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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000623-MR

JORDAN BURTON, SUCCESSOR ADMINISTRATOR OF
THE ESTATE OF ROGER WAYNE BURTON, DECEASED APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 04-CI-00924

DONALD E. BROWN, M.D. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, JONES AND NICKELL, JUDGES.

NICKELL, JUDGE: Jordan Burton ("Burton"), Successor Administrator of the Estate of Roger Wayne Burton ("Roger"), appeals from a jury verdict in favor of Donald E. Brown, M.D., in a medical malpractice action. Burton also appeals from the trial court's denial of a motion for a new trial. Burton raises four

arguments on appeal, three regarding evidentiary issues and one alleging juror misconduct. Finding no error, we affirm.

In 2003, Dr. Brown performed a laparoscopic cholecystectomy on Roger to remove his gallbladder. About two hours after surgery ended, Dr. Willie Wang, the anesthesiologist, contacted Dr. Brown to inform him of Roger's unusual heart rate and blood pressure. Unbeknownst to the medical staff at this time, Roger began bleeding internally almost immediately after the surgery. About one hour later, Roger was transferred to the Lake Cumberland Regional Hospital Emergency Room ("ER") for testing and to check for internal bleeding. While in the ER, Roger became non-responsive, with nearly nonexistent vital signs. Roger was revived and transferred to the Intensive Care Unit ("ICU"). Transfer to ICU occurred about two hours after his arrival at the ER. A CT scan, performed just prior to Roger entering ICU, revealed massive internal bleeding.

During this time, Dr. Brown was being told of Roger's condition, but could not personally attend to Roger because he was in other surgeries. Dr. Brown eventually examined Roger in the ICU where Roger again became unresponsive and was revived again. A little over six hours after the gallbladder surgery ended, Dr. Brown took Roger to the hospital's operating room to perform an exploratory laparotomy to discover the source of the bleeding. Unfortunately, the origin was

not located and Roger was transferred back to ICU where he was kept on life support machines. Roger died 21 days later.

Roger's estate brought the underlying action alleging medical malpractice by Dr. Brown. The primary allegation was Dr. Brown did not personally attend to Roger in a timely manner once he learned Roger was in distress. Dr. Brown's defense centered on his involvement in other surgeries that day and his inability to be in two places simultaneously. After a three-day trial, the jury returned a unanimous verdict in favor of Dr. Brown. Roger's Estate moved for a new trial, but the motion was denied. This appeal followed.

The applicable standard of review for both evidentiary rulings and denial of a new trial motion is abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000); *Shortridge v. Rice*, 929 S.W.2d 194, 196 (Ky. App. 1996). "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).

Burton first contends the trial court erred in admitting testimony and an exhibit undisclosed in discovery. During discovery, Burton served interrogatories on Dr. Brown. One asked for information regarding "any and all surgical procedures which Dr. Brown performed on the day of Roger's surgery." In response to the interrogatory, Dr. Brown stated he had performed a colonoscopy

before Roger's surgery and a right neck mass excision after Roger's surgery at approximately 4 p.m. Later, during his deposition, Dr. Brown stated he thought he was performing an abdominal surgery during the time Roger was in distress, but was unsure. At trial, however, Dr. Brown testified he performed three surgeries after Roger's procedure: excision of a mass from a neck, amputation of a toe, and emergency bowel surgery. When Dr. Brown sought to introduce a timeline showing his movements after Roger's surgery, Burton objected.

On appeal, Burton argues admitting the timeline and testimony about three surgeries was prejudicial and necessitates a new trial. Citing CR[1] 26.05, Burton argues Dr. Brown was required to supplement his interrogatory responses when new and relevant information became available. Burton argues information about the previously undisclosed surgeries should have been supplied before trial.

We agree with Burton. To be admitted at trial, information regarding the additional surgeries, and the timeline refencing it, should have been supplied before trial. The question, however, is whether the trial judge erred in allowing this exhibit and testimony into evidence. A trial court has broad discretion in addressing a violation of discovery orders and Dr. Brown clearly violated CR 26.05; but, close calls over discretionary issues must be affirmed. *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64, 72-73 (Ky. 2010).

[1] Kentucky Rules of Civil Procedure.

However, even if we believed the trial court abused its discretion in this instance, any error was harmless.

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

CR 61.01. Here, Dr. Brown continually maintained he was unable to attend to Roger while he was engaged in another surgery. Revelation of the extra surgeries into evidence, while inconvenient, did not affect Burton's substantial rights.

Burton next argues the trial court erred in allowing Dr. Brown to question Dr. Robert Walsh, Burton's expert, about prior medical license discipline. During his deposition, Dr. Walsh was asked if any disciplinary action had been taken against him. He responded two such actions had occurred—one at Bristol Regional Medical Center and one at Owensboro Mercy Health System. Both instances had nothing to do with his medical ability, but revolved around his treatment of nurses. During Dr. Walsh's cross-examination, a bench conference was held in which defense counsel indicated he had uncovered an additional instance of discipline. Counsel also indicated the Kentucky Board of Medical

Licensure ("KBML"), not the two hospitals previously mentioned during Dr. Walsh's deposition, had restricted his license. Burton acknowledged the license restrictions imposed by the KBML were the same instances Dr. Walsh testified to during his deposition.

The trial court allowed Dr. Brown to question Dr. Walsh about how many times he had been suspended and the sanctions were imposed. The trial court allowed this questioning because it believed an opposing party should be allowed to impeach an expert's credibility with potential inconsistencies between testimony provided during a deposition and information received via subsequent discovery. Had Dr. Walsh testified differently than shown by the KBML discipline, the trial court would have allowed further questioning. But Dr. Walsh's answer was consistent with the information defense counsel had gathered from the KBML; therefore, no further questioning on this topic followed.

Burton argues Dr. Walsh's discipline by the KBML was a collateral issue and irrelevant to his testimony, *i.e.*, whether Dr. Brown violated the applicable standard of care in treating Roger. Dr. Brown argues the credibility of an expert witness is always at issue.

The issue of Dr. Walsh's license is collateral and immaterial to the case at hand; his interaction with nurses had nothing to do with whether Dr. Brown committed malpractice. *See Branham v. Rock*, 449 S.W.3d 741, 746-48 (Ky.

2014). On the other hand, and as the trial court indicated, "[t]he credibility of a witness' relevant testimony is always at issue, and the trial court may not exclude evidence that impeaches credibility even though such testimony would be inadmissible to prove a substantive issue in the case." *Sanborn v. Commonwealth*, 754 S.W.2d 534, 545 (Ky. 1988). As this is a discretionary issue, we must affirm because we cannot say with certainty the trial court erred. *Dexter*, 330 S.W.3d at 72-73.

Third, Burton alleges the trial court erred by not granting a mistrial when Dr. Brown mentioned he is required by insurance companies and the government to provide pre- and post-operative care for up to three months. Burton argues Dr. Brown mentioned "insurance" to suggest to the jury Roger's medical bills would be paid by a third party. Dr. Brown maintains the mention of insurance was isolated, inadvertent and not grounds for a mistrial or new trial.

We agree with Dr. Brown. An isolated and inadvertent mention of insurance does not require a mistrial or the granting of a new trial. *Herald v. Gross*, 343 S.W.2d 831, 834 (Ky. 1961); *Bowling Green-Hopkinsville Bus Co. v. Montgomery*, 278 Ky. 837, 129 S.W.2d 535, 538 (1939). The trial court did not abuse its discretion in this instance.

Burton's final argument is the trial court erred by not granting a new trial based on juror misconduct. Dr. Brown's wife is a member of the Somerset

Independent School Board of Education and one of the jurors is a teacher within the Somerset school system. Burton learned this connection after trial.[2] Burton alleges the connection gave the juror a financial interest in the litigation and she answered *voir dire* untruthfully. In other words, Burton believes the juror voted in favor of Dr. Brown because she was scared she might lose her job. The *voir dire* question at issue was: "[i]f you were a party to this case, do you know of any reason why you would not be content to try this case by someone like you . . . in your frame of mind?" Burton argues this juror should have mentioned her connection to Dr. Brown's wife because of this question. We disagree.

"A trial court may grant a new trial based on juror misconduct upon demonstration that 'a juror failed to answer honestly a material question on *voir dire*, and . . . that a correct response would have provided a valid basis for a challenge for cause.'" *Gibson v. Fuel Transp., Inc.*, 410 S.W.3d 56, 62 (Ky. 2013) (citations omitted). After reviewing the policies of the Somerset Board of Education and the relevant statutes regarding the powers of the Board, the trial court concluded the Board has no power to terminate a teacher's employment. That power is reserved for the superintendent. The trial court found no juror misconduct.

[2] This juror's disclosure form, which is contained in the record, indicates she was employed by Somerset Independent Schools. This should have put Burton on notice of a potential conflict.

> We can hardly conceive of a circumstance in which greater deference should be granted to the findings of the trial court. It is appropriate to recall that the trial judge personally conducted much of the voir dire examination and presided over all of it. He presided over the trial and likewise presided over the post-trial hearing on the motion for new trial. The trial judge was immersed in the case and it would be utterly extraordinary for an appellate court to disregard his view as to questions of candor and impartiality of a juror.

Haight v. Commonwealth, 938 S.W.2d 243, 246 (Ky. 1996) (citation omitted). We do not believe the trial court abused its discretion in denying the motion for a new trial. After reviewing the statutes cited by the trial court in its order, we agree the Board has no power over the hiring or firing of teachers. In addition, the question asked in *voir dire* is general and vague and we will not disturb the trial court's ruling because of it. *See Gibson*, 410 S.W.3d at 62. If trial counsel wanted more information about potential jurors' employment, that question should have been asked directly.

Based on the foregoing, we affirm the judgment of the trial court.

CLAYTON, JUDGE, CONCURS.

JONES, JUDGE, CONCURS IN RESULT ONLY.

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