case depends upon the unique facts and circumstances of that case. Factors the trial court is to consider in exercising its discretion are: length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice.

Snodgrass v. Commonwealth, 814 S.W.2d 579, 581 (Ky. 1991) (internal citations omitted), *overruled on other grounds by Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001). Though *Snodgrass* is a criminal case, this court has applied the aforementioned factors to civil cases involving continuances. *Guffey v. Guffey*, 323 S.W.3d 369, 372 (Ky. App. 2010).

Here, the record shows the trial court initially set a trial date of November 13, 2012. Both parties then moved for a continuance, which the court granted. The Estate's request for a continuance was based on the inability of its medical expert to appear due to the expert's health condition. The court rescheduled the trial date to February 11, 2013. In late January 2013, the Estate filed another motion to continue, again citing the inability to take the deposition of its medical expert due to his health condition.

The trial court held a hearing, during which it considered reasonable alternatives to a continuance. The court ultimately denied the Estate's motion, citing as grounds the prior continuances granted, the age of the case (the case was filed in 2009), the time still available before trial for the medical expert to give an evidentiary deposition, and the need to be fair to both sides. The Estate's medical expert was able to give a deposition, which the jury heard at trial. The Estate now argues that contrasted with the two defense medical experts who testified at trial, and the two defendant doctors who also testified, its inability to present the live testimony of its medical expert put it at an overwhelming disadvantage.

During the hearing to address the Estate's CR 59 motions, the trial court recalled the facts and circumstances of this case and noted that it had weighed both sides and the impact of a continuance before denying the Estate's motion. The court correctly stated that a determination as to the admissibility of expert witness testimony, and whether expert testimony is cumulative, lies within the trial court's discretion. *See Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 578 (Ky. 2000) (we review a trial court's ruling on the admission of expert witness testimony for an abuse of discretion). The record shows the court properly considered the requisite factors in denying the Estate's motion for a continuance. Based on our review of the record, we are unable to say the court's decision not to grant another continuance was an abuse of its discretion.

Next, the Estate argues the trial court failed to seat a non-prejudicial jury panel and the jury failed to properly deliberate the issues presented. Specifically, the Estate maintains the jury was unable to be fair and impartial due to connections with UK Medical Center and the jury's deliberation of approximately one hour was too short for it to adequately consider the evidence presented.

During the hearing on the Estate's CR 59 motions, the trial court observed that the Estate's complaint about the jury pool was more of an expression of its dissatisfaction with the local community's connection with UK in general, as opposed to an objection to a specific juror. Indeed, the Estate does not identify any particular trial court ruling on motions to strike for cause which it is appealing. And, as the trial court recalled, potential jurors' connections with UK were

explored during *voir dire* and the court made rulings on motions to strike accordingly. The Estate does not identify any juror who sat on the panel who it alleges should not have due to bias. As a result, we find no merit in this alleged error.

Furthermore, the Estate does not identify a single act of misconduct with respect to jury deliberations. It simply speculates that the jury's deliberation of approximately one hour indicates jury misconduct. This argument is an insufficient ground for a new trial. During the hearing on the CR 59 motions, the trial court noted that it had allowed the jurors to ask questions during trial, which they did, and the answers given most likely caused their deliberations to be more effective and therefore shorter in duration. In addition, as the defendants pointed out, this two-day trial was a relatively short trial for a medical malpractice case. The Estate's displeasure with the length of jury deliberations, without any evidence of jury misconduct, does not warrant a new trial and the trial court properly denied one on this basis.⁴

⁴ We note that the Estate has failed to cite to portions of the record which might support either of its arguments pertaining to jury bias and jury misconduct. This alone justifies rejection of its claims. *See Monumental Life Ins. Co. v. Dep't of Revenue*, 294 S.W.3d 10, 23 (Ky. App. 2008) (appellate court declines to address an issue on its merits because appellant did not cite the court to the appellant's preservation of the issue as required by CR 76.12(4)(c), nor did it provide any citations to any of the evidence in the record which allegedly supported the arguments). In addition, the Estate has not provided any legal authority in support of either claim. *See Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky. App. 2005) ("an alleged error may be deemed waived where an appellant fails to cite any authority in support of the issues and arguments advanced on appeal."). The record shows that the Estate's CR 59 motions likewise did not cite any legal authority in support of these assertions. Based on the absence of any factual or legal basis for reversing the trial court's decision with respect to these claims, we decline to do so.

Lastly, the Estate contends the trial court abused its discretion by denying its motion to limit “defensive use” of evidence concerning the six-month sobriety rule for liver transplants. We review a trial court’s evidentiary rulings for an abuse of discretion. *Barnett v. Commonwealth*, 317 S.W.3d 49, 61 (Ky. 2010) (citation omitted).

The Estate argues that two weeks before trial, it became aware of a written protocol in place at UK Medical Center that addresses what is known as the “six-month sobriety rule.” In essence, that rule requires a patient seeking a liver transplant to be six months free of any alcohol use before the patient will be considered for a liver transplant. The Estate asserts that it had requested during discovery any written protocol that was in place at the time of Richard’s treatment at UK, and that the defendants’ “last minute” disclosure of this protocol through the deposition testimony of one of their medical experts was improper.

However, the record shows that evidence of the written protocol was not admitted at trial, the portion of the expert’s deposition testimony discussing the protocol was removed, and no witness discussed the protocol. We fail to appreciate how any error could have thus resulted. The Estate further asserts that the six-month sobriety rule should not have been discussed at all – by Dr. Shedlofsky and two defense medical experts – since the issue was irrelevant and highly prejudicial. *See* KRE⁵ 402, KRE 403. The Estate acknowledges that it was aware prior to trial of defense testimony concerning the six-month sobriety rule.

⁵ Kentucky Rules of Evidence.

The defense used the six-month sobriety rule to show that the defendant doctors' decision not to refer Richard for a transplant was reasonable since Richard had used alcohol within the six months leading up to his treatment at UK and thus he would not have been eligible for a transplant at the time. We do not believe this evidence was irrelevant or misleading. Richard's eligibility under the six-month sobriety rule goes to liability and causation, and whether the defendants exercised reasonable care by not referring him for a transplant, which the Estate claims they should have done.

The Estate cites one case, *Combs v. Stortz*, 276 S.W.3d 282 (Ky. App. 2009), arguing that physician expert testimony must be probable, not speculative. Yet, the Estate does not cite to the record or point to any physician testimony which it claims was speculative. Again, we could reject its claimed error on that basis alone. *Monumental Life Ins. Co.*, 294 S.W.3d at 23. Even if the Estate did provide citations to the record supporting its argument, *Combs* is inapplicable since the standard for expert opinion testimony articulated in that case only applies to plaintiff's expert witnesses. Defense experts are not bound by the "probability" standard and may introduce testimony "couched only in terms of 'possibility.'" *Sakler v. Anesthesiology Assoc., P.S.C.*, 50 S.W.3d 210, 213 (Ky. App. 2001). In addition, the *Combs* standard for expert testimony is inapplicable to Dr. Shedlofsky's factual testimony as a treating physician. Regardless, the record reflects that the testimony of Dr. Shedlofsky and two defense medical experts met the requisite standard for admissibility. Accordingly, the trial court did not abuse

its discretion by denying the Estate's motion to limit "defensive use" of evidence concerning the six-month sobriety rule for liver transplants.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Dwight O. Bailey
Flatwoods, Kentucky

BRIEF FOR APPELLEES:

Bradley A. Case
Stephen J. Mattingly
Louisville, Kentucky