RENDERED: OCTOBER 10, 2003; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000247-MR

GEORGE ROBERTS; AND
CHESTER MAE ROBERTS — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON JUDGE
ACTION NO. 99-CI-006381

LINDA M. NELSON — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: BARBER, McANULTY, AND TACKETT, JUDGES.

BARBER, JUDGE: The Appellant, George Roberts, seeks review of a judgment of the Jefferson Circuit Court directing a verdict for the Appellee, Linda M. Nelson. Appellant asserts that the trial court abused its discretion by not allowing the treating physician's deposition to be introduced into evidence. We agree, and reverse and remand for new trial.

Appellant deposed Dr. Christopher Wohltmann, who had treated him at University Hospital in Louisville for injuries

sustained in the subject April 20, 1998 motor vehicle accident. Dr. Wohltmann's deposition was taken on November 7, 2001, via a three-way conference call with the witness in Texas. The case proceeded to trial.

Our review of the video log indicates that on December 18, 2001, after voir dire and jury selection, court was recessed for the day at 12:31. On the morning of December 19, 2001, pretrial issues were discussed. Thereafter, a directed verdict was entered for the Appellee.

Appellant explains that during the discussion of pretrial issues, Appellee requested exclusion of Dr. Wohltmann's deposition in its entirety, because the deposition was not signed. Although not apparent of record, because no videotape was included with the record on appeal, Appellee states:

> However, in our case, as soon as the Trial Court stated that the deposition had not been signed and placed in the Court's record, undersigned counsel moved immediately, objecting to the introduction of the deposition testimony because he had not signed the deposition and it appeared based on the record that he had requested signing.

Appellee maintains that an avowal was necessary to preserve the issue for appeal. We disagree. In *Underhill v. Stephenson,*[1] the Supreme Court explained that "[t]he purpose of an avowal is to permit a reviewing court to have the information

[1] Ky., 756 S.W.2d 459, 461 (1988).

needed to consider the ruling of the trial court." The substance of Dr. Wohltmann's testimony is not at issue; therefore, an avowal was unnecessary.

At issue is whether the trial court abused its discretion in excluding the deposition for errors or irregularities in its signing and filing, and whether the record is sufficient for us to make that determination. CR 32.04(4) governs errors and irregularities as to the completion and return of depositions:

> Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, **signed**, certified, sealed, indorsed, transmitted, **filed**, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained. (Emphasis added)

Our review of the record reflects that on July 5, 2001, an order was entered reassigning the case for jury trial on December 18, 2001. The order directed counsel to follow the same guidelines noticed in the previous trial order for pretrial compliance documents. The previous "Civil Jury Trial Order," entered March 27, 2000, requires that "objections to portions of any depositions shall be in writing and filed with the Court no later than fifteen (15) days before trial. . . ." Further, that "[a]ll motions in limine shall be submitted no later than ten (10) days before trial."

On September 4, 2001, Appellant filed a "Notice of Filing" that he intended to introduce the testimony of Dr. Christopher Wohltmann as an expert witness, and that it was expected the doctor's deposition would be taken via telephone. As noted, Dr. Wohltmann's deposition was taken on November 7, 2001.

On November 30, 2001, the Appellee filed written objections to certain portions of Dr. Wohltmann's deposition, referencing the page numbers and lines of the transcript; moreover, Appellee sought to "remove objections" to other portions of the deposition. No defect in the signing or filing of the deposition was raised.

Based upon our review of the record, we conclude that any error under CR 32.04(4) was waived, and that the trial court abused its discretion in excluding Dr. Wholtmann's deposition. Appellee had a copy of the deposition transcript no later than November 30, 2001, when she filed her written objections. Any defect could have been ascertained with due diligence at that time, and certainly should have been discovered prior to the second morning of trial. In disallowing the deposition, the trial court failed to follow its own rules regarding the cut-off date for objections to depositions. Disallowing the deposition substantially prejudiced the Appellant, for without Dr. Wohltmann's testimony, he could not prove his case. Had Appellee

filed a motion to suppress with "reasonable promptness," Appellant would have had the opportunity to cure any defect prior to trial. We cannot discern how allowing the deposition would have prejudiced the Appellee in any way. Unquestionably, Appellee was on notice that Appellant intended to rely upon Dr. Wohltmann as his expert, and Appellee had an opportunity to cross-examine the doctor.

Insofar as the sufficiency of the record, CR 61.02 allows us to consider a palpable error which effects the substantial rights of a party, "even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."

In *Louisville Rent-A-Space v. Akai,*[2] the wrong party had been named as a defendant. At a hearing, the court dismissed the defendant, but declined to impose sanctions under Rule 11, having employed an incorrect standard. The Court of Appeals held that:

> Unfortunately, no transcript of the November 6, 1986 hearing appears in the record. In fact, the entire record can be termed meager at best. In general, an appellant has the duty to make a sufficient record to enable a review of alleged errors. *Burberry v. Bridges,* Ky., 427 S.W.2d 583 (1968). Further, an appellant has the duty to show that alleged errors were properly preserved. CR 76.12(4)(c)(iv). However, in the case at bar,

[2] Ky. App., 746 S.W.2d 85 (1988).

> the trial court clearly erred in employing the good faith standard. Had the correct standard been followed by the trial court, there is a substantial probability that appellant would have prevailed. Under these circumstances, we view the error as a substantial one, CR 61.02, and the failure to properly preserve it is not fatal. Therefore, the trial court should again examine the facts of this case in light of the correct standard.[3]

In this case, had Dr. Wohltmann's deposition been allowed, there is a substantial probability that Appellant's case would have been decided by the jury on its merits. The civil "rules should be applied to provide for a just determination on the merits, rather than to use a technicality to work a forfeiture."[4] We view the trial court's error as a substantial one, resulting in a manifest injustice. Accordingly, we reverse the judgment and remand for new trial.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Jude A. Hagan
Lebanon, Kentucky

BRIEF FOR APPELLEE:

Donald Killian Brown
Jeri D. Barclay
Louisville, Kentucky

[3] *Id.,* at 87.
[4] *West v. Goldstein*, Ky, 830 S.W.2d 379, 384 (1992).