RENDERED: June 17, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002438-MR

SANDRA E. ZOLKIEWICZ AND
RONALD ZOLKIEWICZ — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS J. KNOPF, JUDGE
ACTION NO. 99-CI-004442

MICHAEL HEIT, M.D. AND UNIVERSITY
OBSTETRICAL AND GYNECOLOGICAL
ASSOCIATES, P.S.C. — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND TAYLOR, JUDGES.

COMBS, CHIEF JUDGE: Sandra Zolkiewicz and her husband, Ronald Zolkiewicz, appeal from a judgment of the Jefferson Circuit Court that awarded her $30,000 following a jury trial in a medical negligence case. They had alleged that the appellee, Dr. Michael Heit, was negligent in treating Sandra, who suffered from urinary incontinence. In seeking a reversal of the

judgment and a new trial, the Zolkiewiczes argue that the trial court erred in failing to excuse for cause a juror from the *venire*. In the alternative, they ask that this matter be remanded for entry of an amended judgment in the amount of $100,000 -– the amount of damages that the jury had awarded to Sandra. After reviewing the record, we have found no error in the refusal of the trial court to strike for cause any member of the *venire*. However, because of the manner in which the jury was instructed, we agree that the court erred in entering a judgment that failed to conform to the jury's verdict on the issue of damages. Therefore, we vacate and remand.

Dr. Michael Heit is a urogynecologist and reconstructive pelvic surgeon. In 1996, he performed a suburethral sling procedure on Sandra to correct problems that she was experiencing from incontinence. Sandra was unable to void following the surgery. Dr. Heit then performed a second surgery –- a partial "take down" of the sling. Although testing conducted after the second surgery revealed that Sandra still suffered an obstruction, Dr. Heit did not inform her of those test results nor did he advise her to undergo an additional surgery.

Sandra continued to suffer from problems with urination, painful bladder spasms, and sexual dysfunction. In addressing her complications, Dr. Heit advised Sandra to undergo

physical therapy and to attempt to "retrain" her bladder. After more than a year of catheterizing herself in order to be able to void, Sandra consulted with a urology specialist at the Cleveland Clinic. In 1998, a different physician performed a procedure (by now her third) on Sandra to remove the obstruction. Although the third surgery eliminated the need for self-catheterization, she continues to suffer from urge incontinence -– a permanent condition resulting from the prolonged period during which the obstruction remained.

On July 30, 1999, the Zolkiewiczes filed a complaint against Dr. Heit and his practice, University Obstetrical and Gynecological Associates, P.S.C. They alleged that the doctor deviated from the accepted standards of care in treating Sandra and thereby caused her significant mental and physical pain and suffering. Ronald asserted a claim for loss of consortium.

A trial was conducted in May 2003. At two points during *voir dire*, the Zolkiewiczes moved to strike for cause a member of the *venire*, Sue Comer (incorrectly identified in the parties' briefs as "Ms. Kulmer"). Counsel initially sought to disqualify Ms. Comer when she informed the court that her husband had previously been involved in a civil lawsuit involving his employment. She elaborated to say that her experience left her with "some real serious resentments about

the whole situation." Counsel moved for dismissal of Juror Comer from the *venire* after the following exchange at the bench:

> Mr. Thompson[1]: I guess the point we're raising with you is do you feel like you could sit – be fairly or – fairly, impartially be a juror in this case?
>
> Juror Comer: To be honest, I don't know. I haven't, you know, put that to the test, and that's as honest as I can be about it.
>
> The Court: Well, I mean, I think – you know, we just want you to sit and be fair to both sides.
>
> Juror Comer: I think I'm a fair person. Whether I – I do get a little emotional about the issue [her husband's lawsuit], but this one isn't anything [like] what happened with us, so surely I can separate myself from it.
>
> The Court: I mean, you're the person that needs to tell us that.
>
> Juror Comer: Yeah.
>
> The Court: If you feel like you can be fair to both sides. That's what they want.
>
> Juror Comer: I think I can be fair. I don't – you know, I do have that experience, so I just wanted to make sure you knew that.
>
> [further discussion about the previous lawsuit]
>
> Mr. Thompson: Given that you've had this experience, okay, and if it won't bother you, fine, but given that you've had this experience, do you feel like that maybe it might be fair to have somebody else. Even though you might try to put that aside, those feelings might come out. In other

[1] Hon. Tyler Thompson, counsel for the Zolkiewiczes.

words, if – would you want someone sitting on a jury that had this experience?

Juror Comer: I don't know what to say. I mean, I have personal opinions about litigation, period.

The Court: I think the real question is can you put that aside and listen to this case, you know, and not be – you know, and not make somebody –

Juror Comer: Yeah, keep myself out of it. I'm not very good at that, but I can certainly try.

Juror Comer appeared a second time at the bench and made the following disclosures regarding doctors in general:

Juror Comer: My friend's husband just closed his [medical] practice due to the doubling of his malpractice insurance and it's a big loss to me, both my surgeon and my best friend, so . . .

The Court: Do you think it will affect you in any deliberation in this case?

Juror Comer: I think negligence is a separate issue. I think mine is with health insurance and frivolous lawsuits, so . . . I think –

The Court: Again, everybody wants to start on an even plane. In other words, before you hear any of the evidence, do you feel like you could be fair to both sides?

Juror Comer: I feel I may be slightly biased towards the physician.

The Court: Would that – I guess my question would be will that mean you would have one side not starting out even before we begin? And I'm not suggesting you are or not, I'm just . . .

Juror Comer: I – you catch me with these questions. I don't know how to answer them.

. . .

> The Court: Let me answer your question. Here's the easiest way. If your daughter or your son or somebody was sitting on either side of these tables, would you want you as a juror? If it was your daughter on either side, if it was your, you know, daughter as a doctor or your daughter as a plaintiff, would you want you as a juror?
>
> Juror Comer: I don't think skepticism is a bad thing and I think I'm ultimately fair, so with that –
>
> The Court: I think that's the question you need to ask yourself. In other words, Mr. Thompson and Mr. Grohmann [Dr. Heit's counsel], they want to start out on an even –
>
> Juror Comer: I know. And they both deserve –
>
> The Court: Yeah. They deserve a fair trial.
>
> Juror Comer: Right. Exactly.
>
> The Court: -- and that's why we want to make sure you'll be fair to both sides.
>
> Juror Comer: I think I can.

The Zolkiewiczes renewed their challenge to Ms. Comer.

The court embarked upon some further questioning of Ms. Comer, who repeated that she had some bias in favor of the physician's side. However, she qualified that admission with the statement that she also possessed "empathy towards anyone who's been wronged." She stated that she could be fair to both sides. Expressing confidence in her ability to be fair, the trial court refused to excuse her for cause. Juror Comer was sworn as a juror and sat on this case.

At the close of the trial, ten jurors (not including Juror Comer) determined that Dr. Heit was negligent in his treatment of Sandra and that his negligence was a substantial cause of her injuries. In apportioning fault for Sandra's injuries, nine jurors (including Juror Comer) found Sandra to be 70 per cent responsible and Dr. Heit 30 per cent responsible. The same nine jurors who signed the comparative fault instruction also found that Sandra had sustained damages in the amount of $100,000 "as a direct result of the fault of Dr. Heit."

In its final judgment, the trial court reduced the jury's $100,000 award by 70 per cent. The Zolkiewiczes filed a motion for a new trial based on their conviction that the court had erred in selecting the jury. Additionally, they asked the court to alter or amend the judgment, contending that the court erred in reducing the jury's award of damages. Observing that the jury had been instructed to determine Sandra's damages resulting solely from Dr. Heit's fault, they argued that the subsequent application of the apportionment percentages to the award was improper. The motion was denied on October 16, 2003. This appeal followed.

The appellants first argue that they were deprived of a fair trial due to the court's refusal to remove Juror Comer for cause during *voir dire*. They claim that she was biased and

that they were "forced to use one of their peremptory strikes to remove [her] as a potential juror." (Appellants' brief, at p. 9.) Some confusion exists as to whether or not she served on the jury. Our review of the record reveals that Juror Comer actually did serve on the jury. However, Dr. Heit claims that she did not sit on the jury. He contends that the record does not disclose which party used a peremptory strike to remove her from the panel.

We note that juror information sheets are no longer filed in the record but are maintained in sealed envelopes in the custody of the circuit court clerk. We have reviewed those sheets, which reveal the disposition of the original thirty-five *venire* persons assigned to this case: three were stricken for cause; eleven were stricken at random; and the Zolkiewiczes and Dr. Heit exercised four peremptory strikes each, eliminating eight additional jurors. Thirteen jurors remained following that process, including Juror Comer; those thirteen jurors were seated. At the conclusion of the closing arguments, one of the jurors was randomly selected as the alternate and was excused from further service.

Contrary to the Zolkiewiczes' account of the proceedings, they did not use any of their peremptory strikes to exclude Juror Comer. Moreover, the juror whom they allege to have been prejudiced against Sandra actually voted with the

majority to award her damages. Noting these discrepancies, we have proceeded to examine the merits of the issue.

Citing Montgomery v. Commonwealth, 819 S.W.2d 713 (Ky. 1991), the Zolkiewiczes contend that after Juror Comer expressed her generalized bias in favor of doctors, the trial court was obligated to dismiss her for cause. They claim that the court erred in attempting any rehabilitation of the juror:

> There was nothing subtle about juror [Comer's] frank admission of bias. She told the judge she was biased at least twice. She also told the judge she was sympathetic toward the physician's side of the case and that she had negative suspicions about plaintiffs in general. [Comer's] statements were not nuanced hints requiring an inference of bias. They were direct. [Comer] felt she was biased and she said so. The judge did not accept those statements at face value but instead applied indirect pressure by engaging [Comer] in a dialogue that clearly invited her to claim impartiality after she had already admitted to be predisposed in favor of Dr. Heit. (Appellants' reply brief, at unnumbered page 2.)

Montgomery, supra, was a criminal case in which the Kentucky Supreme Court determined that the trial court abused its discretion in failing to excuse potential jurors who "acknowledged [a] familiarity with the pretrial publicity surrounding the case" and who had formed opinions about the defendant's guilt. Under such circumstances, the court concluded that a biased juror could not be rehabilitated by a

"magic question." Id. at p. 718. In Gould v. Charlton Co., Inc., 929 S.W.2d 734 (Ky. 1996), the Supreme Court revisited Montgomery, observing that it had not intended to impair the trial court's broad discretion in the process of selecting qualified jurors. Id. at 739.

> Rather [Montgomery] mandated that the discretion be based on the "totality of circumstances" of the voir dire examination rather than a predictable and unilluminating response to a "magic question."

Id.; see also, Mabe, 884 S.W.2d at 671.

Unlike the situation in Montgomery, supra, Juror Comer did not have any prior knowledge about the facts of the Zolkiewiczes' malpractice case; she had not formed any opinions about their specific claims. She expressed general opinions about frivolous lawsuits and her sympathy for the dilemma of doctors so pressed to meet the rising costs of insurance that some were forced to give up the practice of medicine. On the other hand, she also emphasized her ability to empathize with plaintiffs who had been wronged. She consistently affirmed that she was a "fair" person and that she would try to be fair to both sides if she were selected as a juror.

A trial court enjoys considerable discretion in deciding whether to excuse a juror for cause. Rodriguez v. Commonwealth, 107 S.W.3d 215, 221 (Ky. 2003); Altman v. Allen, 850 S.W.2d 44, 46 (Ky. 1992). The reason underlying such a

broad delegation of discretion in a trial court was articulated in Mabe v. Commonwealth, 884 S.W.2d 668, 671 (Ky. 1994):

> [U]nlike witnesses, prospective jurors have had no briefing by lawyers prior to taking the stand. Jurors cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this, and under our system it is that judge who is best suited to determine the competency to serve impartially. The trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading.

Id., quoting, Patton v. Yount, 467 U.S. 1025, 1038-1039, 104 S.Ct. 2885, 2892-2893, 81 L.Ed.2d 847 (1984).

Absent a showing of a clear abuse of discretion, we may not disturb a trial court's decision whether to excuse a juror for cause on appeal. Allen v. Altman, supra, at 46. In light of the court's thorough exchange with Juror Comer, we cannot conclude that it clearly abused its discretion in deciding not to excuse her for cause.

The Zolkiewiczes next argue that the trial court erred in entering a judgment in the amount of $30,000 rather than $100,000. We agree.

In instruction No. 2, the trial court set forth Dr. Heit's duties. It then asked the jury to determine whether the doctor had failed in executing those duties and -- if so -- whether that failure was a substantial factor in causing

Sandra's injuries. A majority of the jurors agreed that Dr. Heit failed to meet the proper standard of care in his treatment of Sandra. In Instruction No. 3, the trial court informed the jury that Sandra had a duty to exercise ordinary care for her own health. It then required the jury to compare her fault (if any) in causing her injuries to that of Dr. Heit. As noted earlier, the jury apportioned 70 per cent of the fault to Sandra and 30 per cent to Dr. Heit.

The trial court then should have instructed the jury to determine the **total amount** of Sandra's damages -- disregarding her degree of fault. See, KRS[2] 411.182(1)(a); John S. Palmore, Kentucky Instructions to Juries (Civil), §46.02. Instead, the trial court's Instruction Number 5 provided as follows:

> If you found against Dr. Heit, under Instruction No. 2, you shall award such damages if you believe, from the evidence, that will fairly and reasonably compensate for the following damages allegedly incurred by filing Verdict Form B.
>
> VERDICT FORM B
>
> We, the jury, find for the Plaintiff, Sandra Zolkiewicz, and award her the following sums of money which will fairly and reasonably compensate her for such of the following damages for which we believe the evidence she has sustained **as a direct result of the fault of Dr. Heit:**

[2] Kentucky Revised Statutes.

(a) Pain and suffering she has endured or is reasonably certain to endure in the future (Not to exceed $380,000) (Emphasis added.)

We conclude that the jury's original verdict of $100,000 pursuant to this instruction was not amenable to reduction by application of the comparative fault percentages. Rather, we must presume that the jury -- **as instructed** -- took into consideration its previous percentage determination of fault when it finally calculated the amount of damages Sandra sustained "as a direct result of the fault of Dr. Heit."

Dr. Heit presents three arguments in defense of the judgment: (1) the Zolkiewiczes waived any error by failing to object to the instructions and by tendering the judgment entered by the court; (2) the instructions were in accord with KRS 411.182; and (3) the jury's award was intended to represent Sandra's total damages as unreduced by the percentage of fault apportioned to her. We do not agree with any of these arguments.

It is true that the Zolkiewiczes did not object to the instructions. However, they are not seeking a new trial based on the allegedly erroneous instructions. They are asking that the judgment should conform to the jury's verdict, a verdict rendered pursuant to instructions accepted by both sides. The Zolkiewiczes also contend that they were merely following the

trial court's direction in tendering the instructions as indicated by the court. Their timely motion pursuant to CR[3] 59 was sufficient to preserve for review any error in the judgment itself. In light of the plain wording contained in Instruction No. 5 and Verdict Form B, no reasonable interpretation could be drawn that the jury believed its award to constitute the total sum of the damages sustained by Sandra rather than the amount attributable to Dr. Heit. We agree that the court erred in reducing the judgment and that the correct award to Sandra was the original verdict prior to its amendment.

The judgment of the Jefferson Circuit Court is vacated, and this matter is remanded for entry of a new judgment consistent with this opinion.

ALL CONCUR.

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[3] Kentucky Rules of Civil Procedure.