

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-002040-MR
AND
NO. 2015-CA-000129-MR

MELISSA JONES

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM WARREN CIRCUIT COURT
v. HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 12-CI-01324

FLORA TEMPLETON STUART

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * * * **

BEFORE: DIXON, D. LAMBERT, AND MAZE, JUDGES.

DIXON, JUDGE: In this wrongful termination action, Melissa Jones appeals from a Warren Circuit Court judgment entered upon a jury verdict in favor of Jones's former employer, Flora Templeton Stuart. In a protective cross-appeal, Stuart

asserts errors relating to the court's evidentiary rulings. Finding no error in the court's judgment, we affirm.

Jones began working for Stuart's law office as a bankruptcy paralegal in May 2011. Jones was absent from work due to illness from September 26 through September 29, 2011. Stuart expected Jones to return to work for an 8:00 a.m. meeting on September 30, 2011. Jones did not attend the meeting; consequently, Stuart terminated Jones's employment for failing to report to work as scheduled.

Jones filed a complaint against Stuart in Warren Circuit Court alleging wrongful termination. According to Jones, she was discharged after she refused to follow Stuart's instructions to falsify or misrepresent information contained in clients' bankruptcy petitions. Stuart denied the allegations and contended that Jones was an at-will employee at the time of her termination.¹ Following discovery, the matter proceeded to a jury trial in November 2014. The jury was instructed to find in favor of Jones if the evidence established that Stuart instructed Jones to falsify and/or intentionally misrepresent information in bankruptcy filings and that Jones was terminated because she refused to do so. Jones sought damages of approximately \$640,000, which included back pay, front pay, embarrassment, and humiliation. The jury returned a verdict in favor of Stuart signed by nine of

¹ At the time the civil suit was filed, Jones's appeal of the Kentucky Unemployment Insurance Commission's denial of benefits was pending in Warren Circuit Court. The trial court held the wrongful termination action in abeyance until September 2013, when the trial court rendered its decision affirming the KUIC. A panel of this Court subsequently affirmed the trial court in an unpublished opinion, *Jones v. Kentucky Unemployment Insurance Commission*, 2013-CA-001738-MR (Mar. 13, 2015).

the twelve jurors. The trial court entered judgment in favor of Stuart and subsequently denied Jones's motion for post-judgment relief. This appeal and protective cross-appeal followed.

The first two arguments raised by Jones relate to pretrial evidentiary rulings by the trial court. "Our standard of review in matters involving a trial court's rulings on evidentiary issues and discovery disputes is abuse of discretion." *Manus, Inc. v. Terry Maxedon Hauling, Inc.*, 191 S.W.3d 4, 8 (Ky. App. 2006). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

First, Jones contends the trial court erred by denying her request to depose attorney Mark Flener. Flener testified in the KUIC hearing as Stuart's expert witness regarding general bankruptcy procedure. Although Stuart identified Flener as a potential witness in pretrial discovery, Stuart ultimately retained attorney John Rogers as her bankruptcy expert. Jones filed a motion to compel the deposition of Flener, since Stuart previously identified him as a potential expert witness. The trial court initially granted Jones's motion to compel Flener's deposition; however, Stuart objected and moved to set aside the order compelling deposition. At the hearing on Stuart's motion, the court noted that Flener was not going to be Stuart's expert witness, and Jones acknowledged she wanted to depose Flener because she expected his testimony to support the testimony of her own bankruptcy expert, Chip Bowles. The court reviewed the transcript of Flener's

testimony at the KUIC hearing and, concluding Flener's testimony would be unnecessarily repetitive of Bowles's, the court set aside the order compelling Flener's deposition.

On appeal, Jones contends she was entitled to depose Flener because he had been identified as Stuart's expert.

CR 26.02(4)(b) states:

A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35.02 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Flener was a non-testifying expert pursuant to CR 26.02(4)(b); consequently, absent a showing of exceptional circumstances, Jones was not entitled to depose Flener.² The record reveals the trial court thoroughly considered Jones's request and concluded that Flener's opinions as to general bankruptcy practices would be repetitive of the testimony offered by Jones's own expert. We conclude the trial court did not abuse its discretion by setting aside the order compelling Flener's deposition.

Jones next argues the court erred by allowing Stuart to impeach Jones's credibility by eliciting from her that she had previously been convicted of a felony.

² Despite Jones's vigorous argument to the contrary, CR 35.02, which addresses the disclosure of a medical report by an examining physician, does not apply to Flener's testimony. *See Morrow v. Stivers*, 836 S.W.2d 424, 428 (Ky. App. 1992).

Jones asserts that evidence of her felony conviction, which was twelve years prior to trial, was unfairly prejudicial.

Jones was convicted of perjury in Barren Circuit Court in May 2002. In ruling on Stuart's motion in *limine* to admit the prior conviction, the trial court addressed KRE 609(b), which states:

Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten (10) years has elapsed since the date of the conviction unless the court determines that the probative value of the conviction substantially outweighs its prejudicial effect.

The trial court ruled that Stuart could elicit Jones's status as a convicted felon during trial, but the court deemed the nature and date of the conviction inadmissible. Jones testified regarding numerous disputed issues of fact, including her responsibilities as Stuart's paralegal, her absence from work prior to her termination, and whether she attempted to contact Stuart prior to 8:00 a.m. on September 30, 2011.³

In the medical malpractice case *Miller ex rel. Monticello Banking Co. v. Marymount Med. Ctr.*, 125 S.W.3d 274, 284-85 (Ky. 2004), the Kentucky Supreme Court affirmed the trial court's decision to admit evidence of the plaintiff's prior conviction for burglary that was more than ten years old. The Court explained:

Thus, Mr. Miller placed his credibility squarely in issue by testifying in contradiction of other witnesses and of entries in hospital and business records. Such is a factor to consider in determining the probative value of

³ A highly contested issue between the parties was the authenticity of an e-mail Jones allegedly sent to Stuart on the evening of September 29, 2011, which advised Stuart that Jones would not be in the office until 10:00 a.m. on September 30.

the proffered evidence. Another factor is the nature of the prior conviction. [Robert G.] Lawson, [*The Kentucky Evidence Law Handbook*], § 4.30, at 217–18 [(3d ed.1993)] (The type of conviction being offered to impeach is insignificant to the prejudice factor because the jury is not informed of the nature of the offense, but it is significant to the probativeness factor because, *e.g.*, ‘a conviction for perjury is more indicative of untruthfulness than a conviction for rape.’). Likewise, a conviction of burglary is a crime of dishonesty, *Commonwealth v. Richardson*, 674 S.W.2d 515, 517 (Ky. 1984), that would be more probative of untruthfulness than a conviction of *e.g.*, rape. Finally, a conviction that is eleven to twelve years old is more relevant than one that is, *e.g.*, more than twenty years old. *Compare Brown v. Commonwealth*, 812 S.W.2d 502, 503 (Ky. 1991) (admission of twenty-two-year-old conviction held reversible error), *overruled on other grounds by Stringer v. Commonwealth*, 956 S.W.2d 883, 891 (Ky. 1997). As for the factor of prejudice, while evidence that a party is a convicted felon is always prejudicial, it obviously is not as prejudicial in a civil case as in a criminal case.

Id. at 285-86. Here, Jones placed her credibility in issue by contradicting other witnesses and evidence, the nature of her prior conviction indicated dishonesty, the conviction occurred within a still-relevant time period of twelve years, and the evidence was used to impeach Jones in civil litigation. We are satisfied the trial court did not abuse its discretion in allowing Stuart to introduce evidence of Jones’s prior felony conviction for impeachment.

Next, Jones argues the court erred by denying her motion for a new trial due to an inconsistent verdict. Our standard of review on appeal is whether the trial court’s decision was an abuse of discretion. *Kaminski v. Bremner, Inc.*, 281 S.W.3d 298, 304 (Ky. App. 2009).

During deliberations, the jury advised the court that it had reached a verdict; however, the jury also requested that the court read aloud a note signed by all of the jurors. The judge advised the jury that he would read the note after presenting the jury's verdict. The verdict form indicated the jury found in favor of Stuart by a nine to three vote. The court then read the jury's note, which stated:

After several hours of deliberating, we think we have reached a verdict; however, we would like a statement read to Flora that the verdict does not reflect the jurors' belief as to the ethics of Flora's practice. To a person, each juror does not believe Flora runs an ethical bankruptcy practice. That is not the issue before this court, but if it were, twelve jurors believe that Flora's bankruptcy practice is not performed ethically or professionally.

Jones argues here, as she did before the trial court, that a new trial was warranted because the verdict in favor of Stuart was inconsistent with the jury's note. We disagree.

In *Commonwealth v. Abnee*, 375 S.W.3d 49, 52 (Ky. 2012), the Kentucky Supreme Court explained:

RCr 10.04 is Kentucky's current expression of the old and well-considered common law rule that prohibited the impeachment of a jury verdict by the testimony of one of the jurors. RCr 10.04 states that '[a] juror cannot be examined to establish a ground for new trial, except to establish that the verdict was made by lot.' The rule is firmly rooted in the early years of Kentucky jurisprudence.

Id. (internal footnote omitted).

Jones relies on the jury's note to impeach an otherwise facially valid verdict. Notably, Jones has not alleged the instructions were improper, or that there was insufficient evidence to support the verdict, or that there was an overt act of juror misconduct. *See Maras v. Commonwealth*, 470 S.W.3d 332, 336 (Ky. 2015). We are mindful of the view recently expressed by the Kentucky Supreme Court in *Maras, supra*:

[W]e are charged with refraining from entertaining suspicion or engaging in conjecture that the jury verdict may have resulted from compromise, mistake, or even carelessness — after all, juries may indulge in precisely such motive or vagaries and verdicts cannot be upset by speculation or inquiry into such matters.

Id. at 337 (internal footnotes, citations, and quotation marks omitted).

The jury was instructed to find in favor of Jones if the evidence established that Stuart instructed Jones to falsify and/or intentionally misrepresent information in bankruptcy filings and that Jones was terminated because she refused to do so. Nine of the twelve jurors signed the verdict form in favor of Stuart. Throughout the trial the jury heard unflattering testimony about Stuart and her law practice; however, the jury's verdict in favor of Stuart as to Jones's claim of wrongful termination was supported by substantial evidence. After careful review, we conclude the trial court did not abuse its discretion by denying Jones's motion for a new trial.

Finally, Jones seeks review of the court's denial of her motion for a new trial pursuant to CR 60.02(c). Jones contends she learned, post-trial, that Stuart

committed perjury when she denied using certain e-mail accounts to communicate with Jones. Jones fails to provide this Court with any citations to the video record of Stuart's allegedly untruthful trial testimony. *See* CR 76.12(4)(c)(v). We are not required to scour the record to find where it might provide support for Jones's claims. *Smith v. Smith*, 235 S.W.3d 1, 5 (Ky. App. 2006). We are not persuaded the court abused its discretion by denying Jones's motion for a new trial pursuant to CR 60.02.

After fully considering each of the arguments raised in Jones's direct appeal, we affirm the judgment of the trial court in all respects. The issues raised in Stuart's protective cross-appeal are rendered moot since we affirm the judgment; consequently, we need not address Stuart's cross-appeal.

For the reasons stated herein, we affirm the judgment of the Warren Circuit Court.

ALL CONCUR

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