

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2014-CA-000074-MR

PAUL AND AURELIA HOWARD

APPELLANTS

v. APPEAL FROM MARTIN CIRCUIT COURT  
HONORABLE JOHN DAVID PRESTON, JUDGE  
ACTION NO. 12-CI-00244

KELLY AND DONNA CALLAHAM

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON, NICKELL, AND VANMETER, JUDGES.

CLAYTON, JUDGE: Appellants Paul and Aurelia Howard have filed an appeal arising from the denial of their Kentucky Rules of Civil Procedure (CR) 60.02 Motion for Relief from Judgment filed in the Martin Circuit Court. After a review of the record, and consideration of the arguments of counsel, we affirm the decision of the trial court.

## BACKGROUND

This is the second appeal filed by the Howards from a jury verdict in a property dispute case which involved the appropriate placement of a boundary line. A jury verdict was rendered on September 20, 2013. The first appeal, No. 2013-CA-002130-MR, was dismissed for failure to timely file a notice of appeal. Subsequently on December 13, 2013, the Howards filed a motion for a new trial pursuant to CR 60.02. As grounds for their motion, they argued that two members of the jury, who voted with the majority, received a benefit from one of the Petitioners, Martin County Judge Executive Kelly Callaham.

On October 8, 2013, the Martin County Fiscal Court awarded bid contracts for bridge construction which included the construction of a bridge on Shirley Penix Cemetery Road. The Howards alleged that jurors Donna Muncy, the niece of Shirley Penix, and Josie Penix, the niece by marriage of Shirley Penix, received benefits from Callaham. According to Callaham, Shirley Penix died in May, 2000.

The motion alleges that “if bids were awarded on October 8, the bridge was planned for some time.” Therefore, the Howards argue that the prospective award of the bid resulted in a favorable verdict to the Petitioners. The Howards seek relief from the judgment because of this “newly discovered evidence.” Callaham argues that he is not mentioned in the motion and there is no reference in the motion as to who voted to award the bid. Further, he argues that

there is no fact that supports the allegation that the jurors received any benefit at all.

On December 19, 2013, at the trial court's motion hour, the judge denied the Howards' CR 60.02 motion. There was no additional proof presented, however, no evidentiary hearing was held. This appeal followed.

#### STANDARD OF REVIEW

The parties agree that the standard of review of a CR 60.02 motion is whether the trial court abused its discretion in ruling upon the motion. The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). In some circumstances, an evidentiary hearing on the motion may be held. However, "[A] movant is not entitled to a hearing on a CR 60.02 motion unless 'he affirmatively alleges facts which, if true, justify vacating the judgment and further allege[s] special circumstances that justify CR 60.02 relief.'" *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000).

#### ANALYSIS

The Howards argue that they are entitled to relief pursuant to CR 60.02(b). In relevant part, CR 60.02 states:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds...(b) newly discovered evidence which by due

diligence could not have been discovered in time to move for a new trial under Rule 59.02.

The Kentucky Supreme Court held in *Foley v. Commonwealth*, 425 S.W.3d 880, 886 (Ky. 2014), that:

... in order for newly discovered evidence to support a motion for new trial it must be of such decisive value or force that it would, with reasonable certainty, have changed the verdict or that it would probably change the result if a new trial should be granted. [Citations and internal quotes omitted.]

Juror bias is alleged in the case at bar. Any bias could affect the verdict. As stated in *Bowman ex rel. Bowman v. Perkins*, 135 S.W.3d 399,402 (Ky. 2004), "...[t]he prevailing rule is that a juror should be disqualified when the juror has a close relationship with a victim, a party or an attorney, even if the juror claims to be free from bias." *Butts v. Commonwealth*, 953 S.W.2d 943, 945 (Ky. 1997). A trial court should presume the possibility of bias of a juror if said juror has "a close relationship, be it familial, financial or situational, with any of the parties, counsel, victims or witnesses," regardless of the answers said juror may give during voir dire. *Ward v. Commonwealth*, 695 S.W.2d 404, 407 (Ky. 1985) (quoting *Commonwealth v. Stamm*, 286 Pa.Super. 409, 429 A.2d 4, 7 (1981)). "Once that close relationship is established, without regard to protestations of lack of bias, the court should sustain a challenge for cause and excuse the juror." *Id.*

We now consider the facts presented in this case to support the motion. According to the newspaper article attached to the CR 60.02 motion, the bid for four bridges to be built was awarded to J & L Trucking of Martin County

(Hereinafter “J & L Trucking”). One of the bridges was on the Shirley Penix Cemetery Road. The motion to accept the bid of J & L Trucking was made by District 3 Magistrate Darrell Mills and seconded by John Hammond. The Fiscal Court then unanimously voted to approve the bid. There is no reference to any payments or benefits to anyone else.

Neither the motion nor the article in support of the motion establishes that the jurors received any benefit. No facts were presented to the trial court which demonstrate a bias by these two jurors. Further, if the motion is correct that “this bridge was planned for some time,” it raises the question as to why the bidding process and the bridge locations could not have been discovered earlier. Therefore it has not been shown that this is newly discovered evidence which, through due diligence, could not have been discovered in time to move for a new trial under CR 60.02.

## CONCLUSION

The Howards have not demonstrated any newly discovered evidence which is of such decisive value or force that with reasonable certainty would have changed the verdict. They also have not shown any special circumstances warranting an evidentiary hearing. Thus, we affirm the decision of the Martin Circuit Court.

ALL CONCUR.

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