

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002190-MR

ROSEMARY HOROWITZ

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 96-CI-02994

KENTUCKY EASTER SEALS SOCIETY, INC.,
A/K/A CARDINAL HILL REHABILITATION HOSPITAL

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: DYCHE, EMBERTON, AND MILLER, JUDGES.

MILLER, JUDGE: Rosemary Horowitz brings this appeal from a judgment of the Fayette Circuit Court entered September 8, 1999, upon a jury verdict. We affirm.

In September, 1996, Horowitz brought an action against the Kentucky Easter Seals Society, Inc., a/k/a Cardinal Hill Rehabilitation Hospital (Cardinal Hill), alleging that Cardinal Hill negligently performed a functional capacity evaluation (FCE) upon her in January, 1996, resulting in personal injuries.

It appears that Horowitz had a history of back problems. In 1990, she had a break in her lower spine, which was

repaired through a spinal fusion. She took leave from her employment and began receiving continuous disability benefits from her employer's insurance carrier, CIGNA Insurance Company (CIGNA). Her symptoms worsened, and she underwent a second fusion in 1991. In 1992, because of continuous pain and deteriorating condition, she underwent a third spinal surgery utilizing rods and screws to stabilize her spinal column. In 1993, she underwent a fourth surgery wherein new rods and screws were inserted in her back in addition to a solid fusion.

After the foregoing travail, her doctor was of the opinion that her condition reflected an arachnoiditis picture. Arachnoiditis is a condition that can develop as a result of multiple back interventions from surgeries and myelograms. Her diagnosis was that of spondylolisthesis and arachnoiditis.

In January, 1996, Horowitz went to Cardinal Hill, a rehabilitation hospital, for an FCE as requested by CIGNA. CIGNA was paying disability benefits and was interested in determining her ability to return to work.

Linda Freudenberger, a licensed occupational therapist, and Jennifer Meyers, a licensed physical therapist, conducted the FCE at Cardinal Hill.

An FCE is designed to determine a person's maximum safe functional abilities. Before administering the various physical tests, Horowitz was interviewed at length concerning her medical history, physical impairment, and disabilities. It is through the physical tests relative to this evaluation that Horowitz claims to have incurred personal injury. She basically claims

that the FCE exceeded her physical limitations thereby causing additional injury.

Horowitz's action came on for trial before a jury on July 19, 1999. The jury returned a verdict for defendant, Cardinal Hill. Judgment was entered upon the verdict, thus precipitating this appeal.

Horowitz presents an assortment of alleged errors during the course of the trial. Specifically, she claims: (1) Error in composing the jury; (2) Error in admission of evidence; (3) Error in presentation of admissions to the jury; (4) Error in excluding evidence; (5) Error in permitting appellee to substitute witnesses; (6) Error in excluding testimony by appellant's experts; and (7) Error in permitting interruptions and delay in the trial.

We shall discuss the assignment of errors in the order presented.

The first allegation of error surrounds of juror number 449 and juror number 517. Juror 449 stated that he was romantically involved with an employee of Cardinal Hill. The court refused to strike this juror for cause. Horowitz was forced to use a peremptory challenge to exclude this juror and now claims error.

It is fundamental that a juror is qualified to serve unless there is a showing of actual bias. See Key v. Commonwealth, Ky. App., 840 S.W.2d 827 (1992). It is incumbent upon a party claiming bias to prove his point. See Polk v. Commonwealth, Ky. App., 574 S.W.2d 335 (1978). The ultimate fact

is that the court has broad discretion in qualifying jurors, and unless there is a clear abuse, this Court will not interfere. We perceive no such abuse.

During the course of trial, juror 517 and other jurors were apparently speculating as to the identity of a person sitting in the back of the courtroom with a laptop computer. They speculated the person was an insurance representative either of Cardinal Hill or CIGNA. Juror 517 approached the individual and asked questions. The court interviewed this juror and subsequently discharged her. Thus, juror 517 had no part in the verdict. As a matter of fact, neither of the complained jurors participated in the decision. As to other jurors, Horowitz failed at trial to discover the extent of the alleged misconduct and failed on appeal to prove that her right to a fair and impartial trial was impaired. See Gould v. Charlton Company, Inc., Ky., 929 S.W.2d 734 (1996). We thus conclude that no reversible error resulted.

We turn to the second assignment of error. In March, 1997, Horowitz served upon Cardinal Hill a set of Requests for Admissions. Request No. 12 read as follows:

REQUEST NO. 12: Admit that page 2 of Exhibit "C" attached hereto, acknowledges that, on Jan 25, 1996, Plaintiff lifted the following weights: 23.75 pounds, 18.75 pounds, 11 pounds, and 18.75 pounds.

Cardinal Hill answered as set forth below, and the matter was admitted. Ky. R. Civ. P. (CR) 36.01.

RESPONSE NO. 12: Deny that part of page 2 of Exhibit "C" which appears to state "On January 25, 1996, Plaintiff lifted the following weights: 23.75 pounds, 18.75

pounds, 11 pounds, and 18.75 pounds".
Actually, plaintiff lifted 23.75 pounds from
12 inches to her waist, 18.75 pounds from
knee height to her waist height, 11 pounds
from her waist to overhead and two handed
carried 18.75 pounds 15 feet".

On June 2, 1997, Horowitz took the deposition of
Meyers. While reviewing documentation of Horowitz's FCE, Meyers
testified that she had made a mistake, which formed the basis of
the above admission. She stated that the lifting of 18.75 pounds
was not from knee height to waist height, but was rather from
waist to eye level. During the course of trial, Cardinal Hill
requested the court to withdraw the admission. Rather than
allowing withdrawal of the admission, the court permitted
Cardinal Hill to produce evidence contradicting the admission.

Horowitz complains that the trial court committed
reversible error by allowing evidence contradictory to the
parties' above admission. In support thereof, she cites to CR
36.02 which states, in part, as follows:

Any matter admitted under Rule 36 is
conclusively established unless the court on
motion permits withdrawal or amendment of the
admission. Subject to the provisions of Rule
16 governing amendment of a pretrial order,
the court may permit withdrawal or amendment
when the presentation of the merits of the
action will be subserved thereby and the
party who obtained the admission fails to
satisfy the court that withdrawal or
amendment will prejudice him in maintaining
his action or defense on the merits.

Thus, we observe that ordinarily an admission is conclusive and
may not be contradicted at trial. However, the court may permit
withdrawal or amendment of such admission subject to the
provisions of CR 16. That rule provides, in part:

The court shall make an order which recites . . . the agreements made by the parties as to any of the matters considered . . . and such order when entered controls the subsequent course of the action, unless modified at or before the trial to **prevent manifest injustice**. (Emphasis added.)

We think it incumbent upon the trial court to ensure that facts presented by admission are true. In the case at hand, we believe that the introduction of contradictory evidence prevented a "manifest injustice." CR 16. While it appears the trial court may have erred procedurally in permitting explanatory evidence rather than simply withdrawing or amending the admission, we think such error harmless. CR 61.01.

We now review assignment of error number three. We note that this argument is somewhat vague. Apparently, the complaint is that the trial court prejudiced the jury against Horowitz in the manner in which it read certain admissions. Specifically, the matter surrounds whether Horowitz submitted herself to Cardinal Hill for the FCE on January 24 and 25, 1996, with a twenty-five-pound weight limitation.

We do not think the jury was prejudiced by the trial court's reading of the admissions. Pursuant to her own request, the court read the judicial admissions in the manner and format selected by Horowitz. The court made it abundantly clear that these were questions asked by Horowitz and the answers given by Cardinal Hill. At the outset, the court advised the jury as follows:

Plaintiff has posed certain questions to the Defendant asking that they make certain admissions which they have made from time to time throughout the course of the trial. I'm

going to read to you now those admissions that have been asked throughout the course of the trial.

The court was asked by Horowitz's counsel to clarify the matter, and the following colloquy took place:

Mr. Morris: Your Honor, I would like to have the Court explain one thing. These are admissions that Cardinal Hill is willing to admit to.

Judge Noble: I've already stated to the jury that these are requests to admit, they were posed to the defendant; that the defendant at various times throughout the course of the trial admitted to.

Mr. Morris: I just wanted the jury to understand those are not things that the Court is saying.

Judge Noble: I think they understand, don't you?

Finally, we are not of the opinion the jury was misled by the presentation of the admissions. The jury was well aware of the nature of this law suit. The charge was that Cardinal Hill negligently administered physical tests in performing the FCE. The basis of the negligence was that certain tests exceeded physical limitations applicable to Horowitz. We discern no prejudice in the manner of presenting the admissions to the jury.

We now turn to asserted error number four. Horowitz apparently designated CIGNA as a deponent. As such, the testimony of CIGNA's corporate representative, one Paul Haberstock, was produced. CR 30.02(6). The purpose was to secure information regarding Horowitz's disability claim.

Horowitz now argues it was prejudicial to allow Cardinal Hill to attack the representative's credibility upon the basis of lack of personal knowledge. We disagree with this contention. Certainly any witness who offers evidence is open to impeachment on the basis of lack of information about which he or she speaks. We know of no evidence that is *per se* unimpeachable. It was certainly permissible to show that the corporate representative had no personal knowledge of things about which he spoke. We do not think it prejudicial for Cardinal Hill to have demonstrated such. As a matter of fact, it is common knowledge that corporate executives generally do not speak from personal knowledge, but rather from information compiled by corporate subordinates. We conclude it was altogether proper for Cardinal Hill to call this to the attention of the jury. It was a useful element in evaluating the testimony of the corporate representative.

We now address assignment number five. During the course of the trial, Cardinal Hill's expert, one Kate Tuminski, became incapacitated. The court allowed Cardinal Hill to substitute another expert, one Dr. Daniel Wolens. Horowitz claims that the substitution was in error and that Wolens was not a qualified expert. We reject both arguments. The substitution of an expert is well within the discretion of the trial court. See Ray v. Stone, Ky. App., 952 S.W.2d 220 (1997). The competency of Dr. Wolens as a witness was more than adequately substantiated. Dr. Wolens was a board certified physician in occupational medicine. He had extensive experience in a clinical

practice focused upon spinal injury and had served as medical director of a hospital's occupational and environmental medical program. In summary, we do not think the trial court abused its discretion in this matter. Id.

We now focus upon the sixth assignment of error. Horowitz maintains that the trial court committed reversible error by excluding the testimony of certain "experts" and by refusing to allow evidence of alleged missing and/or destroyed Cardinal Hill documents. Horowitz, however, failed to identify the excluded "experts," failed to specify what testimony was excluded, and further failed to demonstrate any prejudicial effect therefrom. Moreover, Horowitz does not explain the significance or content of the mysterious missing and/or destroyed documents. Upon the whole, we hold that if any error occurred it was harmless. CR 61.01.

Horowitz also argues that the trial court committed reversible error by its admonition to the jury to disregard certain testimony of one, Susan Isernhagen. Isernhagen testified that it was a physical therapist's duty to monitor the FCE and to stop same if a patient exhibited pain or discomfort. The trial court admonished the jury to disregard such testimony. The court informed the jury that it had the ultimate responsibility to determine whether Cardinal Hill's physical therapists had any duty to stop testing because of pain. We are of the opinion that the court's admonition to disregard Isernhagen's testimony did not affect a substantial right of Horowitz and thus was not prejudicial error. Ky. R. Evid. 103(a); CR 61.01.

We now dispose of Horowitz's final argument. Horowitz generally argues that the trial court did not conduct the trial in an "orderly process" by allowing forty- to sixty-minute recesses, seventy- to ninety-five-minute lunch breaks, and forty-five- to fifty-minute side-bars. We summarily reject such argument.

The record demonstrates this case was well tried. In sum, we believe Horowitz received a fair and impartial trial.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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