

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002117-MR

THE ESTATE OF TODD CHARLES COX, a minor,
Deceased, by the Personal Representative
DWIGHT COX and JERRY F. SAFFORD, Ancillary
Administrator of the ESTATE OF TODD CHARLES COX APPELLANTS

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 99-CI-00238

RANDALL DAVIDSON, M.D.; JOSEPH D. POTZICK,
M.D.; and GILBERT, BARBEE, MOORE & MCILVOY,
P.S.C., d/b/a GRAVES-GILBERT CLINIC APPELLEES

and NO. 2000-CA-002193-MR

JOSEPH D. POTZICK, M.D. and GILBERT, BARBEE,
MOORE & MCILVOY, P.S.C., d/b/a GRAVES-
GILBERT CLINIC CROSS-APPELLANTS

vs. CROSS-APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 99-CI-00238

THE ESTATE OF TODD CHARLES COX, a minor,
Deceased, by the Personal Representative
DWIGHT EDWARD COX; DWIGHT EDWARD COX,
individually; SHIRLEY FAYE COX, individually;
DWIGHT EDWARD COX, as Next Friend of DANE LOUVIERE;
KAITLYND COX; NICOLETTE COX; CORDELL COX, a minor;
TIMOTHY COX, a minor; JERRY R. SAFFORD, Ancillary
Administrator of ESTATE OF TODD CHARLES COX; and
SHIRLEY FAY COX, as Next Friend of DANE LOUVIERE CROSS-APPELLEES

and

NO. 2000-CA-002224-MR

RANDALL DAVIDSON, M.D. CROSS-APPELLANT

vs. CROSS-APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 99-CI-00238

THE ESTATE OF TODD CHARLES COX, a minor,
Deceased, by the Personal Representative
DWIGHT EDWARD COX and JERRY F. SAFFORD,
Ancillary Administrator of the ESTATE
OF TODD CHARLES COX

CROSS-APPELLEES

OPINION
AFFIRMING AS TO THE APPEAL
AND THE CROSS-APPEALS

** ** * * * * *

BEFORE: COMBS and MILLER, Judges; and MARY COREY, Special
Judge.¹

COMBS, JUDGE: The Estate of Todd Charles Cox and others appeal from a judgment of the Warren Circuit Court entered April 18, 2000, following a jury verdict in favor of the defendants in a medical negligence action. In their cross-appeal, the appellees (defendants below) challenge the trial court's denial of their motion for a directed verdict. We affirm as to both the appeal and the cross-appeals.

Just after midnight on March 1, 1998, Todd Charles Cox, a minor, was seen at Greenview Hospital Emergency Department in Bowling Green Kentucky. Cox, an Alabama resident, had been visiting family in Louisville when he began suffering severe stomach pain and episodic vomiting. En route to Huntsville, Cox's father decided that his son needed prompt medical attention. Dr. Randall Davidson, the emergency room physician,

¹Senior Status Judge Mary Corey sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

assessed Cox and determined that he was dehydrated and suffering with acidosis. Fluid treatment was ordered and laboratory tests were conducted. The test results led Dr. Davidson to believe that Cox might have a diabetic condition. Dr. Davidson then consulted by telephone with Dr. Joseph Potzick, a pediatrician.

Dr. Potzick believed that Cox's elevated blood-sugar level stemmed from gastritis and dehydration rather than from a diabetic condition. Potzick suggested that fluid treatment be continued and that Cox be carefully observed. He discouraged Cox's admission to the hospital unless his condition worsened.²

Acting on his own clinical judgment, Dr. Davidson discharged Cox at 3:45 a.m. After an uneventful, three-hour drive home and a shower, Cox suddenly collapsed and died.

On February 19, 1999, Dwight Cox was appointed personal representative of his son's estate in Alabama.³ Days later, this wrongful death action was filed in Kentucky's Warren Circuit Court by Cox both in his individual capacity and as personal representative of the Estate.⁴ Because there was no indication in the complaint that an ancillary administrator had been appointed in the Commonwealth to represent the interests of the

²Dr. Davidson's encounter record indicates that after Cox's father was informed of the possible need for admission, he indicated that he "really did not want to admit the child here and would rather take him home to see a doctor there."

³Letters of Administration appended to the complaint named Dwight Edward Cox the personal representative of the estate and indicated that he was granted authority to act in transactions specifically identified in the Alabama Code.

⁴Attorneys representing the plaintiffs were permitted to appear pro hac vice.

Estate of Todd Charles Cox, Dr. Potzick and Graves-Gilbert Clinic contended in their answer that the complaint failed to state a claim upon which relief could be granted.⁵

Following *voir dire*, a jury was empanelled and the plaintiffs presented their evidence. The defendants then filed a joint motion for directed verdict in which they contended that the action could not proceed to judgment against them since the Estate lacked proper ancillary administration and thus a proper plaintiff to prosecute the action. The trial court considered the motion but refrained from ruling until the close of proof.

The defendants presented their respective cases and then renewed their motion for directed verdict. They argued again that the plaintiffs had failed to qualify a Kentucky ancillary administrator and that since the statute of limitations had run, their failure could not be remedied by re-filing the action or by amending the original pleadings. The trial court denied the motion and permitted the plaintiffs to amend their pleadings to add Jerry F. Safford (their Kentucky attorney) as a party-plaintiff to serve as the ancillary administrator of the Estate.⁶

The jury was instructed, and the parties delivered their closing arguments. Following deliberation, the jury

⁵Kentucky violates no federal constitutional guarantee by requiring a foreign fiduciary to apply and become appointed personal representative of a decedent's estate in the courts of this state. See Vassill's Administrator v. Scarsella, 292 Ky., 153, 166 S.W.2d 64 (1942).

⁶Todd Cox died on March 1, 1998. The amended complaint of the ancillary administrator was not filed until April 14, 2000.

returned a verdict in favor of the defendants. The trial court denied the plaintiffs' motion for new trial as well as the defendants' motion for JNOV.

On appeal, the appellants contend that the trial court erred by failing to instruct the jury properly and by failing to order a new trial based upon juror misconduct. We consider each issue in turn.

By way of a supplementary motion for new trial, the appellants contended that the proceedings had been tainted by juror misconduct.⁷ They argued that juror Stephanie Talley had knowingly failed to disclose the fact that she had grown up with Larea Steele, an employee of the Graves-Gilbert Clinic. The trial court rejected the contention.

On appeal, the appellants contend that the court should have granted a new trial because they had established that the juror had failed to give a proper response during *voir dire*. We disagree.

A party seeking a new trial on the ground of juror misconduct has the burden of proving the facts on which he relies to warrant such action by the court as well as showing that the facts as proven operated to his prejudice. Norris v. Payton, Ky., 83 S.W.2d 870 (1935); see also, Ligon Specialized Hauler, Inc. v. Smith, Ky. App., 691 S.W.2d 902 (1985). Having reviewed relevant portions of the voir dire proceedings, we are not persuaded that Ms. Talley failed to provide an accurate response

⁷Despite grave reservation, we accept that the appellants' argument has been properly preserved for our review.

to questions posed to her. Moreover, even if the facts alleged were true, the appellants have failed to demonstrate how they were prejudiced in any respect.

The issue of whether a new trial should be granted is a matter of judicial discretion which will not be disturbed on appeal unless an abuse of discretion is shown. Louisville Memorial Gardens, Inc. v. Commonwealth, Department of Highways, Ky., 586 S.W.2d 716 (1979). Talley testified that she had not failed to disclose requested information; that she had not talked with Steele during the pendency of the trial; and that her decision in the case had not been improperly affected. We conclude that there was no abuse of discretion in the trial court's denial of the appellants' motion for a new trial.

Next, the appellants contend that the court should have granted a new trial because it failed to instruct the jury properly. CR 59.01 permits a new trial to be granted for errors of law occurring at trial and properly objected to by the party seeking relief.

The appellants argue that the trial court erred in submitting Instruction #2 to the jury. It provided as follows:

Do you believe from the evidence, that Todd Charles Cox died from a condition that could not be diagnosed or treated and without the fault of anyone?

The appellants contend that the instruction precluded the jury from considering the doctors' negligence and amounted to a

prejudicial comment on the weight of the evidence as to Cox's cause of death.⁸

The appellants have failed to comply with CR 76.12(4)(c)(iv), which requires an appellant to supply a statement with reference to the record showing whether an issue was properly preserved for review and, if so, in what manner. The appellees' citation to the record indicates that the appellants expressed broad disapproval of the challenged instruction: "I don't like Instruction 2." They also registered a generalized objection: "I object." With respect to a separately discussed instruction, they made an objection to the giving of any instruction "other than what we tendered." Such vague objections given without articulating specific grounds are insufficient to preserve the issue for appeal. See Burgess v. Taylor, 44 S.W.3d 806 (2001).

An argument with respect to jury instructions will not be considered where the trial court's attention was not timely called to the point. Pipelines, Inc. v. Muhlenberg County Water District, Ky., 465 S.W.2d 927 (1971). The Appellants first asserted these specific errors in their motion for a new trial. Consequently, the dilatory objection cannot be cured and considered timely for the issue to be properly preserved for review. Nevertheless, considering the instructions as a whole, we conclude that the law as stated was essentially correct and

⁸Defense pathologists indicated that Cox suffered from a blockage of the av node artery, which was the condition that was the ultimate cause of death. This condition could not have been diagnosed, treated, or prevented by the physicians.

resulted in no prejudice. In combination with Instruction #2, the court instructed the jury: (1) that it was the duty of Dwight Cox to exercise ordinary care for the life and safety of his son; (2) that it was the duty of each doctor to exercise the degree of care and skill expected of a reasonably competent physician; and finally, (3) that any fault be apportioned to each party. The court allowed counsel to make these points to the jury during closing argument. We conclude that the instructions were sufficient. Collins v. Galbraith, Ky., 494 S.W.2d 527 (1973). The judgment is affirmed on appeal.

On cross-appeal, the appellees contend that the plaintiffs failed to file a viable complaint before the running of the statute of limitations and that the trial court erred by permitting relation back of their amended complaint. They argue that the court erred in refusing to grant their motion for a directed verdict based on this issue.

In ruling on a motion for directed verdict, the trial court must consider the evidence in the strongest possible light in favor of the party opposing the motion. A directed verdict should not be entered unless there is "a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ." Taylor v. Kennedy, Ky. App., 700 S.W.2d 415 (1985).

It is undisputed that a foreign administrator is not authorized to bring a tort action in Kentucky. The personal representative who may bring such an action is one appointed by or who qualifies in the proper court of the Commonwealth. See

Vassil's Administrator v. Scarsella, 292 Ky. 153, 166 S.W.2d 64 (1942). It is also undisputed that the amended complaint properly naming a domestic personal representative as plaintiff in this case was filed outside the period of the pertinent statute of limitations. The threshold question to be considered is whether the plaintiffs' amended complaint, tendered pursuant to Kentucky Rules of Civil Procedure (CR) 15.03, may be deemed to relate back to the filing of the original complaint that had asserted the claim within the required statutory time-frame.

In Richardson v. Dodson, Ky., 832 S.W.2d 888 (1992), the Kentucky Supreme Court addressed a fact situation similar to the case before us. In Richardson, the decedent's son, acting in his individual capacity, timely filed a *pro se* complaint alleging the wrongful death of his mother. Id. at 889. He was later appointed administrator of the decedent's estate. Prior to the filing of any motion or responsive pleading, he filed an amended complaint properly alleging his status as administrator of his mother's estate. However, the applicable statute of limitations had run by this time. The trial court held that the amended complaint could not relate back to the fatally flawed original complaint and dismissed the action. This court affirmed that decision. We held that an action brought by one who has no authority to bring it is a nullity and that substitution of the proper party is of no avail if the period of limitation has run.

Upon discretionary review, the Kentucky Supreme Court reversed the order of dismissal entered by the trial court and remanded the case. Id. at 890. Referring to the provisions of

CR 15.03(2), the Supreme Court held that the amended complaint related back to the date of the original pleading because the claim arose out of the conduct, transaction or occurrence "set forth or attempted to be set forth in the original pleading. . . ." In doing so, the Court concluded that the initial complaint, although flawed, was sufficient to permit subsequent amendment naming the personal representative of the decedent's estate as plaintiff to relate back pursuant to CR 15.03. Id. at 889.

In its opinion, the Richardson Court emphasized that the appellant, the decedent's son, was a person entitled by statute to act as administrator of the estate. The Court also noted that relation back of the amended complaint under CR 15.03 was not prejudicial to the defendants since the amendment sought only to designate the correct capacity in which the son was suing. Finally, the Court noted that the purpose of statutes of limitations is served when notice of litigation is given within the period allowed. See Nolph v. Scott, Ky., 725 S.W.2d 860 (1987).

On the other hand, there are noteworthy differences distinguishing Richardson from this case. Most importantly, the original plaintiff in Richardson was a person statutorily entitled to act as administrator of the decedent's estate and, indeed, was so appointed. Kentucky Revised Statute (KRS) 395.040 provides as follows:

- (1) The court shall grant administration to the relations of the deceased who apply for administration, preferring the surviving husband or wife, or if the surviving husband or wife does not nominate a suitable administrator, then such others as are next

entitled to distribution, or one (1) or more of them whom the court judges will best manage the estate.

(2) If no person mentioned in subsection (1) applies for administration within sixty (60) days from the death of an intestate, the court may grant administration to a creditor, or to any other person, in its discretion.

(Emphasis added.) Dwight Cox admittedly failed to become qualified in Kentucky to serve as an administrator of his son's estate in order to have proper standing to bring the wrongful death action. Even more disturbing, he failed to take immediate remedial action to have an administrator so appointed. The administrator finally chosen was not a relative but one who was appointed pursuant to the court's discretion.

The main question for our consideration is whether such an administrator not statutorily designated can qualify for purposes of CR 15.03. Richardson stopped short of such a determination:

Our view as to the application of CR 15.03 to the facts presented here is strengthened by recognition that appellant was a person entitled to be appointed administrator of the decedent's estate and, indeed, was so appointed. See KRS 395.040. We need not determine whether one outside the eligible class of appointees could toll the running of the statute by filing such a complaint.
(Emphasis added.)

Id. at 889-890. We are persuaded that the Richardson rule allowing relation back should be extended to apply in this case. The main purpose of CR 15.03 is to provide timely notice of the onus and specter of litigation to an unwary defendant. The defendants in this case were certainly not taken by surprise by

the lawsuit; it had long been timely filed before the deficiency as to the naming of the administrator finally became an issue.

The Richardson court observed in discussing a related case:

Thus, we discern no significance in the abortive attempt, if there was one, to obtain an appointment prior to the expiration of the statutory period. The event which tolled the statute was the filing of the complaint.

Despite the dilatory appointment of Mr. Safford as administrator, we believe that the policy of CR 15.03 was not compromised and that the Richardson reasoning is broad enough to encompass this factual situation. Therefore, the trial court did not err in holding that the doctrine of relation back saved this cause of action. It correctly denied the motion for directed verdict, and we affirm on the two cross-appeals in this matter.

In summary, we affirm the trial court both on appeal and on the cross-appeals.

ALL CONCUR.

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BRIEF FOR APPELLEES/CROSS-
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