

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-002029-MR

BEVERLY HICKS

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 10-CI-00394

PIKEVILLE MEDICAL CENTER

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, D. LAMBERT AND TAYLOR, JUDGES.

D. LAMBERT, JUDGE: Beverly Hicks (Hicks) sued Pikeville Medical Center (PMC) for medical negligence. The jury found in favor of PMC. Hicks now appeals the Pike Circuit Court's November 20, 2013 order denying her post-judgment motion for a new trial. After review, we affirm.

I. BACKGROUND

On March 11, 2009, Hicks underwent back surgery at PMC. She returned two days later complaining of pain in her left wrist. As it turned out, her wrist was broken.

Hicks later sued PMC for negligence. In her complaint, she alleged, *inter alia*, that her injury occurred during the surgery at PMC. PMC disputed the claim, and the matter was tried before a jury from April 23, 2013, to April 30, 2013. The jury ultimately returned a unanimous verdict for PMC.

Three relevant events occurred at trial. First, PMC called an expert witness, Adam M. Smith, M.D., to testify regarding Hicks' injury. Dr. Smith classified the injury as a "hyper dorsi-flex fracture" and explained that such fractures commonly occur when someone falls on an outstretched hand. Dr. Smith further added that one could watch YouTube to see how these types of fractures occur.

Second, an alternate juror responded to witnesses' statements throughout the trial with noises and animated gestures. Hicks objected to the loud behavior, arguing that it tainted the jury. Hicks further asked for the juror to be dismissed. The circuit court did not select the juror in question to serve on the panel, and the juror did not participate in the deliberations.

Finally, during closing arguments, PMC's counsel analogized Hicks' burden of proof to a situation in baseball where the runner reaches first base at the

same time the ball arrives in the first baseman's glove. Hicks did not object to this analogy.

Following trial, the circuit court entered an order reflecting the jury's verdict and dismissed Hicks' complaint. Hicks subsequently filed a series of post-judgment motions. The first was a motion for a new trial, and the circuit court denied it on June 11, 2013.

Neither party took any further action until July 15, 2013. On that day, Hicks filed a motion under CR¹ 60 claiming she had not received a copy of the trial court's June 11, 2013 order due to an error of the Pike Circuit Court Clerk's office. After a hearing, the circuit court granted Hicks an additional ten days to supplement her CR 60 motion with evidence that a copy of the order was never received. Hicks responded with an affidavit signed by Mrs. Candice Pack, Hicks' counsel's employee in charge of opening the mail. In the affidavit, Mrs. Pack swore that a copy of the June 11, 2013 order never arrived at the office.

After considerable debate as to the sufficiency of the evidence provided in both Hicks' motion and Mrs. Pack's affidavit, the circuit court found that Hicks did not receive timely notice of the order and granted relief under CR 60. The circuit court then set aside the June 11, 2013 order and once again denied Hicks' motion for a new trial effective November 20, 2013. This appeal followed.

II. STANDARD OF REVIEW

¹ Kentucky Rules of Civil Procedure.

On appeal, a trial court's decision whether or not to grant a motion for a new trial is reviewed for an abuse of discretion. *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64, 72 (Ky. 2010). "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). This Court also defers to a trial court's factual findings unless the findings were clearly erroneous; that is, the findings were not supported by substantial evidence. *See* CR 52.01; *see also* *Stanford Health & Rehab. Ctr. v. Brock*, 334 S.W.3d 883, 884 (Ky. App. 2010). Moreover, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses because judging the credibility of witnesses . . . [is] within the exclusive province of the trial court." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Legal issues receive no deference and are reviewed *de novo*. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998).

III. ANALYSIS

As a threshold issue, we must first decide whether Hicks filed a timely notice of appeal. PMC argued that Hicks' appeal did not comply with CR 73.02(1)(a) because Hicks did not file the appeal within 30 days following the June 11, 2013 order. PMC also argued that Mrs. Pack's affidavit could not overcome the clear evidence that a copy of the order was mailed to Hicks' counsel's office. Hicks, on the other hand, maintained that the trial court properly relied on Mrs.

Pack's affidavit and correctly applied *Kurtsinger v. Bd. of Trustees of Ky. Ret. Sys.*, 90 S.W.3d 454 (Ky. 2002). For the following reasons, we agree with Hicks.

Under CR 73.02(1)(a), a party has 30 days “after the date of notation of service of the judgment or order” to file a notice of appeal. Failure to file a notice of appeal within this 30-day window is fatal to an appeal. *Fox v. House*, 912 S.W.2d 450, 451 (Ky. App. 1995). However, when an error of the trial court or the circuit court clerk's office prevents a party from learning of the entry of a final judgment, the trial court *may* grant that party's CR 60.02 motion to vacate the previous judgment without abusing its discretion—even though the effect of the decision extends the time for taking an appeal. *See Kurtsinger*, 90 S.W.3d 454 at 456-57 (emphasis added).

Here, although there was evidence in the records of the Pike Circuit Court Clerk that a copy of the order was sent to the correct mailing address of Hicks' counsel and no express finding by the trial court that an error occurred within that office, the trial court presumably based his decision on the sworn statement of Hicks' employee who was in a position to know if a copy of the order had ever been received. The decision to find Mrs. Pack's affidavit credible was a decision for the trial court, and we will not disturb it.

Having addressed the timeliness issue, we now turn to the second issue on appeal: whether Dr. Adam Smith improperly informed the jury they could watch YouTube to observe how an individual would sustain the same kind of wrist

fracture as Hicks. According to Hicks, this statement invited the jurors to search the information on their own.

Although we understand Hicks' concern given modern technology, we cannot find that the circuit court abused its discretion. Hicks offered no proof that a juror disobeyed the circuit court's admonition not to conduct personal investigations or research the issues and thus failed to overcome the presumption recognized in *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003), that jurors follow a trial court's admonition.

Hicks' next argument concerns the behavior of the alternate juror. Hicks asserts that the circuit court abused its discretion in not granting a new trial because of the prejudicial effect the juror's actions had on the rest of the panel. We cannot agree with this assertion because the trial court found that conduct in question was a natural consequence of the juror's lengthy career as a paramedic rather than some intent to influence the other jurors. Such a conclusion was thus properly grounded and not for this Court to disturb.

As for her final argument regarding the propriety of PMC's baseball analogy during closing, Hicks is precluded from raising it. Hicks did not object to the use of the analogy at trial, and "[i]t is an unvarying rule that a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court." *Combs v. Knott County Fiscal Court*, 141 S.W.2d 859, 860 (1940). Accordingly, the decision of the Pike Circuit Court is affirmed.

ALL CONCUR.

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