RENDERED: OCTOBER 1, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001685-MR

SHARON LAY, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF BRANDON LAY, DECEASED; AND FRED LAY — APPELLANTS

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE STEVEN R. JAEGER, JUDGE
ACTION NO. 01-CI-01193

CHRISTOPHER S. ADLEY, M.D.; AND PEDIATRIC CARE OF KENTUCKY, P.S.C. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON, AND MINTON, JUDGES.

JOHNSON, JUDGE: Sharon Lay, individually and as administratrix of the estate of Brandon Lay, deceased, and Fred Lay, individually, have appealed from the trial order and judgment entered by the Kenton Circuit Court on July 7, 2003, following a defense verdict in their medical malpractice action against the appellees, Christopher S. Adley, M.D. and Pediatric Care of Kentucky, P.S.C. Having concluded that the trial court did not abuse its discretion in denying the Lays an evidentiary hearing

or in denying their post-verdict motions for a mistrial with respect to the issues of juror impropriety, we affirm.

On June 8, 2001, the Lays filed a medical malpractice action against the appellees, in which they alleged, inter alia, that Dr. Adley was negligent in his care and treatment of their son, Brandon Lay, and that his negligence resulted in Brandon's death.[1] The case proceeded to trial and on February 21, 2003, a Kenton County jury returned a 9-3 verdict in favor of the appellees. Following the verdict, the Lays requested the trial court to poll the jury. Each juror subsequently confirmed his or her vote in open court, thereby reaffirming the 9-3 verdict in favor of the appellees. Shortly thereafter, the Lays' attorney, Eric Deters, approached several members of the jury as they exited the courtroom to inquire about the verdict.

On February 27, 2003, the Lays filed a motion for a mistrial based on allegations of juror misconduct. In support of their motion, the Lays submitted affidavits from several members of the jury, namely, Sarah Brady, Ray Davis, John Gilligan, Dan Gaddy, Darren McCulley and Michael Clark.[2] In sum, the affidavits cited various instances of alleged misconduct.

[1] The Lays alleged that Pediatric Care of Kentucky was vicariously liable for the actions of Dr. Adley under the theory of respondeat superior, or in the alternative, that it was directly liable for his actions under a theory of negligent supervision.

[2] Brady, Gilligan and Gaddy voted for the defense. Davis, McCulley and Clark did not sign the defense verdict. When polled, they indicated that they voted for the plaintiffs.

More specifically, Brady stated that she "did not speak truthfully when polled" and that she "switched [her] vote to the defense . . . to get it over with." Brady further stated that juror Diane Russell informed her during deliberations that she had discussed issues related to the case with her daughter-in-law, who is a nurse. Gilligan stated that he "did not speak truthfully when . . . polled[,]" and he claimed the jurors that supported the appellees "convinced [him] wrongfully . . . to change [his] vote." Gaddy also stated that he "was not speaking truthfully when . . . polled." Davis and Clark both stated, in separate affidavits, that Russell informed the panel during deliberations that she had discussed issues related to the case with her daughter-in-law. Davis and Clark further stated they were under the impression that Russell had spoken with her daughter-in-law during the trial. McCulley stated that he discussed the result of a prior case that involved a medical malpractice claim in which he served as a juror with Beth Averbeck.[3] McCulley further stated that he "recall[ed] discussions among several jurors at jury breaks, prior to deliberations, about [a] prior baby death case heard by [the

[3] Averbeck served on the jury in the case sub judice. McCulley stated that the discussion took place in an elevator at the courthouse prior to the completion of jury selection.

same venire]."[4] In addition to the aforementioned allegations of misconduct, the Lays claimed that juror Justin Smith was not a legal resident of Kenton County when the case was tried.[5]

In response to the Lays' motion for a mistrial, the appellees submitted affidavits from jurors Terry Legg, David Meyer, Russell, Averbeck and Smith.[6] In sum, Russell unequivocally denied having discussed the case with her daughter-in-law during the trial and Averbeck, Meyer, Legg and Smith stated that they did not recall Russell ever mentioning that she had discussed the case with her daughter-in-law. Smith further stated that he was a resident of Kenton County.

On March 18, 2003, the Lays filed a motion requesting an evidentiary hearing on the issue of Russell's alleged conversation with her daughter-in-law. On July 7, 2003, the trial court entered an order denying the Lays' motions for a mistrial and evidentiary hearing. The court stated that it was not convinced "[the] parties were denied a fair trial[,]" or that "[t]here was [a] fundamental defect in [the] proceedings that resulted in any manifest injustice." On the same date, the

[4] The case alluded to by McCulley in his affidavit is Wells v. St. Elizabeth Medical Center, Case No. 01-CI-00255. The Wells case is currently pending on appeal before a different panel of this Court. It appears from the record that McCulley and Clark were the only jurors who served on both cases.

[5] In support of this contention, the Lays submitted an affidavit from Smith's girlfriend, Angie Hupfer, which they claim indicates that Smith was not a legal resident of Kenton County when the case was tried.

[6] Legg, Meyer, Russell, Averbeck and Smith all voted for the defense.

trial court entered a trial order and judgment consistent with the jury's verdict.

On July 15, 2003, the Lays filed a motion for a new trial, a motion to vacate judgment, and a motion for an evidentiary hearing. On August 8, 2003, the trial court entered an order denying the post-judgment motions filed by the Lays. The order reads, in relevant part, as follows:

> There is an abundance of information, accusation, innuendo, and name-calling in the various affidavits and pleadings filed of record. The Court concludes that a further evidentiary hearing is not necessary. Moreover, the Court finds no authority or grounds that would permit counsel for Plaintiff to depose a juror about the manner of the jury deliberations. Therefore, the plaintiffs' requests for an evidentiary hearing and to depose juror Diane Russell are DENIED [emphasis omitted].
>
> As in the case of Wells v. St. Elizabeth, decided contemporaneously herewith, the plaintiffs' grounds for new trial in this matter are asserted on various and different shifting theories. The allegations made are directly controverted by other members of the jury panel. The decision of the jury was confirmed by the jury poll in open Court, and no member of the panel at anytime had reported any violation of the Court's admonitions. See Rietze v. Williams, [Ky.,] 458 S.W.2d 613 (1970). This is particularly significant because the foreperson . . . McCulley, was aware of the issues that had been raised in the Wells trial, and, as stated in his affidavit, was particularly cautious during these deliberations. Based upon the totality of these circumstances, the Court concludes that no juror's conduct had any

> prejudicial effect on the deliberations or verdict. . . . Furthermore, the Court is not convinced that this jury rushed to judgment. The jury deliberated for more than two hours. The jury asked questions, and had them answered. . . . The verdict of this jury was supported by the evidence.

This appeal followed.

The Lays argue on appeal that the trial court abused its discretion in denying their motion for a mistrial and subsequent motion for an evidentiary hearing. In support of this contention, the Lays cite several instances of alleged juror misconduct, which they claim prejudiced their right to a fair trial. Specifically, the Lays contend that: (1) several jurors switched their vote just to end the trial; (2) Russell and Averbeck discussed the case during their lunch breaks; (3) Russell and Averbeck improperly allowed prejudice to influence their votes; (4) Averbeck interfered with the deliberations of the jury; (5) Russell discussed issues related to the case with her daughter-in-law during the trial; (6) several jurors discussed a prior case heard by the same jury venire, which also involved a medial malpractice claim, during the trial; and (7) Smith was not a "proper member of the jury." In addition to the foregoing allegations of juror misconduct, the Lays claim the trial court abused its discretion by not allowing the jury "to review in part or in whole" the video deposition of a witness,

Dr. Gary Utz, who testified at trial. We will address the issues raised by the Lays in this appeal in order.

It is well-established that a mistrial should only be granted "if there is a manifest, urgent, or real necessity for such action."[7] As the Supreme Court of Kentucky stated in Gould v. Charlton Co., Inc.:[8]

> It is universally agreed that 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. The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way.[9]

A trial court's decision to deny a motion for a mistrial will not be disturbed absent an abuse of discretion.[10]

"It is a long-established and generally accepted doctrine . . . that testimony or affidavits of jurors impeaching a verdict rendered by them will not be received where the facts sought to be shown are such as inhere in the verdict" [footnote omitted].[11] That is to say, absent a few limited exceptions, "a

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[7] Burgess v. Taylor, Ky.App., 44 S.W.3d 806, 815 (2001).

[8] Ky., 929 S.W.2d 734 (1996).

[9] Id. at 738.

[10] See, e.g., Maxie v. Commonwealth, Ky., 82 S.W.3d 860, 863 (2002).

[11] 75B Am.Jur.2d Trial § 1899 (1992). The origins of this rule can be traced to Lord Mansfield's often-cited decision in Vaise v. Delaval, 1 Term Rep. 11, 99 Eng. Rep. 944 (K.B. 1785). See 8 Wigmore, Evidence, § 2352 (McNaughton rev. 1961). The rule that a verdict cannot be impeached by the affidavit or

verdict cannot be impeached by the affidavit or testimony of a juror."[12] As the United States Supreme Court noted in Tanner v. United States:[13]

> There is little doubt that post-verdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict seriously disrupt the finality of the process. . . . Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of post-verdict scrutiny of juror conduct.[14]

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testimony of a juror was first recognized by Kentucky in Wickliffe v. Payne, 4 Ky. 413, 418 (1809), and it has been applied with consistency thereafter, subject to a few limited exceptions. See, e.g., Robert G. Lawson, The Kentucky Evidence Law Handbook, § 3.15 p. 152 (3d ed. 1993)(noting that "[t]here is a strong, deeply-rooted policy against subjecting jury verdicts to challenge on the basis of information provided by jurors who have rendered those verdicts. . . . The policy is reflected most directly in a universally recognized principle that broadly prohibits jurors from impeaching the validity of their own verdicts, a prohibition that is firmly embedded in the case law of Kentucky").

[12] Rietze, 458 S.W.2d at 620-21 (noting that "the affidavits of jurors are admissible to show a mistake in a verdict which had the effect of misrepresenting the jury's intention and finding"). City Taxi Service, Inc. v. Gipson, Ky., 289 S.W.2d 723, 725 (1956). The affidavits of jurors are also admissible to sustain a verdict. See, e.g., Gregorich v. Jones, Ky., 386 S.W.2d 955, 956 (1965).

[13] 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987).

[14] Id. 483 U.S. at 120-21. See also McDonald v. Pless, 238 U.S. 264, 267-68, 35 S.Ct. 783, 59 L.Ed. 1300 (1915):

> But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and

In Doyle v. Marymount Hospital, Inc.,[15] this Court acknowledged that prohibiting a juror from impeaching his or her own verdict "may work a hardship when juror misconduct . . . can only be shown by the testimony of a fellow juror."[16] Nevertheless, the Court reasoned that the theory behind the rule "is that a juror [should] recognize and report any misconduct to the trial court immediately and that to allow him to do it after the verdict 'would invite the very kind of mischief the rule was designed to obviate.'"[17] It is important to note that while some jurisdictions limit the rule prohibiting a juror from impeaching his or her verdict to statements concerning the juror's own conduct, in Kentucky it extends "to statements tending to show improper acts or communications by third persons."[18] Moreover,

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> many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.

[15] Ky.App., 762 S.W.2d 813 (1988).

[16] Id. at 815. (noting that "the fact that the juror making the affidavit did not concur in the verdict returned is immaterial" [footnote omitted]). 75B Am.Jur.2d Trial § 1904 (1992).

[17] Doyle, supra at 815 (quoting Rietze, 458 S.W.2d at 620).

[18] Rietze, 458 S.W.2d at 620. Cf., Doyle, supra at 816-17 (noting that affidavit of non-juror admissible to show that juror discussed issues related to the case with affiant). Many jurisdictions permit jurors to testify on the issue of whether extraneous information or any outside influence was

it is well-established in this jurisdiction that affidavits or testimony from a juror concerning statements made during deliberations as to matters not in evidence are inadmissible.[19]

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improperly brought to bear upon the jury. Most, if not all, of the jurisdictions that allow such testimony do so based in part on their evidentiary rules. For example, Federal Rule of Evidence (FRE) 606(b) provides that:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes [emphasis added].

Kentucky Rule of Evidence (KRE) 606, on the other hand, does not contain a provision permitting such testimony. In fact, the Kentucky Rules of Evidence are silent with respect to the admissibility of testimony by jurors concerning their verdicts. As Professor Lawson notes in his treatise on Kentucky Evidence Law, "'[the] decision to leave the matter out of the[ ] Rules is based on a belief that the subject matter is more closely related to the validity of verdicts than to the admissibility of evidence.'" The Kentucky Evidence Law Handbook at § 3.15 p. 152 (quoting Evidence Rules Study Committee, Kentucky Rules of Evidence--Final Draft, p. 57 (Nov. 1989)).

[19] See Jones v. Commonwealth, Ky., 450 S.W.2d 812, 814 (1970)(noting that affidavit of juror in criminal case stating that fellow jurors made statements during deliberations concerning criminal charges pending against the defendant that were not admitted into evidence held inadmissible). See also Barnes v. Lucas, Ky., 249 S.W.2d 778, 779 (1952)(stating that "it is well established that the affidavit of a juror [cannot] be used to impeach the verdict of the jury except to show that it was arrived at by lot. [RCr 10.04]. This rule applies to civil, as well as criminal, cases"); and Turner v. Hall's Adm'x, Ky., 252 S.W.2d 30, 34 (1952)(noting that affidavit of jurors inadmissible to show that statements were made by other jurors during deliberations concerning the extent of the defendant's insurance coverage when no evidence of insurance was admitted at trial).

The Lays reliance on the "appearance of evil" exception to the rule prohibiting jurors from impeaching their own verdict is misplaced.[20] The trial court in the case before us admonished the jury on numerous occasions throughout the course of the trial. Moreover, the jury failed to raise any allegations of misconduct during the trial and each juror confirmed his or her vote in open court when polled. The trial court is vested with "broad discretion, to determine the prejudicial effect of juror misconduct--including the impact of extra judicial information."[21] Given the vacillating nature of the affidavits submitted by the Lays in support of their motion for a mistrial, we are simply unpersuaded that the "appearance of evil" was so great as to undermine the integrity of the verdict returned by the jury. Consequently, we are unable to conclude that the trial court abused its discretion in denying the Lays' motion for a mistrial with respect to these issues.

The Lays further contend that juror Justin Smith was not a resident of Kenton County at the time of the trial. "To obtain a new trial because of juror mendacity, 'a party must

[20] In Dillard v. Ackerman, Ky.App., 668 S.W.2d 560, 562-63 (1984), this Court held that when the "appearance of evil" militates in favor of a new trial an exception to the rule that a jury cannot impeach its own verdict is warranted. The Court noted that "where the misconduct . . . was patently improper, in view of our rule that a jury cannot impeach its own verdict, we would be helpless to redress the wrong caused unless we had a doctrine to apply such as the 'appearance of evil principle.'" Id. at 562. See also Young v. State Farm Mutual Automobile Insurance Co., Ky., 975 S.W.2d 98 (1998).

[21] Gould, 929 S.W.2d at 740.

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.'"[22] The Lays made no such demonstration here. As previously discussed, Smith stated in his affidavit that he was a resident of Kenton County.[23] The Lays failed to introduce any evidence indicating that Smith lied about his residency during voir dire.

The Lays also contend that the trial court abused its discretion by failing to conduct an evidentiary hearing on the issue of Russell's alleged conversation with her daughter-in-law. We were unable to find any support for the proposition that a trial court is required to conduct an evidentiary hearing whenever a party raises allegations of juror misconduct following an unfavorable verdict. The mere fact that post-verdict allegations of juror misconduct are raised does not automatically create a right to a hearing. We are of the opinion that the decision to conduct a hearing with respect to allegations of juror misconduct lies within the sound discretion

[22] Adkins v. Commonwealth, Ky., 96 S.W.3d 779, 796 (2003)(quoting McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984)).

[23] As noted above, an affidavit of a juror is admissible to sustain a verdict. Gregorich, 386 S.W.2d at 956.

of the trial court.[24] As previously discussed, Russell unequivocally denied having discussed the case with her daughter-in-law during the trial. Moreover, several jurors stated that they did not recall Russell ever mentioning that she had discussed the case with her daughter-in-law. While the affidavits submitted by jurors Brady, Davis and Clark certainly suggest otherwise, it is well-established that "[t]he trial judge [ ] determines the issue of credibility in this area."[25] Consequently, we cannot conclude that the trial court abused its discretion by failing to conduct an evidentiary hearing on the issue of Russell's alleged conversation with her daughter-in-law. To hold otherwise would, as the United States Supreme Court noted long ago, "make what was intended to be a private deliberation, the constant subject of public investigation[.]"[26]

Finally, the Lays claim that the trial court abused its discretion by not allowing the jury "to review in part or in whole" the video deposition of Dr. Gary Utz.[27] During deliberations, the jury submitted a written request to review

[24] See, e.g., United States v. Sun Myung Moon, 718 F.2d 1210, 1234 (2nd Cir. 1983)(stating that "a trial court is required to hold a post-trial jury hearing only when reasonable grounds for investigation exist. Reasonable grounds are present when there is clear, strong, substantial and incontrovertible evidence, that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial of a defendant" [citation omitted]).

[25] Duncan v. O'Nan, Ky., 451 S.W.2d 626, 629 (1970).

[26] McDonald, 238 U.S. at 267-68.

[27] Dr. Utz testified on behalf of the Lays at trial via video deposition.

the video deposition of Dr. Utz. The record indicates that both parties agreed to allow the jury to review Dr. Utz's video deposition, which lasted approximately 38 minutes, in its entirety.[28] The trial court informed the jury in writing that Dr. Utz's video deposition would be played "in open court in its entirety." For whatever reason, the jury returned a verdict prior to viewing Dr. Utz's video deposition. The record clearly indicates that the trial court advised the jury that they could review Dr. Utz's video deposition in open court if they so desired. Consequently, we cannot conclude that the trial court abused its discretion with respect to this issue.[29]

Based on the foregoing reasons, the trial order and judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

[28] The Lays' attorney initially suggested that the jury be provided with a transcript of the deposition.

[29] The Lays argue in their brief that the trial court erred by requiring the jury to review Dr. Utz's entire deposition. This argument merits little attention as the record indicates that the Lays never objected to having the entire deposition played for the jury. Moreover, the jury did not specify which portions of Dr. Utz's video deposition it wanted to review. The jury simply asked to see the "record of Dr. Utz's deposition."

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