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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000879-MR

MARCIA JEFFRIES, EXECUTRIX
OF THE ESTATE OF MARY KATHERINE
IRWIN — APPELLANT

v.

APPEAL FROM METCALFE CIRCUIT COURT
HONORABLE PHILLIP R. PATTON, JUDGE
ACTION NO. 06-CI-00056

GEORGIA-PACIFIC CORPORATION — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

DIXON, JUDGE: Appellant, Marsha Jeffries, Executrix of the Estate of Mary

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Katherine Irwin[2] (the Estate), appeals from an order and judgment entered by the Metcalfe Circuit Court following a defense verdict in Irwin's asbestos products liability and negligence action against Appellee, Georgia-Pacific Corporation. Having concluded that the trial court did not err in denying Irwin's motion for a new trial, we affirm.

On April 14, 2006, Mary Irwin filed a products liability and negligence action against Georgia-Pacific[3] claiming that she developed malignant mesothelioma as a result of being exposed to asbestos while using joint compound manufactured by Georgia-Pacific. The case was tried before a jury over seven and one-half days in February 2007. During deliberations, the jury submitted a request to the trial court to review the Irwin family's depositions. After discussing the question with counsel, the trial court responded in writing: "I am advised that you have asked to look at the depositions given by the Irwin family. – Under the rules the answer is no." Later, the jury submitted a second question asking whether Georgia-Pacific was "innocent until proven guilty." Again, after discussing the question with counsel, the trial court responded: "I am advised that you ask are the defendants innocent until proven guilty? – Read the instructions which set out the law."

[2] Mary Katherine Irwin was originally the Appellant in this matter. Irwin died on April 23, 2008. By order of this Court dated August 11, 2008, Marsha Jeffries, Executrix of Irwin's estate, was substituted as Appellant of record.

[3] The Complaint named numerous other defendants who are not at issue in this appeal.

After deliberating for three hours, the jury returned a unanimous verdict in favor of Georgia-Pacific. Specifically, the jury answered the following three interrogatories:

> (1) Did Mary Katherine Irwin or Chester E. Irwin use asbestos-containing joint compound manufactured by Georgia-Pacific Corporation?
>
> YES _____ NO ____X____
>
> (2) Does Mary Katherine Irwin have an asbestos-related disease?
>
> YES ____X____ NO_____
>
> (3) Was Mary Katherine Irwin or Chester E. Irwin's use of asbestos-containing joint compound manufactured by Georgia-Pacific Corporation a substantial factor in causing or contributing to cause Mary Katherine's alleged injury?
>
> YES _____ NO ____X____

Thus, although the jury concluded that Irwin did, in fact, suffer from an asbestos-related disease, it did not result from exposure to joint compound manufactured by Georgia-Pacific.

Irwin thereafter filed a CR 59 motion for a new trial claiming that (1) the trial court should have permitted the jury to rehear the deposition testimony of Irwin; (2) the jury's question regarding the guilt or innocence of Georgia-Pacific was evidence that it was confused about the applicable law; and (3) the admission of improper hearsay testimony by Georgia-Pacific's vice-president was reversible error. Attached to Irwin's motion were affidavits from five jurors expressing their

confusion as to the proper burden of proof. Following a lengthy hearing, the court orally denied the motion for new trial, commenting,

> This is not the first time there's been some possible confusion about reasonable doubt and all that. I've gotten home after civil trials, and my wife would ask, "Well did they find him guilty?" – and you know she's got a college education. But I think we tried to make it very clear to the jury that this is a civil case, nobody's going to jail, and I think in voir dire and . . . in closing arguments counsel on both sides talked a little bit about the burdens. And then the instructions were, given the complexity of the case, quite simple, requiring the jury to answer a couple of questions . . . .
>
> . . . .
>
> I can't substitute my judgment for the jury you know, with the testimony being that [the Irwins] bought [the joint compound] from 1958 on and Georgia-Pacific didn't even manufacture it until 1965 and that neither of the stores that they allegedly bought it regularly carried or, ever carried Georgia-Pacific, you know, that was the evidence, and the jury could believe that or not believe that, and decided that while she developed this mesothelioma as a result of exposure to asbestos, and I'd say most likely to the joint compound, it wasn't Georgia-Pacific's. And there was certainly evidence there to support that conclusion by the jury.
>
> . . . .
>
> You know, when I used to prosecute cases . . . if I lost, I'd talk to the jurors and invariably decide, "Well heck, they didn't understand, and if they'd understood I would have won!" But you know they were very conscious and I think it was apparent to everybody that they listened attentively and did the best they can and I think that – I'm not surprised that they expressed later that there was some confusion. I think there's always some confusion, but we have a jury system in this country and the jury made their decision. They may, like all of us, in

> hindsight, have reservations about the decision they made, but that was their decision. They answered two simple questions, and therefore the motion for a new trial is denied.

Irwin thereafter appealed to this Court. Additional facts are set forth as necessary.

On appeal, the Estate first claims that the trial court erred in refusing to permit the jury to rehear Irwin's deposition testimony. Further, citing *Bellamy v. Pathak*, 869 S.W.2d 45 (Ky. App. 1993) and *Young v. State Farm Mutual Insurance Company*, 975 S.W.2d 98 (Ky. 1998), the Estate argues that the trial court failed to establish on the record that it even had the discretion to permit the rereading of the deposition testimony that was admitted into evidence. The Estate does not suggest that the trial court erred in refusing to let the jury review the deposition transcripts, but rather contends that the court should have brought the jurors back into the courtroom and informed them that specific portions of the deposition testimony could be reread to them.

In its brief to this Court, the Estate contends that the issue is "[p]reserved for appellate review by the jury asking the trial judge for the opportunity to review some crucial testimony and by the trial judge's written response denying the jury the simplest of assistance, and by Plaintiff's Motion for a New Trial." Notably absent from the above language, however, is any reference to an objection or request for further action at the time of the trial court's complained-of action. CR 46; *Loew v. Allen*, 419 S.W.2d 734 (Ky. 1967). The trial

court informed counsel, albeit off the record[4], of the jury's question and its proposed answer. Yet Irwin's counsel did not object to the proposed answer or request that the court reread any deposition testimony. Nor did counsel request the video be turned on so that a proper objection could be noted of record.

The Estate's reliance on *Bellamy, supra,* is misplaced. Therein, the trial court declined the jury's request for clarification concerning a specific portion of recorded testimony. Counsel not only requested that the court reread the specific testimony, but objected on the record when the trial court declined to do so. On appeal, a panel of this Court held that "[a] trial court has discretion to permit the rereading or replaying of testimony given at trial after a specific request by the jury." *Id*. at 47. Unlike in *Bellamy*, however, the jury herein did not request to hear specific testimony, but rather sought to have all of the Irwin family's depositions in the jury room. Thus, it was incumbent upon counsel to make known to the trial court "the action which he or she desired." *Loew, supra*.

Clearly the trial court did not err in refusing to permit the jury to take the deposition transcripts into the jury room. *Thompson v. Walker*, 565 S.W.2d 172 (Ky. App. 1978); *Williams v. Watson*, 207 Ky. 256, 268 S.W. 1067 (1925). And while the trial court certainly has the discretion to permit the replaying or rereading of testimony, neither the jury nor counsel requested such action. Instead, Irwin chose not to raise the issue until her motion for new trial, which is simply insufficient to preserve any error for appellate review. *Gabow v. Commonwealth*,

[4] Apparently, it was the trial court's practice to discuss jury instructions and other matters off the record, but to allow any party to make a record if agreement could not be reached.

34 S.W.3d 63, 73 (Ky. 2000), *overruled in part on other grounds* by *Crawford v. Washington*, 541 U.S. 36, 60-61, 124 S.Ct. 1354, 1369-70, 158 L.Ed.2d 177 (2004), as recognized in *Jackson v. Commonwealth*, 187 S.W.3d 300, 304 (Ky. 2006).

We reach the same conclusion with respect to the jury's question regarding the burden of proof. The Estate maintains that the trial court had a sua sponte obligation to bring the jurors into the courtroom and clarify "this fundamental point of law." In support, the Estate cites to federal cases regarding the responsibility of the court to enlighten the jury as to legal principles. *See Bollenbach v. United states*, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed.2d 350 (1946) and *Price v. Glossen Motor Lines, Inc.*, 509 F.2d 1033 (4th Cir. 1975). However, the law is clear in this Commonwealth that "[o]ur approach to [jury] instructions is that they should provide only the bare bones, which can be fleshed out by counsel in their closing arguments if they so desire." *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226, 228 (Ky. 2005).

Notwithstanding, the Estate does not dispute that at the time the trial court proposed its written answer, counsel neither objected nor requested that the trial court clarify the standard. While the Estate complains that there was no opportunity to object since the parties were off the record, no request was made for the video to be turned on for the purpose of making a formal objection.

Nor do we find any merit in Irwin's contention that the juror affidavits warrant a new trial. "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." 75B Am.Jur.2d *Trial* § 1899 (1992). In other words, absent a few limited exceptions, "a verdict cannot be impeached by the affidavit or testimony of a juror." *Rietze v. Williams*, 458 S.W.2d 613, 620 (Ky. 1970), *overruled on other grounds* in *Centre College v. Trzop*, 127 S.W.3d 562 (Ky. 2003).

In *Hood v. Spitzlberger,* 242 Ky. 291, 46 S.W.2d 102 (1932), the appellant filed affidavits from jurors claiming they had the mistaken impression that under the instructions they could not render a verdict for the plaintiff except for the full amount of the claim. In rejecting appellant's request for a new trial, the Court held:

> Were we to adopt the rule that new trials could be granted on affidavits of the jurors concerning their impressions as to what they could or could not do, it would open wide the door to trickery, corruption, and fraud, and no verdict would be secure. *Alexander v. Humber,* [9 Ky. 734, 6 S.W. 453 (Ky. 1888)]. We are therefore constrained to the view that the mistake relied on is not the kind of mistake for which a new trial will be granted on the affidavits of the jurors.

Hood, *supra*, at 103.

As the trial court noted, jurors may, in hindsight, have reservations about the decision they made. The affidavits herein were prepared by Irwin's local counsel after the jurors had the opportunity to discuss the case with family and friends. To allow such to form a legal basis for impeaching the verdict would

defeat any semblance of finality in the jury process. *See McDonald v. Pless*, 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed 1300 (1915).

In a related issue, Irwin claims that reversal is warranted because the trial court erred in allowing the jury to verbally communicate its questions through the bailiff in violation of his oath under KRS 29A.320(1). Irwin concedes that issue is also not preserved for review, but claims that the bailiff's conduct was not discovered until counsel was reviewing the record for appeal.

Irwin again relies upon *Young v. State Farm Mutual Insurance Co*., *supra*, wherein our Supreme Court discussed the interaction between the bailiff and jury, noting that under KRS 29A.320(1), "the bailiff is prohibited from communicating with the jurors except to ask them if they have agreed upon a verdict." 975 S.W.2d at 99. However, we find *Young* to be wholly distinguishable from the instant case. In *Young*, the bailiff himself responded to a jury question without ever conveying it to the court. Here, there is no allegation other than the bailiff reported the jury's question verbally instead of insisting that the jury communicate only in writing. We must agree that under Irwin's interpretation of the bailiff's duty, he would have had to violate his oath in order to tell the jurors to put their question in writing.

We simply perceive no prejudice resulting from the bailiff's conduct. Certainly, there is no allegation that he misrepresented the questions or, like the facts in *Young*, he attempted to answer the questions himself. As such, we do not believe that any error, much less palpable error, occurred. CR 61.02

Next, the Estate argues that the trial court erred in allowing the admission of damaging hearsay testimony from Howard Shutte, Georgia-Pacific's Vice-President of Operations for its gypsum division. Shutte was designated by Georgia-Pacific as its corporate representative under CR 30.02(6). The Estate complains that Shutte, relying primarily on hearsay statements of other employees, "took the self-serving position that Georgia-Pacific had tirelessly endeavored to remove asbestos from its ready-mix joint compound, claiming this process began as early as 1970." The Estate claims that as a result, Irwin was severely prejudiced by this hearsay offered to prove Georgia-Pacific was not negligent.

Under CR 30.02(6) a corporate representative is authorized to testify to "matters known or reasonably available to the organization." As such, Shutte was permitted to testify to corporate matters beyond the scope of his personal knowledge. Nevertheless, we need not determine whether Shutte's testimony was improper hearsay, because we believe that any error is necessarily harmless in light of the jury's verdict. *See Vittitow v. Carpenter*, 291 S.W.2d 34, 36 (Ky. 1956) ("[E]rrors are harmless or nonprejudicial where they are not responsible for the appealing party having lost what he contends on appeal he should have attained.")

CR 61.01 provides, in pertinent part: "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." In *Davidson v. Moore*, 340 S.W.2d 227, 229 (Ky. 1960), Kentucky's highest court held, "[w]hile this rule is primarily for the guidance of trial courts, this court, since the adoption of the new rules and

before . . . has accepted it as a rule for guidance and will not reverse or modify a judgment except for error which prejudices the substantial rights of the complaining party."

It is clear from the jury's response to Interrogatory No. 1 that it concluded Irwin neither used nor was exposed to Georgia-Pacific's joint compound. Further, Shutte acknowledged that he had no information about Irwin's exposure to asbestos-related products and did not offer any testimony as to such. Accordingly, we conclude that Shutte's testimony must be deemed harmless and nonprejudicial as it clearly played no part in the jury's verdict.

Similarly, we cannot conclude that Irwin was prejudiced by the testimony of Georgia-Pacific's expert, William Dyson. Dyson testified that Irwin had insufficient asbestos exposure to establish that her mesothelioma was from exposure to the joint compound. The Estate argues on appeal that Dyson's testimony was "junk science" and did not meet the criteria set forth in KRE 702, 705 and Kentucky case law.

Again, however, it is clear from the jury's answers to Interrogatories 1 and 2, that Dyson's testimony did not affect its decision. In fact, the jury clearly rejected some of Dyson's testimony by finding that Irwin did suffer from an asbestos-related disease. We agree with Georgia-Pacific that had the jury only been presented with Interrogatory No. 3, the Estate's argument would have more merit. Interrogatory No. 3 concerned proximate cause, rather than cause-in-fact, and would have required the jury to weigh the testimony of the experts and

witnesses to determine the level of Irwin's exposure to Georgia-Pacific's joint compound and whether such was a substantial factor in causing her disease. However, by finding that Irwin did not use joint compound manufactured by Georgia-Pacific, the jury did not reach the issue of proximate cause. Thus, we are compelled to conclude that error, if any, in the admission of Dyson's testimony was harmless. CR 61.01.

For the forgoing reasons, we conclude that the trial court properly found that there was sufficient evidence to support the jury's verdict and that a new trial was not warranted.

The judgment of the Metcalfe Circuit Court is affirmed.

ALL CONCUR.

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