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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001710-MR

ELIZABETH PALMER APPELLANT

v.
APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 10-CI-01277

THE DOCTORS, PLLC AND
WITOLD A. WILK, D.O. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MAZE AND TAYLOR, JUDGES.

DIXON, JUDGE: Appellant, Elizabeth Palmer, appeals from an order of the Hardin Circuit Court denying her motion for a new trial following a unanimous jury verdict in favor of Appellees, The Doctors PLLC and Witold A. Wilk, D.O., in her medical negligence case. For the reasons set forth herein, we affirm.

On May 11, 2009, Palmer went to Dr. Wilk, a licensed practicing Osteopath with offices at The Doctors, PLLC in Hardin County, for the purpose of receiving a check-up and obtaining malaria prophylaxis medication in preparation for her trip to Uganda, Africa. During the visit, Palmer inquired about Mefloquine, a weekly regimen medicine for the prevention of malaria. Dr. Wilk explained to Palmer, however, that he did not like to prescribe Mefloquine due to its side-effect profile. Instead, Dr. Wilk gave Palmer a prescription for Chloroquine (a weekly medication) and Doxycycline (a daily medication). Palmer later testified that she did not realize Dr. Wilk had prescribed two medications until she picked up the prescriptions from the pharmacy. She further testified that she assumed, without further verification, that Dr. Wilk had given her a choice of two medicines and that she chose to only take the Chloroquine.

Palmer subsequently traveled to Uganda in late June 2009 and, upon returning to Kentucky began feeling ill. On July 5, 2009, Palmer sought medical treatment at Hardin Memorial ER where was she was seen by Dr. Scott Dishaw. Palmer disclosed that she had been taking Chloroquine and expressed a desire to be tested for malaria. After conducting routine blood work, Dr. Dishaw discharged Palmer with a diagnosis of a viral syndrome. Two days later, Palmer followed up with Dr. Wilk. Based on her symptoms, Dr. Wilk believed that Palmer was possibly suffering from gastroenteritis or Hepatitis A, and withdrew blood for a hepatitis screen. In addition, Dr. Wilk provided Palmer with Phenergan and a prescription for Cipro. Later that same evening however, Palmer went back to

Hardin Memorial ER and on the morning of July 8, 2009, was transferred to the University of Kentucky Medical Center for treatment of malaria with an infectious disease specialist. Palmer remained hospitalized for several weeks and was required to undergo the amputation of the toes on both of her feet.

On June 14, 2010, Palmer filed a medical negligence action in the Hardin Circuit Court against Dr. Wilk and Dr. Dishaw. Prior to trial, but after the close of discovery, Palmer settled her claims against Dr. Dishaw. A jury trial was subsequently held in June 2013 on Palmer's claims against Dr. Wilk. At the close of evidence, the jury returned a unanimous defense verdict and the trial court entered judgment accordingly.

Palmer thereafter filed a motion for a new trial asserting several trial errors. By order entered on September 4, 2013, the trial court denied Palmer's motion, noting:

> Overall, insufficient grounds have been shown for a new trial. The parties are not promised a perfect trial but a basically fair one. In light of the evidence presented in this lengthy trial, no error claimed (with none actually established) would be anything other than harmless error. CR 61.01. The jury reached a unanimous verdict against the plaintiff in this case. The evidence in this case included an admission by the Plaintiff that she "assumed" that she could choose which medication she would take, despite being prescribed two medications at the same time and receiving them together and with no follow-up with the prescribing doctor before discarding the one medication not taken.

Palmer thereafter appealed to this Court as a matter of right.

Palmer first argues that she was entitled to a new trial because the trial court erroneously refused to strike a juror for cause. Specifically, Palmer alleges that during voir dire, Juror Wright approached the bench and expressed the opinion that the justice system had not worked for his sister and that he thought the process was "kind of corrupt." Palmer points out that Juror Wright commented that he thought plaintiffs often "blow[ ] things out of proportion" and they are "not as hurt as they say." Based upon Wright's statements, Palmer argues that he was clearly biased against her and the trial court abused its discretion, after attempted rehabilitation, to seat Juror Wright. Further, she contends that because she was forced to use a peremptory strike to remove a juror who should have been removed for cause, any error cannot be deemed harmless.

Kentucky law holds that a trial court's decision on whether to strike a juror for cause rests in the sound discretion of the trial court. *Adkins v. Commonwealth*, 96 S.W.3d 779 (Ky. 2003); *Pendleton v. Commonwealth*, 83 S.W.3d 522 (Ky. 2002). In making such a determination, the court must weigh the probability of bias or prejudice based on the entirety of the juror's responses and demeanor. *Shane v. Commonwealth*, 243 S.W.3d 336, 338 (Ky. 2007). "[T]he decision to exclude a juror for cause is based on the totality of the circumstances, not in response to any one question." *Fugett v. Commonwealth,* 250 S.W.3d 604, 613 (Ky. 2008). Specifically, the test for determining whether a juror should be stricken for cause is "whether, after having heard all of the evidence, the prospective juror can conform his views to the requirements of the law and render

a fair and impartial verdict." *Mabe v. Commonwealth*, 884 S.W.2d 668, 671 (Ky. 1994). However, where the trial court determines that a juror cannot be impartial, RCr 9.36 requires a judge to excuse that juror. RCr 9.36 is mandatory, and provides no room for a trial court to seat a juror who demonstrates his or her inability to be fair.

Reading only Juror Wright's selective statements that are contained in Palmer's brief would certainly lead one to the conclusion that he was biased against her. However, a review of the entirety of Juror Wright's conversation at the bench clearly dispels any such notion. Juror Wright made it quite clear that his feelings about his sister's lawsuit were based on the fact that he personally knew the plaintiff therein, and did not believe she had the injuries she claimed to have sustained. Juror Wright went on to state, however, that he would not assume that Palmer was exaggerating about her claims because he did not know her and had not heard any of the evidence. Further, Juror Wright specifically informed the trial court that he would not place any higher burden on Palmer because of what happened with his sister, would not bring any biases that would prevent him from rendering a fair verdict, and that he could follow the trial court's instructions. We agree with the rationale of the trial court:

> The Court was required to consider the interaction with [Juror Wright] as a whole, not just the words and phrases selected by the Plaintiff. Before the Court asked questions of the jury, the Plaintiff's counsel had asked leading questions which appeared to be designed to obtain disqualifying responses rather than seeing what the juror actually thought for himself. Such responses

> are not reliable indicators of the actual views of a juror. Because jurors are not witnesses on cross-examination, leading questions are not appropriate. Having reviewed the totality of the interaction with Juror Wright, no error occurred in refusing to strike him.

Based upon the totality of Juror Wright's responses during voir dire, we cannot conclude that the trial court abused its discretion in refusing to strike him for cause.

Palmer next argues that the trial court erred in permitting references to her claims against Dr. Dishaw. Specifically, during opening arguments, defense counsel showed Palmer's complaint to the jury and discussed her various claims contained therein. The complaint was not introduced as evidence. Nevertheless, Palmer contends that the sole purpose of pointing out a dismissed party that was named in the lawsuit was to improperly inflame the jury and inform them that Dr. Dishaw had settled.

It has long been the law in Kentucky that neither the fact nor the amount of settlement should be communicated to the jury that tries the issue of the non-settling tortfeasor's liability. *Simmons v. Small*, 986 S.W.2d 452, 454 (Ky. App. 1998). However, such did not prohibit defense counsel from discussing Dr. Dishaw's role in the case during his opening statements. Further, with input from Palmer's counsel, the trial court admonished the jury regarding Dr. Dishaw's involvement, instructing them that they were not to speculate about his absence from trial. Thereafter, during her case-in-chief, Palmer's counsel called two expert witnesses who testified about the care that Dr. Dishaw provided, as well as

introduced the video depositions of two treating physicians, both of which included several minutes of questioning by Dr. Dishaw's counsel.

There can be no question that Dr. Dishaw's involvement as a former party in the case was explicit throughout the trial, particularly during Palmer's case-in-chief. As such, we simply cannot agree with Palmer's unsupported assertion that defense counsel's use of her complaint during opening statements left the jury with the conclusion that Dr. Dishaw settled. Even if we were to conclude that it did so, the jury was admonished, at Palmer's request, regarding Dr. Dishaw's absence. Under Kentucky law, juries are "presumed to follow the trial court's admonition." *Doneghy v. Commonwealth*, 410 S.W.3d 95, 107 (Ky. 2013)(*quoting Burton v. Commonwealth*, 300 S.W.3d 126, 143 (Ky. 2009)). The trial court herein did not err in denying Palmer's request for a new trial based upon this issue.

Next, Palmer argues that defense counsel introduced a new and previously undisclosed theory through the testimony of Dr. Wilk. Specifically, during his testimony, Dr. Wilk was asked to explain why he prescribed the combination of Chloroquine/Doxycycline rather than Mefloquine. Dr. Wilk responded that during Palmer's 2009 office visit, she exhibited a "flat affect" and when questioned if there was anything wrong, Palmer indicated that she had "some stuff going on." Dr. Wilk explained that he did not feel comfortable discussing at trial the specifics of what "stuff" Palmer had going on, but noted that it was a contraindication that contributed to his decision not to prescribe Mefloquine. Palmer's counsel did not object to Dr. Wilk's testimony regarding her contraindication for Mefloquine, but

rather during cross-examination questioned Dr. Wilk at length about his decision not to prescribe Mefloquine. In fact, Palmer's counsel even pointed out that Dr. Wilk, in his previous deposition testimony, had not mentioned any contraindications. Interestingly, counsel never specifically questioned Dr. Wilk about what the contraindication was.

Subsequently, during closing arguments, defense counsel reminded the jury that at the time of Palmer's office visit, Dr. Wilk believed she had a specific contraindication for Mefloquine and that such contributed to his decision to prescribe the combination of Chloroquine/Doxyclycline. Defense counsel continued that Dr. Wilk had not felt comfortable discussing the specifics of the contraindication, stating that "there are concepts of honor; there are concepts of ethics that even in a courtroom stand tall."

At a bench conference following closing arguments, Palmer's counsel requested that the jury be admonished regarding defense counsel's statements. After admonishing the jurors that they were not to speculate about the conversation between Dr. Wilk and Palmer, the trial court specifically asked if the parties wanted anything additional said to the jury on the topic, to which both sides declined.

Palmer now argues that Dr. Wilk's statements regarding her supposed contraindications for Mefloquine was undisclosed expert testimony in violation of CR 26.02. Palmer further argues that although the trial court admonished the jury that it was not to consider the conversation between her and Dr. Wilk during the

office visit, such did not cure defense counsel's misconduct during closing arguments. Palmer contends that there is no ethical reason for a defendant physician to withhold testimony about a plaintiff in a medical malpractice action and that, in fact, he cannot refuse to give evidence on the basis of a non-existent patient privilege. She further maintains that defense counsel's "suggestion that Wilk was a person of extreme ethics and would not disclose facts which could embarrass the plaintiff so misstated and misguided the jury that it was likely to have a devastating effect on the trial and is itself reversible . . . ." We disagree.

As a preliminary matter, Dr. Wilk points out that no objection to Dr. Wilk's testimony was raised at trial and Palmer's pretrial motion in limine to preclude the presentation of "New Theories and/or Expert Opinions During Trial Not Disclosed by CR 26.02" was not sufficient to preserve any error for appellate review. We are of the opinion, however, that regardless of the sufficiency of Palmer's motion in limine, not only did she not object to defense counsel's line of questioning, but her counsel cross-examined Dr. Wilk at length about the very issue. In fact, it is apparent that Palmer sought to attack Dr. Wilk's credibility by impeaching him with his prior deposition testimony. Moreover, we do not believe that Dr. Wilk's testimony constituted a new, undisclosed expert theory, but instead related to his thought process at the time of Palmer's office visit and the reason he chose the particular course of treatment. Dr. Wilk's testimony was not required to be disclosed under CR 26.02 because it concerned facts he learned and the opinions

he formed based upon first-hand knowledge and observation during his treatment of Palmer. *See Charash v. Johnson*, 43 S.W.3d 274, 280-281 (Ky. 2000).

We similarly find no reversible error with respect to defense counsel's statements during closing arguments. Palmer requested and received an admonition, and expressed no "contemporaneous dissatisfaction" with the content of such. *Mayo v. Commonwealth*, 322 S.W.3d 41, 51 (Ky. 2010). Further, she specifically declined any additional remedy when questioned by the trial court. "[A] failure to ask for a mistrial following an objection and admonition from the trial court indicates satisfactory relief was granted." *Id.* at 55. We find no merit in Palmer's claims on appeal that her counsel made the tactical decision not to request an additional admonition and that asking for a mistrial would have been fundamentally unfair to her. If Palmer believed she was unfairly prejudiced by defense counsel's statements, the proper remedy was available at that time, not after an adverse verdict was rendered.

Palmer also contends that reversible error occurred when Dr. Wilk testified that based on what he learned at trial, he believed in essence that she had lied about taking the Chloroquine. Palmer asserts that the "suggestion that Dr. Wilk as an expert could tell that [she] had not taken her medication was such a flagrant and fundamentally unfair violation of CR 26.02 that it demands reversal." Again, we disagree.

During his direct testimony, Dr. Wilk testified that Palmer's blood tests indicated the presence of two different species of the malaria parasite, one of

which was susceptible to Chloroquine. Dr. Wilk commented that based upon Palmer's test results, he questioned whether she took either of the medicines he prescribed. During cross-examination, Dr. Wilk was questioned at length regarding his testimony about Palmer's mixed-malaria infection. Palmer's counsel pointedly asked Dr. Wilk whether he thought Palmer was lying about taking the Chloroquine. Dr. Wilk responded that he was not stating an opinion as to whether he believed Palmer was lying about taking the Chloroquine, but rather only that the test results suggested that she might not have taken the medication. Palmer's counsel never objected to the line of questioning.

In light of the fact that the trial court specifically ruled that evidence of the mixed malaria infection was proper, and also that Palmer's counsel not only failed to object to the challenged testimony but chose to cross-examine Dr. Wilk in an effort to discredit him, we cannot conclude that the trial court erred in refusing to grant a new trial on this issue. Error, if any, was harmless at best. CR 61.01.

Finally, Palmer argues that the trial court erred by rejecting her tendered instruction which defined "preponderance of the evidence" as well as explained that the standard for civil cases is not "proof beyond a reasonable doubt." While acknowledging that she is seeking to overturn a century's worth of Kentucky law to the contrary, Palmer nevertheless argues that the time has come to reexamine Kentucky's "bare bones" approach to instructing juries. We disagree.

Beginning with the decision in *Ragsdale v. Ezell*, 35 S.W. 629 (Ky. 1896), Kentucky Courts have consistently rejected the notion that the term

"preponderance" should be defined in jury instructions. Indeed, in *Hardin v. Savageau*, 906 S.W.2d 356, 358 (Ky. 1995), our Supreme Court reiterated, "The prevailing practice of merely instructing the jury that to render a verdict it must 'believe' or be 'satisfied' from the evidence is entirely appropriate when the standard is preponderance. However, as observed in *Ragsdale* and heretofore stated, the term 'preponderance' should not be used because it may not be easily understood and is essentially redundant." *See also Brown v. Commonwealth*, 934 S.W.2d 242, 247 (Ky. 1996) (Court again expressed "its dissatisfaction with the use of the word 'preponderance' in jury instructions.").

"The fundamental function of jury instructions is to set forth what the jury must believe from the evidence in order to return a verdict in favor of the party bearing the burden of proof." *Hilsmeier v. Chapman*, 192 S.W.3d 340, 344 (Ky. 2006); *see also Webster v. Commonwealth*, 508 S.W.2d 33, 36 (Ky. 1974). In Kentucky, the content of jury instructions on negligence should be couched in terms of duty. Kurt A. Philips, Jr., 7 *Kentucky Practice: Rules of Civil Procedure Annotated*, § 51 (5th ed. 1995). As correctly noted by the trial court herein, Kentucky has long employed the use of "bare bones" jury instructions that avoid an abundance of detail. As our Supreme Court in *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226, 230 (Ky. 2005), explained:

> "Bare bones" jury instructions must be given with the understanding that they are merely a framework for the applicable legal principles. It becomes the role of counsel, then, to flesh out during closing argument the legal nuances that are not included within the language of

> the instruction. *See* [*Rogers v. Kasdan,* 612 S.W.2d 133, 136 (Ky. 1981)]. This principle was aptly stated by Justice Palmore in the *Cox* decision, wherein he explained what a lawyer should do if he or she is not satisfied with the trial court's instructions: "[I]f counsel felt that the jury was too thick to get the point all he had to do was to explain it in his summation." [*Cox v. Cooper*, 510 S.W.2d 530, 535 (Ky. 1974)].

The jury instructions herein set forth a basic framework of the applicable legal principles, as well as the duties Dr. Wilk owed to Palmer. The jury was then asked to determine whether they were satisfied from the evidence that Dr. Wilk failed to comply with those duties and whether such failure was a substantial factor in causing Palmer's injuries. We are of the opinion that the jury instructions complied with long-standing Kentucky law and, as such, it could not have been error on the part of the trial court to deny Palmer's tendered instruction.

For the foregoing reasons we affirm the order of the Hardin Circuit Court denying Palmer's motion for a new trial.

TAYLOR, JUDGE, CONCURS.

MAZE, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

MAZE, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: While I concur with the majority regarding all other matters, I respectfully disagree with my colleagues concerning Palmer's motions *in limine* and Dr. Wilk's subsequent testimony at trial. I therefore concur in part and dissent in part.

Specifically, I write to address Dr. Wilk's testimony regarding Palmer's laboratory results. As the sole basis for its decision affirming the inclusion of this testimony, the majority points out that Palmer did not object, and instead sought to cross-examine Dr. Wilk, when Dr. Wilk stated his belief that the results indicated that Palmer did not take her medicines. I refute the role and importance of that fact in the more imperative determination of whether Dr. Wilk's testimony ran afoul of the trial court's pre-trial orders.

Kentucky Rules of Evidence 103(d) states that "[a] motion in limine resolved by order of record is sufficient to preserve error for appellate review." The Supreme Court has qualified this broad rule by stating that such motions cannot be blanket motions, but must "specify the evidence objected to" in order to render a contemporaneous objection unnecessary. *See Lanham v. Commonwealth*, 171 S.W.3d 14, 22 (Ky. 2005).

Prior to the trial, Palmer's attorney filed two motions *in limine* seeking the exclusion of a multitude of items, including new theories of the case not previously disclosed under CR 26.02. I contend that Palmer's second, more specific motion *in limine* was specific enough, under *Lanham*, to exclude Dr. Wilk's previously-unstated belief that Palmer failed to take her anti-malarial medication; and, contrary to the majority's conclusion, it did so without requiring Palmer's contemporaneous objection.

Setting aside the fact of Palmer's failure to object and decision to cross-examine Dr. Wilk, and properly looking to the question of the defense's

compliance with pre-trial orders, two principal facts emerge. First, the statement that Palmer's laboratory results suggested that she did not take her prescribed medication was clearly not disclosed prior to trial. Second, whether intended or not, the statement offered a potentially liability-shifting theory behind Palmer's infection with malaria. Even the most expansive imagination could not conjure a more direct and prejudicial violation of the trial court's pre-trial order. Dr. Wilk's testimony was not only expressly forbidden, it amounted to surprise, which motions *in limine* and CR 26.02 rightfully aim to eliminate.

My experience in the legal profession makes me pragmatic enough to acknowledge and endorse the fact that a party is entitled only to a fair trial, not a perfect one. I genuinely sympathize with, and am hesitant to reverse, a trial court whose unenviable task it is to police strategic maneuvering and eliminate unfair surprise at trial. However, I will say again what I have said before: whether they benefit the plaintiff or the defense, pre-trial orders are a court's primary tool in that task; and therefore, they must mean something. *See Shy v. Walker*, 2012-CA-000891-MR, 2013 WL 3808005 (Ky. App. 2013) (Maze, J., dissenting). This trial court's inclusion of Dr. Wilk's previously-undisclosed testimony rendered its unequivocal pre-trial order meaningless, and it rendered the result of this trial unfair. That is no less true because Palmer did not immediately object to, but decided to challenge, that testimony. For these reasons, I concur in part and dissent in part, as I would reverse and remand the case for a new trial.

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