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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000120-MR

CHARLOTTE A. NEAL, EXECUTRIX OF THE ESTATE OF MICHAEL H. NEAL; and CHARLOTTE A. NEAL, INDIVIDUALLY — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 13-CI-00221

RICHARD D. FLOYD, IV, M.D. and NEW LEXINGTON CLINIC, P.S.C. — APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: DIXON, JOHNSON, TAYLOR, JUDGES.

JOHNSON, JUDGE: Charlotte A. Neal, Executrix of the estate of Michael H. Neal, and Charlotte A. Neal, individually (collectively, "Neals"), bring this appeal from a Trial Verdict and Judgment and an Order Overruling Plaintiffs' Motion for

New Trial in Richard D. Floyd, IV, M.D. ("Dr. Floyd") and New Lexington Clinic, P.S.C.'s ("Clinic") favor, entered on November 30, 2016 and December 22, 2016, respectively. After reviewing the record in conjunction with the applicable legal authorities, we AFFIRM in part and REVERSE in part the Fayette Circuit Court and REMAND this matter for a new trial.

BACKGROUND

The underlying matter involves medical treatment received by Michael H. Neal ("Mr. Neal") under the care of Dr. Floyd. Dr. Floyd performed open heart surgery on Mr. Neal on January 16, 2012. There were complications both during and after the surgery which led to Mr. Neal's death on January 19, 2012. Charlotte Neal filed suit on January 22, 2013, alleging negligence on the part of Dr. Floyd, St. Joseph Hospital, and the Clinic. St. Joseph Hospital was dismissed from the underlying action via an Agreed Order entered on November 30, 2016.

After hearing the evidence, the jury returned a verdict of 10-2 in Dr. Floyd and Clinic's favor, finding that Dr. Floyd did not breach the standard of care he owed Mr. Neal. The Trial Verdict and Judgment was entered on November 30, 2016. The Neals filed a Motion for New Trial pursuant to Kentucky Rules of Civil Procedure ("CR") 59.01 on December 12, 2016. The court entered its Order Overruling Plaintiffs' Motion for New Trial on December 22, 2016.

The Neals filed their Notice of Appeal on January 17, 2017, and raise four issues: The Neals' counsel was improperly prevented from discussing the

standard of proof in a civil case during *voir dire*; the Neals' counsel was improperly prevented from explaining the standard of proof during closing argument; the trial court erred by not answering the jury's question with respect to the preponderance of evidence standard of proof in a civil case; and Juror 4243 should have been stricken for cause. Based on these allegations of impropriety, the Neals request reversal and remand for re-trial.

STANDARD OF REVIEW

We have established clear precedent for the appropriate standard of review when examining a trial court's decision to grant or deny a request for reversal and remand for a new trial.

> The granting of a new trial is within the discretion of the trial court. When a trial court denies a motion for a new trial, our standard of review is whether there has been an abuse of that discretion. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. We presume the trial court to be correct and will reverse only upon clear error.

Kaminski v. Bremner, 281 S.W.3d 298, 304 (Ky. App. 2009) (internal citations and quotation marks omitted).

ANALYSIS

The Neals' first issue on appeal is that they were prevented from sufficiently probing the standard of proof and preponderance of evidence standard during both *voir dire* and in their closing arguments. Despite Dr. Floyd and Clinic

agreeing with the Neals' *in limine* motion to prohibit all mention of the burden of proof at a pretrial conference on October 28, 2016, the Neals were allowed significant leeway by the trial court in putting these issues before the jury. Mr. Mitnik, trial counsel for the Neals, stated the following to the prospective jurors:

> There's this standard of proof and I need to ask you this question about it. I mentioned it earlier, this isn't a criminal case, no one is going to jail. So no one did anything on purpose, so you're not proving beyond a reasonable doubt like you hear on t.v. In a civil case like this it's this "preponderance of evidence" – more likely the things that we're to prove, we gotta prove that we're more likely right.
>
> Here's my question to you: In a medical case, particularly like this, sometimes people feel that that's not enough. Simply saying, "If we've gotta prove that the Doctor didn't do his job right and the level of proof is we gotta prove that's more likely right than wrong." When these experts I talked about, you're gonna have experts that come in and say, I'm gonna tell you, they won't be agreeing in this case. This is not acceptable and the other will say that it is. The jury's gotta decide that. The burden of proof in deciding that is you gotta say what is more likely right, what makes more sense to me. Not beyond a reasonable doubt.
>
> Some people feel in a medical case that's simply not enough. It may be the law and I wouldn't intentionally ignore the law, but I gotta tell you, that doesn't square with my own internal fairness meter. Everybody with me? How many of you feel like that, that more likely right in sorting out the conflicting evidence, is simply not enough in your mind, it oughta be higher than that.
>
> We can talk about what impact that will have but I first need to know if you feel that way.

A single juror raised her hand. As Mr. Mitnik engaged this juror in further discussion, Dr. Floyd and Clinic's trial counsel objected. Mr. Mitnik stated during

the sidebar, "No one [else] has raised their hand to it, just one lady who is already gone for cause. So I'm done with it anyhow." After this sidebar was completed, Mr. Mitnik went on to state to the jury:

> Here's a question that I've got. You heard about these, uh, the standard of care and the judge talked about being like in a car crash and the standard is you don't run a red light. And with a doctor, the judge will give you, and I think he kind of did tell you it's exercising the degree of care ordinarily expected of a reasonably competent doctor in similar circumstances. Same specialty – same circumstances. So it has to do with what the ordinary expectations under these circumstances for somebody with the same kind of training.

The Neals' argument is rebutted since the only juror with a potential issue on this matter was already struck for cause. Further, we find that the Neals were not prevented or stymied from exploring or explaining the appropriate standard of proof based on the quoted words of Mr. Mitnik noted above. Especially in light of the fact that it was done in contravention of the pretrial motion *in limine* on that subject. Based on our view, any reasonable layman would have been fully and utterly apprised of how they were to judge this case and the appropriate standard and thought process to utilize when deciding which side was "right" based on Mr. Mitnik's exhaustive explanation and discussion of the subject.

Similarly, the Neals' argument that they were prevented from sufficiently defining preponderance of evidence in closing arguments is rebutted by Mr. Mitnik's words during *voir dire*. He extensively defined the jury's role in judging this case in contravention of the agreed upon motion *in limine*. Again, the

trial court demonstrated significant leeway in allowing discussion by the Neals on this topic and there was no error by the court in refusing to grant them yet another "bite of the apple" on this topic.

The Neals next contend that the trial court erred when it declined to define "preponderance of evidence" in response to a juror's request to do so. As our Kentucky Supreme Court stated in *Hardin v. Savageau*, 906 S.W.2d 356, 359 (Ky. 1995):

> 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, … the term "preponderance" should not be used because it may not be easily understood and is essentially redundant. But when the evidentiary standard is something greater than preponderance, it is necessary to expressly state the standard to assure an appropriately informed jury.

The jury instruction provided to the jurors stated the following:

> It was the duty of the Defendant, Richard D. Floyd, IV, M.D., as an employee of the New Lexington Clinic, in performing surgery on Michael H. Neal, and providing post-operative care to him to exercise that degree of care and skill as would be expected of a reasonably competent physician specializing in cardiothoracic surgery, and acting under the same or similar circumstances.

The trial court was correct to decline to provide such a definition to a juror based on the best practice established by the Kentucky Supreme Court. The trial court did not abuse its discretion on these "preponderance of evidence" issues.

The Neals' next issue on appeal is that the trial court committed error when it refused to strike Juror 4243 for cause. The Neals contend that Juror 4243 should have been struck for three reasons. First, during *voir dire*, Mr. Mitnik, while discussing "noneconomic damages," stated that "all the money in the world won't bring them back, so what's the point?" Juror 4243 responded, "I think it's just a slight bias for me because no amount of money can bring them back." Mr. Mitnik replied, "There is a slight bias that potentially could have an impact even though you'd try your best to put it aside. Is that fair?" Juror 4243 responded, "I guess so."

When discussing attorney advertising, Mr. Mitnik disclosed that the law firm he works for is Morgan & Morgan, a law firm with ubiquitous advertising across the Commonwealth of Kentucky, and questioned the potential jurors if that would bias their decision-making in the case. Mr. Mitnik asked, "Are your feelings such that in all honesty it may have an unintentional impact on you?" Juror 4243 responded, "It's possible it could."

Finally, the Neals contend that Juror 4243's husband's occupation as a "medical technician for a toxicology lab" made her unsuitable to be a juror on this case. Under questioning on the subject, Juror 4243 denied that it would have any impact on her ability to judge the case fairly.

The Neals' trial counsel's motion to strike Juror 4243 for cause was denied, forcing them to use a peremptory strike to remove Juror 4243 from the panel. The Neals told the court verbally that they would have used an additional

peremptory strike on either Juror 4293 or 4283. Dr. Floyd and Clinic themselves used a peremptory strike on Juror 4283, but Juror 4293 sat on the panel. Dr. Floyd and Clinic contend that since the Neals did not write their choice on their jury sheet, and instead verbally informed the court of the two potential jurors they would have struck instead of just one, they did not properly preserve the issue for appeal.

"Generally speaking, the trial court enjoys 'broad discretion' in deciding whether a juror should be stricken for cause." *Grubb v. Norton Hospitals, Inc.*, 401 S.W.3d 483, 485 (Ky. 2013) (citations omitted). The Kentucky Supreme Court has, however, cautioned courts to err on the side of striking a juror when uncertainty exists, specifically to avoid the exact type of situation we are now faced with. The Kentucky Supreme Court said in *Basham v. Commonwealth*, 455 S.W.3d 415, 421 (Ky. 2015) (internal citations and quotations omitted):

> We have repeatedly encouraged trial courts to strike a juror when a reasonable person would question whether the juror would be fair, because a fair juror is at the heart of a fair and impartial trial. We have made it clear that when there is uncertainty about whether a prospective juror should be stricken for cause, the prospective juror should be stricken. That is, if a juror falls in a gray area, he should be stricken. Further driving home the point, we reiterated that trial courts should tend toward exclusion of a conflicted juror rather than inclusion, and where questions about the impartiality of a juror cannot be resolved with certainty, or in marginal cases, the questionable juror should be excused.

> By erring on the side of caution and striking Juror 846016, the trial court preserved the integrity of the trial.

In *Gabbard v. Commonwealth*, 297 S.W.3d 844, 854 (Ky. 2009) (internal citations and quotations omitted), the Kentucky Supreme Court stated:

> [T]his Court concludes that in order to complain on appeal that he was denied a peremptory challenge by a trial judge's erroneous failure to grant a for-cause strike, the defendant must identify on his strike sheet any additional jurors he would have struck. Appellant did just that here by identifying two additional jurors he would have struck.
>
> The question then is whether the trial court's erroneous failure to grant the for-cause strike is reversible error. This Court has ruled that ordinarily, such an error affects a substantial right of a defendant and is presumed to be prejudicial. However, such an error can be shown to be non-prejudicial if the other jurors the defendant would have used his peremptory strikes on do not actually sit on the jury.

We find that informing the court on the record of jurors the party would have peremptorily struck had they strikes remaining to be functionally identical to the instructions of the Kentucky Supreme Court outlined above and refusing to consider the issue on that basis would be a miscarriage of justice and against the spirit of established precedent. A juror that the Neals identified as one they would have used a peremptory strike on did in fact sit on the jury.

We find that the trial court abused its discretion by not striking Juror 4243 for cause. This Court is not concerned about Juror 4243's response to the question about Juror 4243's husband's occupation. There is no indication of prejudice in that matter. This Court **is** concerned with Juror 4243's response to the questions about non-economic damages and the potential bias created due to the

advertising of Morgan & Morgan. Juror 4243 affirmatively declared her potential bias when attempting to rationalize a cash award due to "noneconomic damages" and she agreed that Morgan & Morgan's advertising could have a negative impact on her impartiality in judging the case.

Specifically, when Juror 4243 was asked about "noneconomic damages" she stated, "I think it's just a slight bias for me because no amount of money can bring them back," and, when asked whether her bias could have an impact on her decision despite her best efforts to put those feelings aside, answered, "I guess so."

Next, when asked whether the attorney advertising could have an unintentional impact on her, she answered, "It's possible it could." At these points in the inquiry, it was possible for follow-up questioning to discern how real these possibilities of bias were. However, there was no follow-up questioning and we are left with the *possibility* that Juror 4243's decision was tainted by "noneconomic damage" considerations and/or Dr. Floyd and Clinic's attorneys' advertising practices.

Without follow-up questioning, the trial court should have erred on the side of caution regarding Juror 4243 and removed her from the jury pool for cause, based on her own admission of her possible inability to be an unbiased juror. Based on Juror 4243's replies to the questioning about "noneconomic damages" and Morgan and Morgan's attorney advertising, we find that, at best, this

juror fell into the "gray area" described by the Kentucky Supreme Court as necessitating removal from the jury pool. As that court has also held:

> When a juror is not properly struck for cause, without peremptory strikes, a defendant would find himself forced into an unfair trial. The substantial nature of a peremptory strike is thus obvious in this context.
>
> Thus, the correct inquiry is not whether using a peremptory strike for a juror who should have been excused for cause had a reasonable probability of affecting the verdict (harmless error), but whether the trial court who abused its discretion by not striking that juror for reasonable cause deprived the defendant of a substantial right. Harmless error analysis is simply not appropriate where a substantial right is involved . . . . Here, the defendant did not get the trial he was entitled to get.

Shane v. Com., 243 S.W.3d 336, 341 (Ky. 2007).

We extensively reviewed the video record of the *voir dire* proceedings in this case and are obviously confined to that record in our analysis. The outcome in this case is dictated by *Gabbard*, which held that this type of error affects a substantial right. *Supra*. Therefore, we must reverse on this issue.

CONCLUSION

Based upon the foregoing, we AFFIRM in part and REVERSE in part the Fayette Circuit Court and REMAND this matter for a new trial.

DIXON, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND DOES NOT FILE SEPARATE OPINION.

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