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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000935-MR

LISA WALKER AND HER HUSBAND,
LARRY WALKER

APPELLANTS

v. APPEAL FROM CHRISTAIN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 07-CI-00277

C. LANCE LOVE, MD., PLLC; AND
C. LANCE LOVE, MD., Personally and
Individually

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: D. LAMBERT, MAZE, AND VANMETER, JUDGES.

D. LAMBERT, JUDGE: Appellants Larry and Lisa Walker appeal a decision by the Christian Circuit Court denying their motion for new trial. Having reviewed the record, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

This appeal stems from a medical malpractice action. Lisa Walker (hereinafter “Lisa”) had suffered with a thyroid condition for more than a decade when in January and February of 2006, she experienced a series of more serious acute symptoms. She suffered heart palpitations, shortness of breath, dizziness, and anxiety so severe that she required multiple visits to the emergency room, an ambulatory care clinic, and her own primary care physician over those two months.

Her primary physician referred her to a cardiologist to investigate whether the symptoms were heart-related. After performing a battery of tests, the cardiologist confirmed the symptoms were not cardiac in nature, and referred Lisa to the Appellee, C. Lance Love, M.D. Love evaluated Lisa, and diagnosed her with hyperthyroidism,¹ toxic diffuse goiter, and thyrotoxic crisis (also known as “thyroid storm”). He recommended surgery, which took place on February 28, 2006.

Complications arose during and after surgery, which left Lisa on life support for four days following the surgery. She remained hospitalized for twelve days in total and continues to experience other effects from the surgery, particularly, a paralyzed vocal cord. As a consequence, she remains permanently and totally disabled.

¹ Lisa’s prior diagnosis had been hypothyroidism, or underactivity in the thyroid gland, for which she had been taking medication.

On February 28, 2007, Lisa and her husband, Larry Walker, instituted this action below, asserting multiple causes of action, including negligence both in the performance of the surgery and in the decision itself to perform the surgery. The parties attempted discovery for approximately three years when finally the trial court entered summary judgment against the Appellants when they failed to retain expert witnesses and provide Rule 26 disclosures.

The Appellants appealed the trial court's summary judgment to this Court, which reversed. Love then sought discretionary review before the Kentucky Supreme Court, which granted such review. In a reported case, the Supreme Court reversed this Court's decision in part and affirmed it in part. *Love v. Walker*, 423 S.W.3d 751 (Ky. 2014).² Ruling that summary judgment was appropriate on all issues except for the issue of whether Love was negligent in determining surgery was the appropriate course of treatment, the Supreme Court remanded the matter to the trial court. Specifically, the Court noted: "on remand, the trial court should limit proof to issues regarding the propriety of surgery in this case." *Id.* at 758.

Lisa eventually retained three expert witnesses and provided their Rule 26 disclosures to Love. She retained Dr. Samuel Bavli and Dr. Harry Benjamin to testify as to the medical issues at play in this case, and an expert on damages, Dr. Gilbert Mathis, to testify as to the economic extent of her damages.

Love moved to strike the testimony of these three witnesses. In an order entered on January 20, 2015, following a hearing, the trial court *sua sponte*

² This Court will refer to the prior appellate opinion as "*Love I.*"

bifurcated the matter into two trials, one to determine Love's liability,³ if any, for negligence, and the other to determine the measure of damages in the event the first trial resulted in a finding of liability on Love's part. Consistent with this ruling and its interpretation of the Supreme Court's directive, the trial court held that the testimony of the Appellants was excluded as it related to Lisa's condition for the purpose of proving damages, and that the testimony of Bavli and Benjamin must be limited to Lisa's condition up to the date of surgery and the standard of care. The court deferred ruling on Mathis's testimony until the liability trial could be completed.

The liability trial took place on April 13-14, 2015. During this trial, Larry took the stand and answered questions on cross-examination regarding Lisa's condition post-surgery for the purpose of determining her improved condition as it related to the propriety of the surgery. Ultimately, the jury voted 11-1 in favor of Love. The Appellants point out that the voting fell along racial lines, with the eleven white jurors voting in favor of Love (who is Caucasian), and the lone African-American juror voting in favor of the Appellants (who are both African-American).

With the need for the damages trial obviated, the Appellants moved for a new, unbifurcated trial pursuant to Civil Rule ("CR") 59.01. The trial court denied the motion, and this appeal followed.

³ The trial in the matter beginning on April 13, 2015, during which the liability of Love for negligence would be determined will hereinafter be referred to as the "liability trial." The second trial wherein the measure of damages would have been determined will be referred to as the "damages trial."

The Appellants argue on appeal that the trial court committed eleven errors, however, many of these are redundant and the allegations can be boiled down to the following: 1) whether the trial court properly bifurcated the matter into two trial proceedings *sua sponte*; 2) whether the trial court erred in excluding expert testimony of the medical and economic consequences of Lisa's surgery at the liability trial; 3) whether the trial court erred in allowing Love to present evidence of Lisa's post-surgery condition; 4) whether the trial court misinterpreted the Supreme Court's opinion in *Love I*; 5) whether Love's failure to settle in court-ordered pretrial mediation merits reversal of the jury's verdict; and 6) whether the jury verdict was tainted by racial bias.

II. ANALYSIS

A. STANDARD OF REVIEW

“The granting of a new trial is within the discretion of the trial court. When a trial court denies a motion for a new trial, our standard of review is whether there has been an abuse of that discretion.” *Kaminski v. Bremmer, Inc.* 281 S.W.3d 298, 304 (Ky. App. 2009). An appellate court must reverse a trial court's ruling as an abuse of discretion if it was “...arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). The trial court's ruling must be presumed correct and

reversed only upon clear error. *Shortridge v. Rice*, 929 S.W.2d 194, 196 (Ky. App. 1996). To determine whether the trial court abused its discretion in denying a motion for new trial requires us to examine the entire proceedings, with the presumption the trial court acted correctly in mind.

Civil Rule 42.02 governs bifurcation of civil actions. The rule states that in situations where separate trials will “be in furtherance of convenience or will avoid prejudice, or will be conducive to expedition and economy, [a court] *shall* order a separate trial of any claim... or [...] any separate issue....” CR 42.02 (emphasis added). This Court has previously held that “CR 42.02 not only allows, but requires bifurcation upon the court finding that separate trials will be convenient, will avoid prejudice, or will be expeditious.” *Calhoun v. Provence*, 395 S.W.3d 480 (Ky. App. 2012).

Trial courts have broad discretion in determining when to bifurcate claims or issues. *Id.* at 481 (citing *Island Creek Coal Co. v Rodgers*, 644 S.W.2d 339 (Ky. App. 1982)). Thus, the standard of review on the issue of bifurcation is abuse of discretion.

Admissibility of evidence is entirely within the discretion of the trial court. *Love v. Commonwealth*, 55 S.W.3d 816, 822 (Ky. 2001). Therefore, appellate courts review evidentiary rulings of a trial court for abuse of discretion as well. *Dunlap v. Commonwealth*, 435 S.W.3d 537, 553 (Ky. 2013).

Interpretation of legal authority, such as a binding appellate opinion, is a question of law. Questions of law are reviewed *de novo*. *See generally*

Phillips v. Lexington-Fayette Urban County Gov't, 331 S.W.3d 629 (Ky. App. 2010).

**B. APPELLANTS FAILED TO COMPLY WITH THE CIVIL
RULES REGARDING APPELLATE PROCEDURE.**

As a threshold matter, Love points to examples in the Appellants' briefs that indicate non-compliance with the rules of procedure for appeals which will affect this Court's disposition of the matter.

It is a dangerous precedent to permit appellate advocates to ignore procedural rules. Procedural rules do not exist for the mere sake of form and style. They are lights and buoys to mark the channels of safe passage and assure an expeditious voyage to the right destination. Their importance simply cannot be disdained or denigrated. Enforcement of procedural rules is a judicial responsibility of the highest order because without such rules substantive rights, even of constitutional magnitude, [...] would smother in chaos and could not survive.

Hallis v. Hallis, 328 S.W.3d 694, 696 (Ky. App. 2010) (internal citations and quotations omitted).

Civil Rule 76.03 governs prehearing conferences. CR 76.03(4)(h) requires an appellant to provide "a brief statement of the facts and issues proposed to be raised on appeal, including jurisdictional challenges," in the prehearing statement. CR 76.03(8) limits the scope on appeal to those issues noted in the prehearing statement: "[a] party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion." This Court has

previously noted that “[i]t has long been the rule in this Commonwealth that an appellant is limited to arguing the issues listed in his prehearing statement.”

Mullins v. Ashland Oil, Inc., 389 S.W.3d 149, 154 (Ky. App. 2012).

The Appellants’ prehearing statement listed four issues for this Court to consider on appeal:

1. Whether the Trial Court erred on its own in bifurcating this medical malpractice case[;]

2. Whether the Trial Court erred in refusing to allow the jury to hear the consequences of the surgery that was the fact [*sic*] the Plaintiff almost died the night of the surgery, she spent 4 days and nights on life support, she spent 12 days in the hospital, and she suffered a paralyzed vocal cord, that you do not expect from thyroid surgery[;]

3. Whether the Court erred in bifurcating the case for its own convenience when it excluded the Plaintiffs[’] economic expert that would have offered an economic opinion in the range of \$1,000,000.00[; and]

4. Whether the Trial Court erred in refusing to allow the Plaintiff herself to testify about the surgery, or to testify that she almost died, to testify that she was on life support for 4 days and nights, to testify that she spent 12 days in the hospital and that she was totally disabled after the surgery and was awarded Social Security Disability [benefits] effective December, 2006.

This list conspicuously does not include several of the eleven enumerated issues raised in the Appellant’s brief, which include: 1) an allegation that the trial court misinterpreted the Supreme Court’s instruction, and the misinterpretation manifested itself in the form of the *sua sponte* bifurcation of the action and the exclusion of certain testimony by Appellants’ experts after the Appellants “verified

with the trial court” that the use of experts was not restricted; 2) a further allegation that the trial court misinterpreted the Supreme Court’s instruction as directing bifurcation; 3) an allegation that the trial court erred in *sua sponte* bifurcating the action when the motion sought to strike Appellants’ experts; 4) a further allegation that the trial erred and abused its discretion when *sua sponte* bifurcating the matter; 5) an allegation that the trial court erred in precluding Lisa’s testimony regarding the surgery; 6) an allegation that the trial court erred in excluding the evidence of the consequences of the surgery from Appellants’ experts; 7) a third allegation that the trial court erred in *sua sponte* bifurcating the action and excluding evidence of Appellants’ million claim of damages; 8) a third allegation that the trial court misinterpreted the Supreme Court’s instruction, by prohibiting Lisa from testifying about the extent of her damages stemming from the surgery; 9) a fourth allegation that the trial court erred in bifurcating the case and ordering the two trials would not occur consecutively; 10) an allegation that the trial court erred in excluding the Appellants’ expert evidence which echoed that contained in the Supreme Court’s recitation of the facts of the case; and 11) an allegation that the trial court committed reversible error in excluding the Appellants’ experts to testify as to the allegedly unnecessary surgery. Later in the Appellants’ brief, they also asserted that the trial court erred in allowing Love to cross-examine Larry about Lisa’s condition post-surgery, and that trial error occurred in that the jury’s verdict was racially motivated.

Taking the redundant arguments together, this Court distilled the Appellants' position to its bare essence, which resulted in the basic allegations of error noted in Section I of this opinion.

An equally serious failure on the Appellants' part is the complete omission of any citations to the record on appeal.

[I]n providing that an appellate brief's contents must contain at the beginning of each argument a reference to the record showing whether the issue was preserved for review and in what manner emphasizes the importance of the firmly established rule that the trial court should first be given the opportunity to rule on questions before they are available for appellate review. It is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court.

Smothers v. Baptist Hosp. East, 468 S.W.3d 878, 881 (Ky. App. 2015) (citing *Elwell v. Stone*, 799 S.W.2d 46 (Ky. App. 1990)).

In situations presenting this Court with the responsibility to enforce the rules of appellate procedure, precedent authorizes three sanctions for non-compliance. *Elwell* at 47. The first potential sanction is to ignore the deficiency and review the issue on its merits. The second potential sanction is to strike the brief or its offending portions. The third potential sanction is to review the issues under a much higher standard of review, "manifest injustice." *Id.*

As several of the errors alleged in the brief inextricably relate to the issues actually presented in the prehearing statement, the Court will exercise *Elwell's* first option and consider those particular issues as if raised therein. On the other hand, the Court declines to further address those issues which do not relate to

the issues noted in the prehearing statement. As such, the arguments that the verdict should be vacated as the result of Love's alleged failure to mediate, and that the verdict should be vacated as the result of an improper racial motive, shall not be considered pursuant to CR 76.03, CR 76.12, *Elwell*, and *Mullins*.

C. THE TRIAL COURT DID NOT ERR IN *SUA SPONTE* ORDERING THE BIFURCATION OF THIS ACTION.

Nothing in CR 42.02 or in case law prohibits a trial court from *sua sponte* bifurcating trial upon finding that severance of claims or issues would be helpful. Quite to the contrary, the language of the rule suggests that bifurcation is mandatory upon the trial court finding it to be appropriate. *Calhoun* at 480.

The Kentucky Supreme Court affirmed the trial court's summary judgment in *Love I*, meaning that the issue of causation by Love as the result of the allegedly botched procedure was conclusively resolved against the Appellants. The Court's instructions to the trial court were to limit the scope of trial to the propriety of the decision to move forward with the operation. While the Appellants ostensibly wanted to present evidence of the consequences of Lisa's surgery as a means of proving damages, such evidence would also likely have the effect of clouding the jury's understanding of which allegedly negligence act they were deciding. Recognizing this risk and the potential prejudice against the defense, the trial court ameliorated the situation by splitting the action into two

trials. Though not stated explicitly in the trial court's written order of January 20, 2015, this understanding provided the foundation underlying that ruling.⁴

The Appellants urge an overly literal interpretation of the Supreme Court's instructions, insisting that because *Love I* did not specifically direct bifurcation, then the trial court misinterpreted the opinion and abused its discretion by ordering bifurcation. For this Court to oblige the Appellants with such a reading would deprive the trial court of the discretion authorized by the authorities cited herein.

This Court cannot conclude that the trial court acted arbitrarily, unreasonably, unfairly, or in a manner unsupported by sound legal principles, in ordering the bifurcation of this matter for purposes of trial. Nor can this Court conclude the trial court misinterpreted the Supreme Court's holding in *Love I*.

**D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN
EXCLUDING THE TESTIMONY OF THE MEDICAL AND
ECONOMIC EXPERTS AS TO THE CONSEQUENCES OF**

⁴ The recording of the January 7, 2015, hearing on Love's motion to strike being absent from the record on appeal, this Court cannot address the possibility that the trial court explicitly made such findings orally. The record does, however, contain a letter from Love's counsel to the trial judge, noting that a proposed order was circulated to those involved. Its entry on January 20, 2015, indicates consistency with the trial judge's oral rulings.

THE SURGERY IN THE LIABILITY TRIAL.

After the matter had been bifurcated, the sole issue presented in the liability trial was the question of whether Love's recommendation that Lisa have the surgery was consistent with the standard of care. In their brief, the Appellants placed enormous emphasis on the medical and economic consequences on Lisa and Larry as the result of the surgery, repeating the same language about Lisa's time in the hospital and condition in a psittacine manner nearly once per page. However, this Court having already determined the trial court acted appropriately in bifurcation of the action, that evidence becomes irrelevant to the only salient issue in the liability trial.

The Appellants sought to call their medical experts, Bavli and Benjamin, and their economic expert, Mathis, to testify in the liability trial. The trial court's order of January 20, 2015, did not preclude the in-person testimony from Bavli or Benjamin. It merely limited the scope of any such testimony to the relevant issue. At trial, deposition testimony of both Bavli and Benjamin were read, in relevant part, into the record. Further, the Appellants requested that reading, in their motion filed on March 24, 2015, which the trial court granted. Thus, Appellants' argument that the trial court improperly excluded their relevant medical testimony is both factually inaccurate and clearly refuted in the record.

The trial court excluded testimony from the medical experts' depositions which reflected the consequences of Lisa's surgery on relevance grounds. Rule 401 of Kentucky Rules of Evidence ("KRE") defines relevant

evidence as “evidence having any 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.” After the bifurcation, evidence of the consequences of the surgery had no probative value to any fact “of consequence” in the liability trial. Hence, the trial court correctly deemed it irrelevant. As the text of KRE 402 aptly states, “[e]vidence which is not relevant is not admissible.”

This Court must conclude that the trial court’s exclusion of certain irrelevant portions of the Appellants’ medical evidence, and the entirety of their economic evidence, from the liability trial did not amount to an abuse of discretion.

E. THE TRIAL COURT’S ADMISSION OF LARRY WALKER’S TESTIMONY WAS HARMLESS ERROR.

The Appellants point out, and Love does not deny, that Larry’s deposition testimony was read into the record and Larry was asked questions during cross-examination about Lisa’s medical condition after her surgery. Specifically, Larry was asked—over Appellants’ counsel’s objection— if Lisa’s thyroid issues had resolved after the surgery. The Appellants only address the testimony of Larry in their brief.

Love argues this instance of testimony related to Lisa’s post-surgery condition was admissible, despite the court’s order, because the purpose for which it was presented differs from the purpose for which the Appellants sought to introduce similar evidence. In arguing in favor of admissibility, Love notes that whether the surgery was successful in its purpose is directly germane to the

propriety of the decision to perform the surgery. Such an argument reflects an attempt to justify the decision to perform the surgery in hindsight, and is not relevant in the decision where the outcome was not yet known. The success of the surgery in terms of achievement of the objective is more relevant to the issue of negligence in the actual performance of the surgery, not the decision whether to have the surgery. The trial court acted arbitrarily in admitting this evidence offered by the Appellee when evidence of the same nature and character was excluded when offered by the Appellants.

However, the deposition of Prakash Shah, M.D., a doctor who had treated Lisa, was also read into the trial record. Shah testified at his deposition, without objection, that the surgery successfully resolved Lisa's thyroid problems.

Thus, the jury heard this evidence twice, once over objection, and once without objection. Appellants' failure to object to Shah's identical testimony renders the trial court's decision to allow Larry's testimony meaningless, and any error harmless.

Regarding our review of the merits of the remaining arguments, we find only harmless error, and as such, we hereby AFFIRM the ruling of the trial court.

ALL CONCUR.

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