

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000325-MR

PAUL L. MILLS

APPELLANT

v. APPEAL FROM ROCKCASTLE CIRCUIT COURT
HONORABLE DANIEL J. VENTERS, JUDGE
ACTION NO. 97-CI-00051

LYNN D. KENNEDY; ESTATE OF
LYNN D. KENNEDY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: DYCHE, HUDDLESTON, AND KNOPF, JUDGES.

DYCHE, JUDGE: Paul L. Mills was involved in a car accident with Lynn Kennedy¹, and the issue of liability was decided by summary judgment by the court prior to trial. Following a trial on the issue of damages, the jury returned a verdict of \$0 for Mills. He now appeals, alleging juror misconduct. Finding no error, we affirm.

Mills claims that Raymond Mason, a member of the jury pool who had been excused from this case by the court for cause but was required by the court to remain for the trial, made an

¹Kennedy succumbed to cancer prior to trial.

inappropriate comment in the presence of the jurors during a break in the proceedings. In an affidavit filed by the father of Mills's counsel, who was in the hallway where the disputed comment was made, Mason was alleged to have said that he would not award Mills any money because it was not right to take money from the deceased defendant's children. Mason was questioned by the trial court and denied making the statement. Mills's counsel declined to question the jurors about the remark when the court offered that opportunity.

The trial court did not admonish the jury specifically about the statement, and the jury returned a unanimous verdict. Mills argues that it was error for the trial court to fail to give the promised admonition, and claims that the jury was tainted by the remark. After examining the portions of the transcript designated by Mills as the record on appeal, we find no error.

Our reading of the record reveals no promise by the trial court to admonish the jury. The exchange between the court and counsel following the examination of Mason, and his denial of making the alleged remark, reads as follows:

COURT: Do you want to poll any of the jurors or talk to any of the jurors?

MR. DAVIS [counsel for Mills]: Probably the person that told us is quite frankly my Father. He came down to watch the trial today, and I know for a fact that my Father said that this man made that statement that he did, and I would ask for a specific admonishment in regard to that. I really don't want to have my Father get involved in it. He would swear that he heard that statement but I believe a specific admonishment from the Court in regard to

whether Mrs. Kennedy had children or whatever would not be relevant.

MRS. LAMBERT [counsel for Kennedy]: I would not object.

COURT: I doubt that any jurors would be too impressed by Mr. Mason's commentary anyway. At the conclusion of the evidence **I will remind them of that obligation.** Okay.

(Emphasis added.)

The trial court indicated in its order denying Mills's motion for new trial that it had examined the alleged statement during trial and "concluded that the integrity of the jury was in no way compromised by the presence of Mr. Mason during the trial, nor by any comments attributed to him." The transcript of the court's remarks to the jury at the close of all evidence is not included in the record on appeal. However, we see no indication that the court promised to admonish the jury about Mason's statement; it stated that it would remind the jurors of their obligation.

Mills's counsel did not poll the jurors regarding what, if any, prejudicial effect the alleged remark might have had on their deliberations or their attitudes. In fact, the entire argument on appeal is based on conjecture and speculation.

Mills's brief to this Court states that:

[w]hether Mr. Mason actually made the statements is not at issue. The fact that the trial court agreed to give the specific admonishment is sufficient to give rise to the inference that the comments were made and could potentially prejudice the Jury.

We are not inclined to pile supposition upon supposition in order to reach the conclusion that the jury could have potentially been tainted.

While an uncontroverted affidavit supporting a motion for new trial may be taken as true, Leslie v. Egerton, Ky., 445 S.W.2d 116, 118 (1969), the affidavit here is directly contradicted by Mason himself. There is no indication that any member of the jury was actually influenced by the statement. Although an award of \$0 damages is unusual, especially where liability has been determined by the court prior to trial, we do not have the testimony of the witnesses to examine whether the award was so disproportionate that it could only have stemmed from passion or prejudice. We will not intrude upon the verdict when we are presented with only an unsupported assumption of prejudice. Tilley v. Bell, Ky., 479 S.W.2d 901, 903 (1972).

The judgment of the Rockcastle Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Rodney G. Davis
Richmond, Kentucky

BRIEF FOR APPELLEE:

Bridget L. Dunaway
J. L. Albright
London, Kentucky