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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000040-MR

SYLVIA CHRISTINE CAYCE, INDIVIDUALLY
AND SYLVIA CHRISTINE CAYCE, AS EXECUTRIX OF
THE ESTATE OF RAYMOND AVERITT SUMNER, JR. APPELLANTS

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW SELF, JUDGE
ACTION NO. 13-CI-00091

TRACEY SUMNER; LISA DAWN SUMNER GONZALEZ;
AND REGEANA SUMNER WASSON APPELLEES

AND

NO. 2015-CA-000093-MR

TRACEY SUMNER CROSS-APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW SELF, JUDGE
ACTION NO. 13-CI-00091

SYLVIA CHRISTINE CAYCE, INDIVIDUALLY
AND KENNETH O. CAYCE, III, INDIVIDUALLY CROSS-APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, STUMBO AND VANMETER,¹ JUDGES.

STUMBO, JUDGE: Sylvia Christine Cayce appeals from a pre-trial order granting Regeana Wasson peremptory strikes for the jury pool and a post-trial order denying her motion to vacate the judgment and for a new trial. Tracey Sumner brought a protective cross-appeal in which she argues that the trial court erred in granting a directed verdict to Appellants and dismissing her tort claims. Ms. Sumner states that her cross-appeal need not be addressed if we affirm the trial court's judgment. We believe the trial court did not err in granting Ms. Wasson peremptory strikes and did not err in denying Ms. Cayce's post-trial motion; therefore, we affirm the court's judgment. We also hold Ms. Sumner's cross-appeal as moot due to our affirmation of the trial court's judgment.

In 2008, Raymond Sumner, Jr. executed a Last Will and Testament which named Lisa Gonzalez, his daughter, and Ms. Wasson, his sister, as his sole beneficiaries. Ms. Sumner is also Mr. Sumner's daughter, but his 2008 will did not name her as a beneficiary.

Sometime after the execution of the 2008 will, Mr. Sumner met Mr. and Ms. Cayce while he and Mr. Cayce were undergoing treatment for cancer. The Cayces are of no relation to Mr. Sumner. On May 2, 2012, Mr. Sumner executed

¹ Judge Laurence B. VanMeter concurred in this opinion prior to being elected to the Supreme Court of Kentucky. Release of this opinion was delayed by administrative handling.

another will. This new will revoked the 2008 will and divided his estate equally between Ms. Cayce and Ms. Gonzalez.

Mr. Sumner died on September 28, 2012. Ms. Cayce, who was named executrix in the 2012 will, subsequently began probate proceedings. On January 28, 2013, Ms. Sumner filed a complaint contesting the 2012 will. Ms. Sumner alleged undue influence in the making of the will and a lack of testamentary capacity. She also alleged various tort claims against Mr. and Ms. Cayce. Ms. Gonzalez was also designated as an involuntary plaintiff. On April 24, 2013, Ms. Wasson moved to file an intervening complaint which also alleged undue influence and lack of testamentary capacity. She too alleged various tort claims against the Cayces. Ms. Wasson's motion to intervene was granted on July 17, 2013.

On November 13, 2014, a pre-trial hearing was held. At this time the issue of peremptory strikes was raised. Pursuant to Kentucky Rule of Civil Procedure (CR) 47.03(1), "each opposing side shall have three peremptory challenges, but co-parties having antagonistic interests shall have three peremptory challenges each." The issue was raised as to whether the co-plaintiffs had antagonistic interests which would allow them each to receive the peremptory strikes. After argument from counsel, the trial court decided that Ms. Sumner and Ms. Gonzalez did not have antagonistic interests and would only be entitled to three peremptory strikes combined. The court believed Ms. Wasson had sufficient

antagonistic interests as to warrant receiving three preemptory strikes for her sole use.²

The case went to trial on November 17, 2014. At the close of the plaintiffs' case, the trial court granted a directed verdict in favor of the Cayces as to all the tort claims. This left only the will contest issues to be submitted to the jury. After a six day trial, the jury found that Mr. Sumner lacked the necessary testamentary capacity to render the 2012 will enforceable and that the 2012 will was invalid due to Ms. Cayce exercising undue influence over Mr. Sumner. The trial court entered its judgment pursuant to the jury verdict on December 5, 2014.

On December 15, 2014, Ms. Cayce filed a motion to vacate the judgment and for a new trial based on the preemptory strike issue. She also filed a motion requesting that the plaintiffs disclose any pre-trial agreements regarding the division of the estate. After trial, counsel for Ms. Cayce discovered that the plaintiffs had entered into a pre-trial agreement which set forth how they would divide Mr. Sumner's estate should they prevail at trial.

A hearing was held on December 23, 2014, regarding the motion to vacate. During the hearing, the pre-trial agreement was presented to the court.³ The agreement set forth how the plaintiffs would divide the estate, that they would cooperate in order to get the 2012 will set aside, and that each party would not have to share any proceeds recovered from the defendants on the various tort causes of action. The court held that its ruling on the preemptory strikes would

² The three preemptory strikes were later increased to four pursuant to CR 47.03(2).

³ Only a part of the agreement is contained in the record before us.

stand and denied the motion. The court stated that it based its previous peremptory ruling on the fact that the plaintiffs alleged different tort claims and that the Cayces had only a finite amount of assets with which to satisfy any judgment entered against them. This appeal followed.

Ms. Cayce's first argument on appeal is that the trial court erred in giving Ms. Wasson her own individual peremptory strikes. We disagree.

"The Court of Appeals should not substitute its judgment for that of the trial judge in determining whether antagonistic interests exist for the purpose of awarding peremptory challenges in the absence of an abuse of discretion." *Sommerkamp v. Linton*, 114 S.W.3d 811, 814-15 (Ky. 2003). "On appeal, the question is not whether the reviewing court would have decided the issue differently, but whether the findings of fact are clearly erroneous, the opposite result is compelled or the trial judge abused his discretion." *Id.* at 815 (citations omitted). "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).

The *Sommerkamp* case cited above lists factors a court should consider when determining if co-parties have antagonistic interests. Although that case concerns medical negligence and co-defendants, the factors are illustrative for our purposes.

Generally, there are three elements to be considered in determining if coparties have antagonistic interests. They are 1) whether the coparties are charged with separate acts of negligence; 2) whether they share a common theory of the case; and 3) whether they have

filed cross-claims. Additional important factors are whether the defendants are represented by separate counsel; whether the alleged acts of negligence occurred at different times; whether the defendants have individual theories of defense; and whether fault will be subject to apportionment. All of these factors are to be weighed by the trial court in determining if the defendants have antagonistic interests and thus are entitled to separate peremptory challenges.

Sommerkamp at 815 (citations omitted). In addition, no single factor should be given “disqualifying weight” and the existence of antagonism should be determined at the time of jury selection. *Id.* at 816. Finally, the antagonistic interests must be present “at the time of jury selection or when the trial judge makes a determination regarding entitlement to separate peremptory challenges”, but they “do not necessarily have to remain antagonistic throughout the trial in order to support the allocation of separate challenges.” *Id.*; *see also Bayless v. Boyer*, 180 S.W.3d 439 (Ky. 2005).

In the case at hand, Ms. Gonzales and Ms. Sumner pled different tort claims than Ms. Wasson and these parties were represented by separate legal counsel. Also, the court found as relevant that the Cayces would only have a finite amount of personal resources to use to satisfy any judgment entered against them individually; therefore, some parties might not be able to recover any damages. We agree with the trial court that these factors indicate that Ms. Gonzalez and Ms. Sumner had antagonistic interests against Ms. Wasson at the time of jury selection, thereby justifying the allocation of separate peremptory challenges.

In addition, as noted previously, the tort claims were dismissed at the close of the plaintiff's case. Even though the tort claims were the sole basis for the trial court's finding of antagonistic interests, the fact that these claims did not go to the jury are of no relevance to our analysis because the issues were present during pre-trial. Also, Ms. Cayce's allegation that trial counsel for the plaintiffs collaborated when determining who to strike from the jury panel is of no relevance for the same reason.

The trial court correctly found that the plaintiffs had antagonistic interests during pre-trial. The trial court did not abuse its discretion and we will not substitute our judgment for that of the trial court.

Ms. Cayce's other argument on appeal is that the trial court erred when it denied her motion to vacate the judgment despite the discovery of new evidence showing the plaintiffs did not have antagonistic interests. Ms. Cayce claims that the pre-trial agreement is evidence that the plaintiffs did not have antagonistic interests because they agreed on how to divide the estate should they prevail at trial and agreed to cooperate in getting the 2012 will set aside. We find no error.

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.

Appellate courts must give “a great deal of deference” to a trial court’s decision to grant a new trial per CR 59.01. In fact, the trial court’s decision whether to grant a new trial “is presumptively correct.” . . . This high level of deference by an appellate court is necessary because the decision to grant a new trial “depends to a great extent upon factors which may not readily appear in the appellate record.” Indeed, unlike appellate judges, the trial judge “has heard the witnesses firsthand and observed and viewed their demeanor and . . . has observed the jury throughout the trial.”

It is important to remember that the trial court’s observations “cannot [be] replicate[d] by reviewing a cold record.” Consequently, an appellate court is “precluded from stepping ‘into the shoes’ of a trial court” in reviewing decisions under CR 59.01.

This Court has previously stated that “[o]nly if the appellate court concludes that the trial court’s order was *clearly erroneous* may it reverse.” Yet, that decision also states that “a CR 59.01 ruling [i]s ‘a discretionary function assigned to the trial judge.’” . . . [I]t is apparent that deciding such a motion actually requires multiple decisions by the trial court, consisting of both fact finding and discretionary judgment. Each of these sub-

decisions is entitled to a different level of deference and standard of review.

First, the trial court must decide whether one of the grounds laid out in CR 59.01 exists. This is a finding of fact and is thus subject to review for clear error. When reviewing a trial court's findings under the clear error standard, the appellate court must determine "whether or not those findings are supported by substantial evidence." Though "[s]ubstantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established," it does not mean the evidence must be absolutely compelling or lead inescapably to but one conclusion. Rather, substantial evidence is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion," or evidence that "has sufficient probative value to induce conviction in the minds of reasonable men[.]"

Second, upon a proper finding under CR 59.01, the trial court must make the discretionary decision whether to grant the motion. Even if the trial court finds that one of the grounds exists, it is not bound in every case to grant a new trial. The issue could be moot, or the grounds may be off-set by other factors. But we need not imagine every scenario where a court could find that one of the CR 59.01 grounds is technically present but still properly deny a new trial. Suffice it to say, whether to grant the motion for a new trial is always within the trial court's sound discretion and is entitled to a great deal of deference by an appellate court.

CertainTeed Corp. v. Dexter, 330 S.W.3d 64, 71-72 (Ky. 2010) (citations omitted)

In the case at hand, the trial court did not indicate as to whether it was denying the motion because it found none of the CR 59.01 grounds present or if it was denying the motion based on its discretionary power. Ms. Cayce does not directly indicate in her brief which of the CR 59.01 grounds she is alleging would entitle her to a new trial. It appears as though she is claiming CR 59.01(b) and (g)

are present. CR 59.01(b) because the plaintiffs claimed they had antagonistic interests, yet agreed on how to divide the estate, and CR 59.01(g) because the pre-trial agreement was newly discovered evidence.

Even if we were to assume CR 59.01(b) and (g) were present, we still believe the trial court correctly denied the motion using its discretionary authority. Even though the pre-trial agreement was not disclosed prior to trial and it showed cooperation between the plaintiffs, the agreement's primary focus was the setting aside of the will. It still allowed the plaintiffs to maintain their separate tort claims against the Cayces. The trial court found antagonistic interests due to the differing tort claims, not the issues surrounding the will contest. The plaintiffs maintained antagonistic interests because of the tort claims and the pre-trial agreement did not alter that fact.

Based on the foregoing, we affirm the judgment of the trial court. Due to the fact we are affirming the trial court's judgment, we need not address the issues presented in Ms. Sumner's cross-appeal.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-
APPELLEE SYLVIA CHRISTINE
CAYCE:

Kenneth R. Haggard
Charles R. Haggard
Hopkinsville, Kentucky

ORAL ARGUMENT FOR
APPELLANT/CROSS-APPELLEE
SYLVIA CHRISTINE CAYCE:

Kenneth R. Haggard
Hopkinsville, Kentucky

BRIEF FOR APPELLEE/CROSS-
APPELLANT TRACEY SUMNER:

Daniel N. Thomas
James G. Adams, III
Hopkinsville, Kentucky

ORAL ARGUMENT FOR
APPELLEE/CROSS-APPELLANT
TRACEY SUMNER:

Daniel N. Thomas
Hopkinsville, Kentucky

BRIEF FOR APPELLEE LISA
DAWN GONZALEZ:

Robert L. Fears
Hopkinsville, Kentucky

ORAL ARGUMENT FOR
APPELLEE LISA DAWN
GONZALEZ:

Daniel N. Thomas
Hopkinsville, Kentucky

BRIEF FOR APPELLEE REGEANA
WASSON:

William G. Deatherage, Jr.
Benjamin R. Talley
Hopkinsville, Kentucky

ORAL ARGUMENT FOR
APPELLEE REGEANA WASSON:

Benjamin R. Talley
Hopkinsville, Kentucky