

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000277-MR

AMANDA BUTLER

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 00-CI-01055

POLLEY NEACE

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, GUIDUGLI, and SCHRODER, Judges.

COMBS, JUDGE. Amanda Butler appeals from an adverse jury verdict and judgment of the Campbell Circuit Court entered on November 16, 2001. Butler filed suit for damages for injuries she sustained when the automobile she was driving was struck by a vehicle operated by the appellee, Polley Neace. Butler contends that the trial court erred to her substantial prejudice by failing to instruct the jury on her claim for future pain and suffering and by failing to declare a mistrial based on her

allegations of juror misconduct. As we disagree with those contentions, we affirm.

On November 6, 1998, Butler and Neace were traveling in separate vehicles on U.S. 27 in Campbell County, Kentucky. Neace's vehicle collided with Butler's, and Butler sustained personal injury. Butler filed this personal injury action against Neace on September 11, 2000. When trial began on October 29, 2001, Neace stipulated as to liability. Following the close of evidence and a short period of deliberation, the jury found unanimously that Butler had not incurred more than \$1,000.00 in reasonably necessary medical expenses nor had she sustained a permanent bodily injury as required by the No fault@ provision of KRS Chapter 304. Consequently, damages were not considered. The trial court entered judgment on November 16, 2001.

On November 26, 2001, nearly a month following trial, Butler filed a motion for relief based on juror misconduct and on the trial court's failure to include a jury instruction related to the damages recoverable for future pain and suffering. Attached to the motion was the affidavit of Sherrie Butler, the appellant's mother and a trial witness.

In the affidavit, Sherrie indicated that on October 29, 2001, she had engaged in a short conversation with a woman (later identified as Linda Schlosser) in a courthouse hallway.

Sherrie averred that the conversation was initiated by Schlosser and that it occurred before the trial began -- although it is not clear whether it occurred before or after *voir dire* and the swearing of the jury. Sherrie's affidavit set forth the following recitals:

4) I told her [Schlosser] I was there for my daughter's trial, that my daughter was in a car wreck and the insurance company now pay (sic) her for the injuries.

5) Ms. Schlosser made a comment to the effect that sounds like an insurance company.

6) At that point, there was no further conversation.

7) I reported this to my daughter's attorney Randy A. Byrd on November 1, 2001.

Linda Schlosser served as the foreperson of the jury that returned the defense verdict. The appellant's attorney did not report the exchange to the court at any time prior to filing the motion for relief.

The appellee responded with Schlosser's affidavit.¹

Schlosser admitted that she had engaged in a short conversation with Sherrie Butler during which Butler:

¹Butler argues briefly that Schlosser's affidavit is used for an improper purpose here. Citing Ritze v. Williams, Ky., 458 S.W.2d 613 (1970), she explains that juror's affidavits cannot ordinarily be used to impeach a verdict. As Neace points out in her brief, Schlosser's affidavit was offered to the trial court in an effort to support the verdict rather than to impeach it.

told me that her daughter was involved in the trial. I had absolutely no further conversation with Sherrie Butler. Her boyfriend or husband started talking to her and I did not say anything else to her at any time.

The trial court considered the motion, the arguments of counsel, and the contents of the affidavits. In an order entered January 2, 2002, the court denied Butler's request for relief. This appeal followed.

The appellant contends that the trial court abused its discretion by failing to declare a mistrial based upon juror misconduct. Depending upon the timing of the conversation, the appellant argues that Schlosser either failed to disclose to the court that she had contact with trial witnesses contrary to the court's admonition or that she failed to respond forthrightly to questions posed during *voir dire*. We are not persuaded that the encounter between Schlosser and Sherrie Butler necessitated a mistrial -- regardless of its timing.

To obtain a new trial because of juror mendacity, "a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause.@

Adkins v. Commonwealth, Ky., 96 S.W.3d 779, (2003), citing
McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556,
104 S.Ct. 845, 850, 78 L.Ed.2d 663 (1984). The appellant has

failed to meet the Adkins standard for declaration of a mistrial so as to warrant a new trial.

During *voir dire*, defense counsel explained to prospective jurors that Sherrie Butler, the plaintiff's mother, and Tom McLafferty, Sherrie's boyfriend, would provide testimony. He asked A[d]oes anyone know Sherrie Butler or Tom McLafferty?@ There was no response from the panel. It is not clear that Schlosser failed to answer this question honestly given her brief encounter with Sherrie Butler and Tom McLafferty. Nevertheless, even if we were to accept that Schlosser had failed to answer the question forthrightly, there is still no evidence to indicate that a more complete answer would have provided the basis for a challenge for cause. Even if defense counsel's allegation could be proven, Schlosser's brief encounter with Butler and McLafferty as described by Sherrie's affidavit would not have required her removal for cause. See Adkins, supra. The trial court did not err by failing to grant a mistrial or to order a new trial on this ground.

Next, we shall consider whether Schlosser's failure to disclose to the court her contact with the witnesses following the court's admonition required the court to declare a mistrial. The appellant correctly observes that if a juror sees or hears anything improper, that juror is under an obligation -- as admonished specifically by the court -- to report that alleged

misconduct to the trial court as soon as possible. The appellant contends that Schlosser's failure to inform the court that she had gained extra-judicial information during a conversation with Sherrie Butler deprived the plaintiff of a fair trial.

We do not presume that a juror's exposure to any and all extra-judicial information automatically renders a trial fundamentally unfair. Gould v. Charlton, Ky., 929 S.W.2d 734 (1996). The trial court is vested with wide discretion to analyze and to determine the prejudicial effect of juror misconduct -- including the impact of receiving extra-judicial information. Gould, supra, citing Byrd v. Commonwealth, Ky., 825 S.W.2d 272 (1992).

Our review of the nature and content of the extra-judicial information identified in this case reveals no indication that Schlosser was rendered unqualified to serve further as a member of the jury. Furthermore, there is no claim or suspicion that the other jurors were influenced or were even aware of the extra-judicial information. If we wholly accept the appellant's description of the encounter between Schlosser and Sherrie Butler, we cannot conclude that the exchange had any improper impact on the trial.²

²The appellant complains that the trial court erred by failing to interrogate Schlosser in an effort to determine whether her encounter

A mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice. There has been no showing of a manifest injustice in this case. The trial court did not abuse its discretion by concluding that a mistrial was not required.³

Finally, the appellant argues that the trial court erred by failing to instruct the jury with respect to damages recoverable for future pain and suffering. That alleged error is harmless in light of the defense verdict. The jury was properly instructed to address a threshold issue before considering any element of damages. The jury decided that the plaintiff's reasonably necessary medical expenses had not exceeded \$1,000.00; it also found that she had not sustained permanent bodily injury as a result of the collision. Those two findings completed and terminated any further considerations. No other damages were recoverable. Consequently, arguments with respect to an alleged error in an additional damages instruction

with Sherrie Butler required a mistrial. We disagree. The affidavits of the parties provided the trial court with adequate information as to the nature and content of the conversation at issue.

³The appellant also contends that Schlosser's failure to disclose that she had overheard a conversation between Sherri Butler and Tom McLafferty required a mistrial. However, there is absolutely no evidence in the record to support the claim that Schlosser may have overheard any conversation between Sherri Butler and Tom McLafferty.

were foreclosed by operation of the verdict. Levi v. Gonzenbach, Ky. App., 33 S.W.2d 657 (1930).

The judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Randy A. Byrd
Cincinnati, Ohio

BRIEF FOR APPELLEE:

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