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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000255-MR

MISTY GLASSON — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, V, JUDGE
ACTION NO. 06-CI-00850

DR. MUHAMMAD RIZWAN AFZAL;
URGENT CARE CENTER-
NORTHERN KENTUCKY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, MOORE, AND THOMPSON, JUDGES.

KELLER, JUDGE: Misty Glasson (Glasson) appeals from a judgment following a defense verdict by a jury in favor of Dr. Muhammad Rizwan Afzal[1]

[1] There was some dispute regarding Afzal's licensing to practice medicine in the United States. However, Afzal's status as a physician is not an issue in this matter; therefore, we refer to him as a physician.

(Afzal)[2] and Urgent Care Center-Northern Kentucky (Urgent Care). Hereinafter, we will refer to Afzal and Urgent Care jointly as the Appellees. On appeal, Glasson argues the trial court allotted too many peremptory challenges to the Appellees; wrongfully permitted the introduction of reputation and "other act" evidence by Afzal; wrongfully permitted the introduction of certain medical evidence while excluding the introduction of other medical evidence; and permitted the Appellees to use that medical evidence during closing argument to question her credibility. The Appellees argue to the contrary. For the reasons set forth below, we affirm.

FACTS

Glasson alleged that, on March 22, 2006, Afzal inappropriately touched her while performing a Selective Tissue Conductance Test (STC Test) and that touching amounted to civil sexual battery. She also alleged Urgent Care negligently supervised Afzal, and the actions of the Appellees caused her severe emotional distress. The Appellees filed a joint answer to Glasson's complaint, denying all allegations of battery and negligence. We will set forth additional facts as necessary when analyzing the issues.

STANDARD OF REVIEW

[2] We note that, throughout the record, Afzal is referred to variously as "Rizwan" and "Dr. John Doe." Afzal testified that, in his country, his last name, Afzal, is his father's name and that Rizwan is the equivalent of a last name in the United States. To be consistent with this Court's practice, we will use the name Afzal throughout this opinion.

Because the standards of review differ somewhat for each issue raised by Azfal, we will set forth the appropriate standard as we analyze each issue.

ANALYSIS

1. Peremptory Challenges

Rule 47.03(1) of the Kentucky Rules of Civil Procedure (CR) provides "each opposing side shall have three peremptory challenges, but co-parties having antagonistic interests shall have three peremptory challenges each." The trial court granted Glasson three peremptory challenges and granted Urgent Care and Afzal three peremptory challenges each, for a total of six peremptory challenges for the Appellees. Glasson argues the Appellees' were not antagonistic to each other; therefore, they should have been treated as one for the purpose of peremptory challenges.

In overruling Glasson's objection to the number of peremptory challenges granted to the Appellees, the trial court stated that it primarily relied on *Sommerkamp v. Linton*, 114 S.W.3d 811 (Ky. 2003). The court noted Glasson alleged battery, which is an intentional tort, against Afzal and negligent supervision against Urgent Care. The court stated those separate and diverse allegations, along with the fact the Appellees had separate counsel, were sufficient to support a finding that the Appellees had antagonistic interests. Furthermore, the court assumed, based on the allegations, there would be some evidence regarding the negligent supervision claim.

The determination of whether parties have antagonistic interests is left to the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. A reviewing court will only disturb the trial court's determination if the court's findings of fact are clearly erroneous. *Davis v. Fischer Single Family Homes, Ltd.*, 231 S.W.3d 767, 773 (Ky. App. 2007), and *Sommerkamp v. Linton*, 114 S.W.3d 811, 814 (Ky. 2003). A reviewing court must analyze the trial court's determination to allot peremptory challenges as of the time that determination was made, not in hindsight following presentation of proof. *Sommerkamp* at 816.

As the trial court noted, the principal case regarding peremptory challenges is *Sommerkamp v. Linton.* In *Sommerkamp*, the Supreme Court of Kentucky stated there are three primary factors a court should consider in deciding if coparties have antagonistic interests: "1) whether the coparties are charged with separate acts of negligence; 2) whether they share a common theory of the case; and 3) whether they have filed cross-claims." *Sommerkamp* 114 S.W.3d at 815 (Internal citations omitted). Additionally, the Court set forth other factors that may be considered, including: "whether the defendants are represented by separate counsel; whether the alleged acts of negligence occurred at different times; whether the defendants have individual theories of defense; and whether fault will be subject to apportionment." *Id.* at 815.

Glasson argued before the trial court, as she does here, that the Appellees' interests were not antagonistic for two reasons: (1) they presented the

same defense; and (2) they did not truly have separate counsel. In support of her mutual defense argument, Glasson notes that, if the Appellees could prove the event did not occur, neither Urgent Care nor Afzal would have liability. If the jury found the event did occur, Afzal would not escape liability, but Urgent Care might, if it could establish it reasonably supervised Afzal. To escape liability, Urgent Care would not be required to assign blame to Afzal, it would only be required to establish it reasonably supervised Afzal. Thus, Urgent Care could escape liability without assigning blame to Afzal, which Glasson argues establishes that the Appellees' interests were not antagonistic.

Urgent Care agrees its primary defense, that the event did not take place, was not antagonistic to Afzal's interest. However, it argues its secondary defense, that it acted reasonably in supervising Afzal, was antagonistic to Afzal and, therefore, the peremptory challenges were properly allotted to the parties.

Having reviewed the record as it existed at the time the trial court made its allotment of peremptory challenges, we discern no error. As noted above, Glasson's theory of recovery against Afzal sounded in intentional tort and her theory of recovery against Urgent Care sounded in negligence. Generally, in a case when both parties are charged with negligence arising from one event, an increase in liability as to one party will result in a decrease as to the other party. Antagonistic interests are inherent in such cases. However, as noted above, the liability between Afzal and Urgent Care were not so proportionally related. Therefore, the potential antagonism between the two is not so clear. However, that

does not mean they did not have antagonistic interests. Urgent Care had to be prepared to present evidence that Afzal was simply a bad actor and it could have done nothing to anticipate or prevent him from improperly touching Glasson. That defense is antagonistic to Afzal's interests, and the trial court properly anticipated that defense might be raised during the course of the trial.

We note Glasson's argument that, "as it played out, nothing in closing argument (or in the entire trial, for that matter) showed any antagonistic interest whatsoever, a point tending to underline the error of awarding Defendants extra preemptory [sic] challenges." It is true the Appellees presented a united defense throughout the trial. In hindsight, the trial court might have ruled differently on Glasson's objection to the allotment of peremptory challenges. However, the trial court must analyze that issue prior to the presentation of proof; and, at that time, the Appellees' interests were antagonistic. Therefore, this argument by Glasson is without merit.

In support of her mutual attorney argument, Glasson states that, while Afzal and Urgent Care had separate counsel, the attorneys were with the same law firm. Furthermore, Glasson notes, and the Appellees do not dispute, that, as a general rule, only one of the attorneys for the Appellees practiced the case prior to trial.

Having attorneys from one law firm defend Afzal and Urgent Care may or may not have been the best choice; however, the fact remains the Appellees did have separate counsel. Furthermore, whether the attorneys were from the same

law firm does not necessarily mean the Appellees' interests were not antagonistic. Attorneys from the same firm can represent clients with diverse interests as long as the clients are fully informed and give their consent. While there is little evidence the attorneys practiced this case from truly adversarial positions, the same could well have been true had the attorneys been from different law firms. Whether the Appellees were represented by counsel from different law firms would not have altered the fact that proving the event did not take place was the best defense for both Appellees. Therefore, whether counsel were from the same law firm is not dispositive of this issue.

Based on the above, we discern no error in the trial court's allotment of peremptory challenges.

2. Admission of Evidence that Glasson Previously Received a Prescription for Zoloft

Glasson testified that, since this event, she has had difficulty sleeping, has had nightmares, feels as if everyone knows what happened and is looking at her, and, as a result, is reluctant to go out in public. During cross-examination, counsel for Afzal questioned Glasson about a 2002 medical record that showed her complaints of depression, sleeplessness, and difficulty socializing. That record also revealed Glasson's physician had prescribed Zoloft, which Glasson admitted taking. However, Glasson explained her symptoms and treatment were related to post-partum depression and lasted for only three weeks. Glasson objected to this

line of questioning, arguing a lack of relevance. The trial court, noting Glasson's complaints during direct examination, permitted the questioning.

On appeal, Glasson questions the relevancy of her prior symptoms and treatment and argues the Appellees put forth that evidence simply to prove her "bad character." The Appellees note that Glasson alleged and testified she "suffered from symptoms of post-traumatic stress syndrome, including anxiety, depression, nightmares, fearfulness, guilt, shame, embarrassment." The Appellees argue any prior evidence of similar symptoms or treatment of those symptoms is relevant to show whether, and to what extent, Glasson's current symptoms are related to the event.

Under the Kentucky Rules of Evidence (KRE), evidence is relevant if it has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. Relevant evidence is admissible unless otherwise provided by the Constitution, the Kentucky Revised Statutes (KRS), other rules of evidence, or rules of the Supreme Court of Kentucky. KRE 402.

This Court reviews rulings on relevancy by a trial court using the abuse of discretion standard. *Love v. Commonwealth*, 55 S.W.3d 816, 822 (Ky. 2001). A decision by the trial court regarding relevancy of evidence will only be disturbed if that decision "was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Cook v. Commonwealth*, 129 S.W.3d 351, 361-62 (Ky. 2004).

Glasson put her mental condition at issue in her complaint and when she testified her symptoms were related to the event. Whether her mental condition was caused by the event was a fact of consequence for the jury. Evidence of prior symptoms and/or treatment is relevant to a determination of the issue of causation. Therefore, it was within the sound discretion of the trial court to admit that evidence, and we will not disturb the court's ruling on appeal.

3. Admission of Testimony by Afzal Regarding His Credentials

On direct examination, Afzal, who is a graduate of a foreign medical school, testified regarding the tests he had to take in order to be recognized as a physician in the United States. In addition to describing the tests, Afzal testified as to the scores he received on those tests. Glasson objected to this testimony arguing that Afzal's character had not been questioned; therefore, such testimony was impermissible character evidence. Afzal argued that he was simply providing such evidence to show that he was qualified to perform the STC test. The trial court permitted Afzal to testify regarding his test scores and credentials.

On appeal, Glasson argues such character evidence, particularly when coupled with the evidence of her previous use of Zoloft, impermissibly elevated Afzal and diminished her in the eyes of the jurors. Glasson argues this disparity in status put her at an unfair disadvantage before the jurors, who were being asked to

weigh her credibility against Afzal's. The Appellees argue the evidence was not offered to prove Afzal's character but for the purpose of rebutting Glasson's claim of negligent supervision. According to the Appellees, an understanding of Afzal's qualifications was necessary for the jury to determine the extent of supervision Urgent Care should have provided.

KRE 404(a) provides "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." The rule gives certain exceptions, all of which are related to criminal actions.

We agree with Glasson that admission of character evidence is not appropriate. However, the limitation on character evidence applies when that evidence is being offered to prove action in conformity with the evidence. For example, testimony that a witness "always lies" would not be admissible to show the witness was lying in court unless one of the exceptions to the rule applied. In this case, the evidence of Afzal's educational achievements was not offered to prove he acted in conformity with that evidence, i.e. he acted intelligently. It was offered to rebut the implication from Glasson that Afzal was not competent to administer the STC test. Furthermore, as noted by the Appellees in their brief, Glasson alleged Urgent Care did not sufficiently supervise Afzal. Proof of Afzal's educational achievements was relevant to the amount of supervision Urgent Care was required to provide. Because Afzal's testimony regarding his educational

achievements was not offered as character evidence and was relevant to issues before the jury, it was admissible.

4. Exclusion of Medical Evidence

At the end of trial, Afzal returned to testify, in pertinent part, that the medical record from March 22, 2006, showed Glasson was menstruating at the time of the STC test. Afzal then re-called Glasson to the stand to testify on re-cross examination. Afzal's counsel questioned Glasson about the medical record, and Glasson testified that she was not menstruating at the time of the test. She stated that she knows she was not menstruating because she was wearing thong panties, and she would not have been wearing thong panties if she were menstruating. The trial court then dismissed Glasson and she left the stand. Glasson's counsel then re-called Glasson in rebuttal and attempted to question Glasson about a medical record dated March 15, 2006. That record indicated Glasson was menstruating at that time. Afzal objected on the grounds that such examination was improper rebuttal. The trial court agreed and did not permit Glasson's counsel to ask any additional questions regarding the March 15, 2006, medical record or Glasson's memory regarding her menstrual cycle. Although we might have ruled differently, we discern no error in the trial court's ruling.

Glasson argues on appeal that Afzal attacked her credibility during closing argument, in part based on the issue of whether she was or was not menstruating on March 22, 2006. According to Glasson, the court's ruling that she

could not discuss the March 15, 2006, medical record put her at a significant disadvantage with regard to the issue of her credibility.

CR 43.02 sets forth the order for proceeding in trial. In pertinent part, the rule states the party with the burden of proof first produces evidence and should "exhaust his evidence before the other begins. But the order of proof shall be regulated by the court so as to expedite the trial and enable the tribunal to obtain a clear view of the whole evidence." CR 43.02(c). Once the parties have presented their evidence, they "will then be confined to rebutting evidence, unless the court, for good reasons in furtherance of justice, permits them to offer evidence in chief." CR 43.02(d).

Determining the order of presentation of proof during trial is within the sound discretion of the trial court. *Commonwealth, Dept. of Highways v. Ochsner*, 392 S.W.2d 446, 448 (Ky. 1965); and *Jenkins v. Louisville and Jefferson County Planning and Zoning Commission*, 357 S.W.2d 846 (Ky. 1962).

In support of her argument, Glasson cites us to *Robinson v. Commonwealth*, 459 S.W.2d 147 (Ky. 1970). In *Robinson*, the defendant was charged with raping his sister-in-law. Robinson testified that the victim was a willing participant and that no rape took place. After Robinson rested, the prosecution called the victim's sister in rebuttal. The sister began to testify regarding a confession Robinson made in her presence. Robinson objected and the court sustained that objection. The Commonwealth then re-called Robinson and asked if he had confessed in the sister's presence. He denied doing so. The

Commonwealth then re-called the sister and she testified regarding the confession. The then-Court of Appeals reversed the trial court and remanded the matter for a new trial. In doing so, the Court held the Commonwealth was not required to "lay a foundation" prior to introducing the testimony of the victim's sister. However, the Court also held the Commonwealth could not hold back evidence that is purely substantive in nature and present it in rebuttal, as doing so was prejudicial to Robinson's rights. *Id.*

Robinson is not instructive for two reasons. First, the trial court in *Robinson* permitted the introduction of substantive evidence in rebuttal; it did not exclude the introduction of evidence. Second, the complaining party in *Robinson* was the party against whom the evidence was offered. In this case, the complaining party is the party who sought to introduce the evidence. Robinson had little to no control regarding the manner in which the Commonwealth presented its evidence. However, Glasson had control over how and when she presented her evidence. As noted by the trial court and the Appellees, Glasson could have offered the March 15, 2006, medical record when the issue of her menstrual cycle first arose. However, she chose to wait until rebuttal to attempt to do so. Therefore, unlike Robinson, she, not her opponent, had control over when she would attempt to present that proof, and she bears the responsibility for timely presenting it.

Finally, we note Glasson testified at some length that she was not menstruating at the time of the test, and explained why she knew she was not. The

trial court's ruling did not foreclose her from addressing the issue; it only foreclosed her from introducing the medical record. Therefore, the trial court's ruling, even if error, was harmless and not reversible.

5. Closing Argument

Glasson argues that, in light of the March 15, 2006, medical record, the trial court erred when it permitted counsel for Afzal to discuss the contents of the March 22, 2006, medical record which contained a "known misstatement" regarding her menstrual cycle.

"[C]ounsel in closing argument is given broad latitude to recite and interpret the evidence." *Owensboro Mercy Health System v. Payne,* 24 S.W.3d 675, 678 (Ky. App. 2000). "However, this does not license counsel to go outside the record, since the argument must be confined to matters in issue and to facts shown by competent evidence, with proper inferences to be drawn therefrom." *Triplett v. Napier,* 286 S.W.2d 87, 90 (Ky. 1955).

Based on the above, the court properly permitted counsel for Afzal to argue during his closing the contents of the March 22, 2006, medical record. The court had admitted that record into evidence and statements during closing argument regarding what inferences the jury could draw from that record was legitimate. Furthermore, Glasson's argument that counsel for Afzal based his closing argument on a "known misstatement" is not persuasive. While the March 15th and March 22nd medical records contain inconsistent information regarding Glasson's menstrual cycle, it is as likely that the March 15th record contains a

misstatement as it is that the March 22nd record does. Therefore, we hold that the trial court's ruling was appropriate.

CONCLUSION

We discern no reversible error in the trial court's allotment of peremptory challenges, the admission and exclusion of evidence, or in its rulings regarding counsel for Azfal's closing argument. Therefore, we affirm.

MOORE, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, CONCURRING IN RESULT ONLY: I concur with the conclusion that the circuit court's judgment should be affirmed but differ with the analysis of the issue regarding the peremptory challenges allotted to Afzal and Urgent Care.

The decision to award additional peremptory challenges must be based on a finding that co-parties' have antagonistic interests. CR 47.03(1). As the majority correctly recites, the factors listed in *Sommerkamp v. Linton*, 114 S.W.3d 811 (Ky. 2003), are relevant to the trial court's inquiry.

In this case, the trial court relied heavily on one factor, the possibility that liability could be apportioned between Afzal and Urgent Care. I do not disagree with the trial court that liability could be apportioned. *See Roman Catholic Diocese of Covington v. Secter*, 966 S.W.2d 286 (Ky. App. 1998).

However, when the comparative fault of co-parties is an issue, their interests are not necessarily antagonistic.

My view is supported by the factors listed in *Sommerkamp* and the Court's unwillingness to hold that the potential apportionment of liability was sufficient to award peremptory challenges to each party. Instead, it offered as guidance numerous factors including: (1) whether they share a common theory of the case; (2) whether they have filed cross-claims; (3) whether they are represented by separate counsel; (4) whether the alleged negligent act occurred simultaneously; and (5) whether the defendants have individual theories of defense. No one factor is determinative.

In this case, the trial court overlooked key factors known to it at the time of trial which demonstrated that Afzal's and Urgent Care's interests were not antagonistic. A predominate fact is that there were no cross-claims filed between the parties. Additionally, the trial court was aware that the parties had the same insurance carrier and the same law firm represented both parties during the pretrial and trial process. Thus, I do not believe that the co-parties' interests were antagonistic.

Despite my disagreement with the majority, I concur in the result reached because I believe that any error was harmless. I realize that my conclusion is contrary to our Supreme Court's holding in *Bowling Green Municipal Utilities v. Atmos Energy Corp.*, 989 S.W.2d 577, 580 (Ky. 1999), where the Court held that allowing excessive peremptory challenges constitutes reversible error without

a showing of prejudice. Nevertheless, I join in Justice Keller's well-reasoned concurring opinion in *Sand Hill Energy, Inc. v. Ford Motor Co*., 83 S.W.3d 483 (Ky. 2002), *opinion vacated by Ford Motor Co. v. Smith*, 538 U.S. 1028, 123 S. Ct. 2072, 155 L.Ed.2d 1056 (2003), and likewise urge Kentucky courts to follow the majority of jurisdictions that apply the harmless error rule to cases where excessive peremptory challenges have been permitted.

No prejudice has been demonstrated by the exercise of additional peremptory challenges by Afzal and Urgent Care. The evidence against Afzal was based only on Glasson's allegations. As to Urgent Care, there is no evidence it had any reason to know that Afzal had a propensity to sexually assault a patient, thus there was no evidence upon which a reasonable jury could have imposed liability for negligent supervision. I believe that despite the technical violation of CR 47.01, this jury was qualified and impartial and rendered a verdict based on the evidence. I would affirm.

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