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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000649-MR

STEPHEN COCANOUGHER,
ADMINSTRATOR OF THE ESTATE
OF BONNIE COMELIA COCANOUGHER;
AND JORDAN DEVRON COCANOUGHER — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 07-CI-02897

COLBY P. ATKINS, M.D.; AND
UNITED SURGICAL ASSOCIATED, P.S.C. — APPELLEES

APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, LAMBERT, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: Stephen Cocanougher, administrator of the estate of Bonnie Comelia Cocanougher, and Jordan Devron Cocanougher appeal from the March

20, 2012, judgment of the Fayette Circuit Court dismissing their medical negligence and wrongful death action against Dr. Colby P. Atkins and United Surgical Associates, P.S.C. upon a jury verdict in favor of Dr. Atkins. After careful consideration, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On June 21, 2007, Stephan Cocanougher, administrator of the estate of Bonnie Comelia Cocanougher; and Jordan Devron Cocanougher filed a complaint for medical negligence and wrongful death. The complaint was based on Bonnie Cocanougher's medical treatment during her hospitalization from May 28, 2006, until June 3, 2006. Tragically, in the early morning hours of June 3, she was found dead in her hospital room.

Originally, the complaint was filed against the following defendants: St. Joseph Healthcare, Inc., which owned and operated St. Joseph East Hospital; Dr. Kelly D. Watson; Dr. Waheed Gul; Kentucky Inpatient Medicine Associates, PLLC; Dr. Atkins; and United Surgical Associates, P.S.C. All the defendants, except for Dr. Atkins and his group, settled prior to the commencement of the trial.

On May 28, 2006, Bonnie was 47 years old and the mother of two children, Jordan, age 16, and Ciara, age 19. Apparently, because of low blood sugar, she collapsed at work and was taken by ambulance to the emergency room at St. Joseph East Hospital. She was admitted to St. Joseph East Hospital for symptomatic hypoglycemia. Bonnie had a history of diabetes and obesity, plus

had recently suffered from an episode of diverticulitis. When admitted, however, Bonnie had no abdominal complaints.

Subsequently, while in the hospital, Bonnie developed epigastric pain, which is pain in the upper middle part of the abdomen. On June 1, 2006, her attending physician, Dr. Kelly Watson, ordered a surgical consult with Dr. Atkins's medical group in order to rule out appendicitis. Dr. Atkins was on call for the group and received the page while at another hospital. He requested that his partner, who was at St. Joseph East, start the surgical consultation. The surgical consult revealed that Bonnie displayed no signs of peritonitis, a condition caused by inflammation of an organ within the abdomen and, thus, she did not need emergency surgery. The physical examination also disclosed that she had positive bowel signs, which indicated that no significant inflammation was present in the abdomen to cause it to not contract.

On that same day, a CT scan was performed on Bonnie. The CT scan showed a colonic obstruction. Subsequently, a colonoscopy was recommended to determine the etiology of the obstruction – cancer or an inflammatory narrowing of the colon. The results of the CT scan also confirmed the absence of free air in Bonnie's abdomen, which was significant for Dr. Atkins, since it meant that there was no perforation in the colon and no need for emergency surgery. Moreover, since Bonnie had a past history of diverticulitis, it supported that diverticulitis was causing the colonic obstruction. Still, a colonoscopy was needed to determine the

cause of the obstruction. Until that procedure was performed, Dr. Atkins treated Bonnie medically. Medical treatment was comprised of a nasogastric tube and intravenous antibiotics.

On June 2, 2006, the results of the colonoscopy ruled out cancer and showed that Bonnie's obstruction was diverticular in nature. Diverticulitis is a condition that develops when diverticula in the colon become inflamed or infected. Upon learning that the obstruction was diverticular in nature, Dr. Atkins proceeded with a plan of medical treatment for which he expected to see some clinical improvement of the diverticulitis within forty-eight to seventy-two hours.

Further, upon receiving the results of the colonoscopy, Dr. Atkins called the hospital to check on Bonnie. The nurse reported that Bonnie's condition had not changed and her vital signs were stable. Consequently, Dr. Atkins continued the medical treatment. Additionally, he ordered a KUB, an x-ray of the abdomen, to check the size of the obstruction. Next, after comparing the x-ray to the CT scan from the previous day, the radiologist informed Dr. Atkins that the size of the obstruction had not changed. Further, the KUB also showed that there was still no free air in Bonnie's abdomen.

Dr. Atkins left St. Joseph East Hospital on the afternoon of June 2, 2006. Before leaving the hospital, he spoke with his partner, Dr. Newton, about Bonnie's condition. Dr. Newton was on call for the surgical group during the overnight hours of June 2 through June 3. And Dr. Nighbert, another partner, was

scheduled to make morning rounds at the hospital. In addition, the nurses and doctors working that evening knew about both Bonnie's obstruction and also that they could call Dr. Atkins or a member of his group if Bonnie's condition warranted it. In fact, neither Dr. Atkins nor anyone from United Surgical Associates was contacted about Bonnie after 2:10 p.m. on June 2, 2006.

Nursing notes from the early morning hours of June 3, 2006, showed that at 4:00 a.m., Bonnie was up at the bedside commode with no complaints. About one hour later, she was found unresponsive and could not be revived. The autopsy revealed an obstruction of the large bowel related to diverticular disease, which resulted in perforation.

The Cocanoughers claim that Dr. Atkins was negligent because he failed to adequately examine Bonnie, failed to recognize a surgical emergency, failed to provide sufficient information for the nurses, physicians, and other caregivers, and failed to perform surgery on her at a time when, according to them, her life could have been saved.

The trial by jury began on February 27, 2012, and continued daily through March 1, 2012, resumed on March 5, 2012, and concluded on March 6, 2012. Both sides presented numerous witnesses; the Cocanoughers introduced a number of documentary exhibits; and, the court instructed the jury as to the substantive law of the case. The jury unanimously found in favor of Dr. Atkins and, hence, the complaint against him was dismissed with prejudice. The

judgment was entered on March 20, 2012, and it is from this judgment that the Cocanoughers now appeal. Additional facts will be provided as needed.

ANALYSIS

The Cocanoughers make two arguments on appeal. First, they maintain that the jury instructions erroneously instructed the jury on the applicable standard of care for Dr. Atkins. They state that the applicable standard of care is that of a reasonably prudent physician rather than that of a reasonably competent physician. In this vein, they also argue that the trial court erred by allowing Dr. Atkins's counsel to argue during closing arguments to the jury about the competency of Dr. Atkins in relation to liability.

Dr. Atkins counters this line of reasoning by noting that the trial court correctly instructed the jury and that the applicable standard of care is that of a reasonably competent physician. Further, Dr. Atkins argues that the statements made by Dr. Atkins's counsel during closing arguments were not only legally accurate but also not prejudicial and, thus, the trial court did not abuse its discretion during this phase of the trial.

The Cocanoughers' second argument is that it was error for the trial court to decline to hold a hearing, pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). They contend that Dr. Atkins used his peremptory challenges inappropriately to remove two of four African-American jurors from the jury panel and, thus, a hearing was required to evaluate the

peremptory challenges. In response, Dr. Atkins observes that the trial court held a hearing regarding the peremptory strikes as mandated under *Batson* and denies that any improper purpose motivated the use of his peremptory challenges.

Jury Instructions regarding Standard of Care

To reiterate, the Cocanoughers contend that the jury instructions, which stated that Dr. Atkins's standard of care was to perform his duty as that of a reasonably competent physician, were incorrect and should have been to perform his duty as that of a reasonably prudent physician. In the case at hand, therefore, the issue on appeal is whether the jury instruction misstated the law. *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226, 229 (Ky. 2005). When alleged errors regarding jury instructions are questions of law, they must be examined using a *de novo* standard of review. *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006) (citing *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006)).

The Cocanoughers presented lengthy arguments that in Kentucky the applicable standard of care for physicians in medical malpractice cases is that of a reasonably prudent physician. We are not persuaded by their arguments. Rather, it is well-established that in medical malpractice cases the standard of care for a physician is that of a reasonably competent physician of the same class under the same or similar circumstances. *Grubbs ex rel. Grubbs v. Barbourville Family Health Center, P.S.C.*, 120 S.W.3d 682, 687 (Ky. 2003); *Mitchell v. Hadl*, 816

S.W.2d 183, 185 (Ky. 1991)(citing *Blair v. Eblen*, 461 S.W.2d 370, 373 (Ky. 1970)).

This legal axiom is discussed in John S. Palmore's, *Kentucky Instructions to Juries,* Fifth Ed., Vol. 2, § 23.01, wherein the standard of care for a physician or surgeon is described as "to exercise the degree of care and skill expected of a reasonably competent physician . . . and acting under similar circumstances." The germane jury instruction tracks this language almost verbatim. Instruction No. 2 said:

> It was the duty of the Defendant, Colby P. Atkins, M.D., in his treatment of Bonnie Cocanougher to exercise the degree of care and skill which is ordinarily exercised by a reasonably competent surgeon acting under the same or similar circumstances as those in this case.
>
> (1) Do you believe from the evidence that Colby Atkins, M.D. failed to comply with the above stated duty?

Hence, the only conclusion that we can reach is that the jury instructions used during the trial conformed to the existing law and do not misstate it. The jury instructions were proper and no error occurred.

Besides questioning the standard of care used in the jury instructions, the Cocanoughers also challenge the legal efficacy of defense counsel's closing arguments. To bolster their argument that Dr. Atkins's counsel used the incorrect standard, they referred to their claim that the standard of care was based on that of a reasonably prudent physician. Clearly, this argument has no merit as discussed

above. Dr. Atkins's counsel merely elaborated on the appropriate standard of care iterated in the jury instructions.

It is the job of counsel during closing argument to persuade the jury, under the applicable law, that his or her client is not liable. Since counsel's statements properly presented the legal liability in a medical malpractice case, there was no impropriety in these closing argument remarks.

Cocanoughers did note that one minor statement by defense counsel - that the jury must determine whether Dr. Atkins was incompetent – did not perfectly reflect the law of the case. But on appeal, when we review of allegations of error in a closing argument, our focus is on the overall fairness of the trial. In fact, attorneys are granted wide latitude during closing argument. *Tamme v. Commonwealth*, 973 S.W.2d 13, 39 (Ky. 1998), *cert. denied*, 525 U.S. 1153, 119 S.Ct. 1056, 143 L.Ed.2d 61 (1999). And, reversal is only justified when the alleged misconduct is so egregious as to render the trial fundamentally unfair. *Berry v. Commonwealth*, 84 S.W.3d 82, 90 (Ky. App. 2001). Lastly, matters pertaining to closing arguments lie within the discretion of the trial court. *Hawkins v. Rosenbloom*, 17 S.W.3d 116, 120 (Ky. App. 1999).

To determine whether an argument during a closing argument is so prejudicial that it warrants a reversal, we consider the unique facts of each case. *Rockwell Intern. Corp. v. Wilhite*, 143 S.W.3d 604, 631 (Ky. App. 2003). In this case, the jury had instructions to properly guide them; Cocanoughers' counsel had

the opportunity during closing arguments to rebut Dr. Atkins's counsel; and finally, the trial court sustained the objection to the aforementioned improper statement. Even though the trial court did not grant the request by the Cocanoughers for an admonition, the decision whether to make an admonition rests squarely within the purview of the trial court's decision-making authority.

Our Supreme Court has expressed the opinion that closing arguments should always be considered "as a whole" and that wide latitude be allowed parties during closing arguments. *Young v. Commonwealth*, 25 S.W.3d 66 (Ky. 2000). Accordingly, we conclude that the statement about the need to not find Dr. Atkins incompetent was not prejudicial and so insignificant that it did not compromise the overall fairness of the trial nor change the outcome of the case. No error occurred.

Impropriety of the defense's peremptory challenges

Peremptory challenges based on race were held to be improper and disallowed by the U.S. Supreme Court in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Although the *Batson* rule involved a criminal case, it was extended by the U.S. Supreme Court to cover civil cases in *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991). The rule applies to civil cases in Kentucky courts as well. *See Washington v. Goodman*, 830 S.W.2d 398, 400-02 (Ky. App. 1992).

At the inception of this trial, approximately 60 potential jurors were available. At the completion of voir dire, after challenges for cause had been

made, twenty-two potential jurors remained. Each party was given four peremptory strikes, which allowed for a panel of twelve jurors and two alternates. Dr. Atkins's counsel used peremptory strikes to remove two of the four African-American jurors on the panel. The Cocanoughers argued that the exercise of these peremptory strikes violated *Batson v. Kentucky*. In the instant case, Bonnie, the decedent, was African-American.

According to the Cocanoughers, immediately following the parties' exercise of peremptory strikes, the trial court asked whether there were any objections to the exercise of peremptory strikes. The Cocanoughers claim that they objected and sought a hearing pursuant to *Batson*. Further, they state that no hearing was held. Dr. Atkins strongly disputes this characterization of the events. He counters that the trial court did address the issue and held a hearing pursuant to *Batson*.

The record indicates that after the jury panel was seated, the Cocanoughers raised a *Batson* challenge. The trial judge then conducted an inquiry pursuant to *Batson* and asked the reason for the use of the peremptory challenges. Dr. Atkins then provided race-neutral reasons for removing the two African-American jurors from the panel.

The rationale behind the use of the peremptory strikes to remove the two jurors was based on information elicited from their self-completed juror forms and discussions during voir dire. It was believed by Dr. Atkins that the two

potential jurors, who were removed, had life experiences which would make it difficult for them to serve as impartial jurors. One potential juror had previously filed a personal injury lawsuit, was the same age as Bonnie, and, like Bonnie, was a single mother raising two children. The other potential juror worked in a clerical position at a hospital and, based on her employment, may have had negative experiences involving physicians such as Dr. Atkins.

After these reasons were offered to the trial judge, the judge responded that "we've had the hearing." The trial court judge then ruled that Dr. Atkins had proffered a legitimate rationale for the use of the peremptory challenges. Impliedly, the trial court determined that the reasons were race-neutral.

The Cocanoughers acknowledge that after they requested a *Batson* hearing, the judge directed that Dr. Atkins provide a race-neutral explanation for using the peremptory challenges. But, even though reasons were provided, the Cocanoughers still maintain that no *Batson* hearing occurred. Dr. Atkins counters that reasons were provided to the court, which satisfied the *Batson* inquiry, and that comprised the hearing. And Dr. Atkins quotes the judge's statement "we've had the hearing," to endorse this explanation.

The response to a *Batson* motion claiming racial discrimination in jury selection involves a three-prong inquiry. First, the defendant must make a prima facie showing that the prosecutor has exercised a peremptory challenge on the

basis of race. Second, once a prima facie showing is made, the burden shifts to the other party to come forward with a neutral explanation for challenging these jurors. Finally, the trial court must determine if the defendant has established purposeful discrimination. *Blane v. Commonwealth*, 364 S.W.3d 140, 148–49 (Ky. 2012) (citations and internal quotations omitted). Notably, we give great deference to a trial court's ruling on a *Batson* motion and will not overturn the ruling absent clear error. *Mash v. Commonwealth*, 376 S.W.3d 548, 555 (Ky. 2012) (citation omitted).

The process for a *Batson* inquiry is succinctly explained in *Commonwealth v. Snodgrass,* 831 S.W.2d 176, 179 (Ky. 1992):

> The sole determination by the trial court when it holds a *Batson* hearing is whether the prosecutor exercised a peremptory challenge on a venireman because of his race. *Batson* gives great deference to the trial court in determining whether the prosecutor's strike is racially motivated. A trial court should give appropriate weight to the disparate impact of the prosecutor's criterion in its decision, but this factor is not conclusive in the preliminary race-neutral inquiry. *Hernandez, supra* at 1863. The trial court may accept at face value the explanation given by the prosecutor depending upon the demeanor and credibility of the prosecutor. *Stanford v. Commonwealth*, 793 S.W.2d 112 (1990). *No additional inquiry or evidentiary hearing is required under Batson.*

(Emphasis added.)

That is exactly what occurred here. A challenge was made that the strikes were based on race; a race-neutral explanation was provided; and, the trial judge decided the explanation sufficiently provided a race-neutral reason for the

strikes. As highlighted in the *Snodgrass* citation, no additional hearing is necessary. On review of such an issue, we give great deference to trial judges' decisions. We do so since trial judges directly ascertain the sincerity of counsel and the credibility of the explanation. In this matter, we hold that no error occurred.

CONCLUSION

Having carefully reviewed the record and the issues raised by the Cocanoughers, we conclude that the jury instructions were legally sound, the closing arguments were not prejudicial, and an appropriate *Batson* inquiry was made. Consequently, we affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

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