rel: April 10, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180308

AMMC, P.C., d/b/a Alabama Men's Clinic, and John Justin Caulfield, M.D.

v.

Robert Snell and Tabitha Snell

Appeal from Jefferson Circuit Court
(CV-16-901166)

WISE, Justice.

AFFIRMED. NO OPINION.

Parker, C.J., and Shaw, Bryan, Mendheim, Stewart, and Mitchell, JJ., concur.

Bolin and Sellers, JJ., dissent.

SELLERS, Justice (dissenting).

Robert Snell and Tabitha Snell sued AMMC, P.C., d/b/a Alabama Men's Clinic ("AMMC"), and Dr. John Justin Caulfield, alleging medical malpractice. After a trial in 2018, a jury returned a verdict in favor of the defendants, and the Snells filed a motion for a new trial. The trial court granted that motion, and the defendants appealed. I respectfully dissent from the Court's decision to affirm the trial court's judgment.

In their motion for a new trial, the Snells asserted that, after the trial, they discovered evidence of juror misconduct. Specifically, they alleged that several jurors had failed to give complete and truthful answers to questions asked during voir dire.

The trial court held two hearings on the motion for a new trial, during which it heard testimony from the jurors. After the hearings, the trial court entered an order granting the motion for a new trial based on the failure of three particular jurors to reveal during voir dire that they or their family members had been defendants in lawsuits. Dr. Caulfield and AMMC appealed.

The applicable standard of review calls for this Court to determine whether the trial court exceeded its discretion in granting the Snells' motion for a new trial. Hood v. McElroy, 127 So. 3d 325, 328 (Ala. 2011). "[T]he proper inquiry for the trial court on [a] motion for new trial, grounded on allegedly improper responses or lack of responses by prospective jurors on voir dire, is whether this has resulted in probable prejudice to the movant." Freeman v. Hall, 286 Ala. 161, 166, 238 So. 2d 330, 335 (1970). "[N]ot every failure of a venireman to respond correctly to a voir dire question will entitle the losing party to a new trial." Wallace v. Campbell, 475 So. 2d 521, 522 (Ala. 1985).

The following occurred during voir dire:

> "[SNELLS' COUNSEL:] ... [W]hen I ask a question about you, what I'm talking about is you and members of your immediate family. Members of your immediate family would be your husband, wife, father, mother, brother, sister, children. So if you know if I ask a question and you know that somebody in your immediate family might be affected by it or might have an answer to that question, if you will hold up your hand, we will see where we go with that.
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> "....
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> "[SNELLS' COUNSEL:] Have any of you ever been defendants in a lawsuit? That is someone sued you or a member of your immediate family? And what I'm talking about, I'm not talking about divorce or

> anything like that, I'm talking about somebody sues you for personal injuries or damages or anything like that.
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> "....
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> "[SNELLS' COUNSEL]: Now, anyone else been a defendant? Not divorces or anything like that, just personal injuries for money, something that involves damages.
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> "....
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> "[SNELLS' COUNSEL]: Now, let me take that back a step. Have any of you been in a situation where it didn't go to a lawsuit but somebody made a claim against you for damages? Car wreck, a bill, anything like that that was upsetting to you?"

In its order granting the Snells' motion for a new trial, the trial court stated that the Snells were probably prejudiced by the failure of jurors C.D.C., M.H., and R.G.H. to properly respond to voir dire questioning.

Juror C.D.C. had three small-claims default judgments entered against her in collections actions from January 2015 to May 2016. She testified during one of the hearings on the motion for a new trial that she did not remember being asked during voir dire if she or her family members had been a defendant in a lawsuit. She also testified that she was not even aware of the default judgments and that she was not trying to deceive anyone by not disclosing their existence.

The Snells, however, introduced evidence indicating that D.C. had been personally served with garnishment papers with respect to one of the small-claims judgments.

Juror M.H. and her mother were sued in an eviction action in October 2015 and had a judgment entered against them in that action. M.H. testified during one of the hearings on the motion for a new trial that she did not remember the question being asked during voir dire regarding whether she or her family members had been a defendant in a lawsuit. When asked if she had, in fact, been a defendant in a lawsuit, she responded that she and her mother had lived at an apartment and that both their names were on the lease. She testified that she did not mean to deceive anyone and that the existence of the eviction judgment did not influence her deliberations.

Juror R.G.H. and his wife had multiple small-claims judgments entered against them in collections actions. During one of the hearings on the motion for a new trial, R.G.H. claimed that he was unaware of some of the judgments. As for the ones he did remember, he testified that he never attended court proceedings and that he did not consider the voir dire questions in the present case to be aimed at collections

actions. He testified that he did not intend to deceive anyone and that the fact that he had been a defendant in the collections actions did not influence his deliberations.

After R.G.H. testified, an investigator employed by the Snells' attorney testified that, when he served R.G.H. with a subpoena to appear at the new-trial hearing, R.G.H. told the investigator that lawyers are "greedy," that R.G.H. had discussed his opinion on that matter with the other jurors at some unknown point during or after the trial, and that R.G.H. had decided early in the proceedings that he was not going to award the Snells anything. R.G.H. denied those allegations. Defense counsel moved to strike the investigator's testimony as hearsay and as an improper attempt to impeach the jury's verdict under Rule 606(b), Ala. R. Evid. The trial court did not rule on the motion to strike, but its order granting the Snells a new trial expressly referenced the investigator's testimony. Even assuming the investigator's testimony was admissible for one reason or another, I am still of the opinion that the trial court exceeded its discretion in granting the motion for a new trial.

Although voir dire questions may be very simple to practicing lawyers, they can be confusing for average jurors. Many members of the general public are unfamiliar with even the legal meanings of the terms "plaintiff," "defendant," and "judgment." Asking someone whether he or she has ever been a plaintiff or a defendant can, at times, require an explanation. Many people do not appreciate what a judgment is, why it is entered against them, or that it was the result of a court action involving litigation. Our legal system and process can be confusing to jurors who have had limited interaction with it.

But jurors take their duty very seriously and give their best efforts to understand their role. They appreciate that, from all the questions asked during voir dire, it comes down to whether they can be fair-minded. Can they set aside prejudices and preconceived notions, listen to the evidence, and make a fair decision? While the makeup of a jury results from seasoned trial counsel's careful study of background, body language, and answers to probing questions resulting in strikes, the jury is basically an amalgam of solid ordinary

citizens trying to fulfill their civic duty to the best of their ability.

Although I believe the vast majority of jurors take their responsibilities seriously and put forth their best effort, I doubt that many people actually enjoy jury duty. For 10 dollars per day and 15 cents per mile they are absent from work and juggle child-care and other family responsibilities. But they serve because they are summoned and they believe this infrequent tax on their time is a responsibility akin to voting. We should be thankful for their service. The last time I myself served as a juror, the presiding judge told everyone how invaluable their service was to the administration of justice. I think that is right; jurors' services are invaluable and critical.

That is why it troubles me when, after a jury has reached a verdict and has been dismissed, the jurors are subjected to investigation to determine if they were truthful during voir dire. The idea that an investigator would use public records after an unfavorable verdict to attempt to nullify that verdict strikes me as a challenge to the entire system. How humiliating must it be for a juror to be hauled back into

court, cross-examined, treated like a criminal, and made to feel that his or her service was illegitimate.

The allegations of misconduct in the present case revolve around whether the jurors understood questions during voir dire, the truthfulness of their answers, and what information regarding their prejudices they failed to disclose. Some of the information used to "impeach" each juror was not newly discovered information, but consisted of information anyone could have obtained before trial by a simple search of courthouse records. Why was this information not obtained earlier in the proceedings and used to consider whether to strike the jurors before wasting time trying the case? To cross-examine jurors after a verdict is rendered using information that was in the public domain and readily available before voir dire is unfair to all parties. Trial counsel bears a burden to be properly prepared for voir dire and should be prohibited from using public information obtainable before trial to engage in post-trial juror examination to support a motion for a new trial.

After the trial in Ankor Energy, LLC v. Kelly, 271 So. 3d 798 (Ala. 2018), counsel for the losing party made numerous

telephone calls to a juror in an effort to obtain an affidavit to assert juror misconduct as a reason for a new trial. The juror, failing to understand what an affidavit was, signed three different statements. On appeal, we held that the "trial court exceeded its discretion in granting the new-trial motion alleging juror misconduct absent ... admissible [evidence] indicating that [the] misconduct was prejudicial." 271 So. 3d at 809. Thus, juror misconduct alone is not enough; the misconduct must have caused prejudice.

In the seminal case of Freeman v. Hall, 286 Ala. 161, 238 So. 2d 330 (1970), the Court noted that the movant for a new trial based on incorrect or nonexistent responses to voir dire questions must demonstrate that the responses or lack thereof resulted in probable prejudice to the movant. The Court identified five relevant factors in determining whether prejudice has been established: 1) the temporal remoteness of the matter inquired about; 2) the ambiguity of the question propounded; 3) the prospective juror's inadvertence or willfulness in falsifying or failing to answer; 4)the failure of the prospective juror to recollect; and 5) the materiality of the matter inquired about.

In my view, the jurors in the present case simply did not understand vague voir dire questioning and legal jargon, forgot about judgments that had been entered against them, or neglected to disclose minor personal information. I see no attempt by a juror to be misleading or evasive during voir dire. It is one thing to knowingly tell a falsehood or fail to disclose a critical disqualifying factor when prompted. But it is quite another to forget a small-claims judgment resulting from a debt or to fail to remember a less than material issue about a relative, coworker, or neighbor. I would conclude that the failure of the prospective jurors to fully and correctly respond to voir dire questions did not influence the jury's deliberations and had no material adverse effect on the jury's verdict. There may have been juror misconduct in the strict sense of the word, but the misconduct was not remotely prejudicial enough to taint the jury's verdict. Accordingly, I dissent.