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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001656-MR

JENNIFER FORD, M.D. — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 15-CI-001368

STEVEN J. REISS, M.D.; AND
BAPTIST HEALTH MEDICAL GROUP, INC.,
D/B/A/ BAPTIST NEUROLOGICAL SURGERY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MAZE, AND TAYLOR, JUDGES.

LAMBERT, JUDGE: Jennifer Ford, M.D. ("Ford") appeals from a final judgment of the Jefferson Circuit Court in favor of appellee Baptist Health Medical Group, Inc. ("Baptist"), in Ford's medical negligence claim. Ford argues the trial court failed to strike three jurors for cause, erred in ruling on an evidentiary issue, and

erroneously permitted Baptist to present inappropriate burden of proof arguments during *voir dire*. Upon review, we affirm.

On March 23, 2015, Ford asserted a claim of medical negligence against Baptist in the Jefferson Circuit Court on the grounds that treating physician, Steven J. Reiss, M.D. ("Dr. Reiss"), negligently failed to timely anticipate, identify, diagnose, and correctly address a rare neurosurgical emergency called cauda equina syndrome.[1] Ford initially asserted claims against Dr. Reiss, but all claims against him were dismissed before trial. Ford claimed she sustained permanent injuries as a result of the alleged negligence and was consequently entitled to an award of damages to recoup her medical expenses and lost wages and compensation for her pain and suffering.

This matter proceeded to a jury trial against Baptist, beginning on April 25, 2017. After hearing the parties' proof, a Jefferson County jury returned a verdict in favor of Baptist. On May 16, 2017, the circuit court entered a judgment in accordance with the jury verdict. Ford subsequently moved for a new trial

[1] As described in Ford's brief, the cauda equina is a bundle of nerves that hang in a free-floating manner at the end of the spinal cord and resemble a horse's tail. These nerves control the sensory and motor functions of the bladder, rectum, anus, perineum/labia/vagina, and parts of the legs. Permanent injury can lead to permanent incontinence in bowel and bladder, foot drop, and other injuries. The cauda equina nerves are susceptible to permanent injury from compression, such as from a herniated disc, because they do not have the protective coating possessed by other nerves in the spinal cord.

pursuant to Kentucky Rules of Civil Procedure Rule (CR) 59.05, which was denied by order entered September 14, 2017. This appeal followed.

Before we address the merits of Ford's claims, we must address two procedural issues. First, Ford attempts to appeal from the trial court's order denying a new trial. This Court has consistently held an "order denying [a] CR 59.05 motion [is] an inherently interlocutory and non-appealable order." *Jones v. Livesay*, 551 S.W.3d 47, 49 (Ky. App. 2018). When an appellant states she is appealing the interlocutory order denying CR 59.05 relief, we should ignore it because "[t]here is no appellate jurisdiction over the typical interlocutory order." *Cassetty v. Commonwealth*, 495 S.W.3d 129, 132 (Ky. 2016). Therefore, we address only the issues Ford raises as to the final judgment.

Second, Ford's brief is deficient. Although not commented on by Baptist, Ford's brief lacks a preservation statement for each argument. CR 76.12(4)(c)(v) requires a statement of preservation:

> so that we, the reviewing Court, can be confident the issue was properly presented to the trial court and therefore, is appropriate for our consideration. It also has a bearing on whether we employ the recognized standard of review, or in the case of an unpreserved error, whether palpable error review is being requested and may be granted.

Oakley v. Oakley, 391 S.W.3d 377, 380 (Ky. App. 2012). "Our options when an appellate advocate fails to abide by the rules are: (1) to ignore the deficiency and

proceed with the review; (2) to strike the brief or its offending portions, CR 76.12(8)(a); or (3) to review the issues raised in the brief for manifest injustice only[.]" *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). In this case, we elect to ignore the deficiency for two reasons: (1) Ford's recitation of the procedural history contains numerous cites to the record; and (2) Ford's three arguments either lack merit or are unpreserved for appellate review.

For her first issue, Ford argues the trial court erred when it failed to strike three jurors for cause, forcing her to use peremptory strikes to eliminate them from the pool. Ford further argues she would have used her peremptory strikes to eliminate potential jurors who were insurance company employees or were otherwise objectionable. However, Ford's argument was not properly preserved for appellate review. "[I]n order to complain on appeal that [she] was denied a peremptory challenge by a trial judge's erroneous failure to grant a for-cause strike, the [party] must identify on [her] strike sheet any additional jurors [she] would have struck." *Gabbard v. Commonwealth*, 297 S.W.3d 844, 854 (Ky. 2009); *Grubb v. Norton Hospitals, Inc.*, 401 S.W.3d 483, 487 (Ky. 2013) (extending the requirement in *Gabbard* to civil cases). Although Ford orally informed the court which jurors she would have struck had the trial court granted the requested for-cause strikes, her strike sheet lacks any such notation. The Supreme Court of Kentucky has made clear that in "all cases tried after finality of

our decision in *Gabbard*," parties *must* identify on their strike sheet any additional jurors they would have struck in order to properly preserve the issue for appeal. *Pauley v. Commonwealth*, 323 S.W.3d 715, 720 (Ky. 2010). Ford failed to comply with the requirement in *Gabbard*, so we cannot address her unpreserved argument.

Second, Ford argues the trial court erred when it permitted Baptist to present an implicit comparative negligence defense after granting summary judgment on the issue. More specifically, Ford asserts Baptist was permitted to refer to her as a "sophisticated" patient because she is an obstetrician/gynecologist and argues this was a backdoor approach to place blame on her. We review a trial court's evidentiary ruling for abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000); *see also Pauly v. Chang*, 498 S.W.3d 394, 411 (Ky. App. 2015). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

Ford raised this issue as an oral motion *in limine* during a pretrial conference. Although Ford did not submit a written motion *in limine* regarding references to her as "sophisticated," the parties engaged the trial court in a lengthy discussion of Baptist's ability to cross-examine Ford. The trial court denied Ford's motion, despite previously granting summary judgment as to comparative fault,

stating "I'm not going back or reversing my prior order, but I don't think we need to make a blanket total prohibition, which I think would effectively prevent them from even cross-examining Dr. Ford." The trial court further opined, "The jury knows that she's a doctor. I don't think that there's any real prejudice that's going to be created by saying that she's a sophisticated patient. I mean, the jury knows that." Although Ford's brief cites to repeated references to her "sophistication" throughout the trial, her brief does not mention any contemporaneous objections to such references. However, "[m]otions in limine can preserve issues for appellate review, provided they are sufficiently detailed about what the moving party intends to exclude." *Montgomery v. Commonwealth*, 505 S.W.3d 274, 280 (Ky. App. 2016) (citing *Lanham v. Commonwealth*, 171 S.W.3d 14, 22 (Ky. 2005)). Based on our review of the pretrial hearing, Ford's oral motion *in limine* was sufficiently specific as to the particular testimony she sought to exclude.

Even though Ford preserved this issue for our review, her argument lacks merit. Our rules require litigants to provide this Court with "citations of authority pertinent to each issue of law." CR 76.12(4)(c)(v). Ford provides no citation to authority in support of this argument and instead makes the unsupported argument that referring to her as "sophisticated" somehow implies she interfered with Baptist's medical treatment and, thus, was partially at fault for her own injuries. *Pauly*, 498 S.W.3d at 416. Her argument merely consists of conclusory

statements and a self-serving interpretation of the facts without indicating to this Court what legal authority entitles her to relief on those facts. Without more, we will not further evaluate the trial court's reason for denying Ford's motion *in limine* regarding use of the word "sophistication" and say no more.

Ford's third argument is that the trial court erred in permitting Baptist, during *voir dire*, to advise the jury the Plaintiff bore the burden of proof and to describe that burden. Ford further argues there is no burden of proof in a civil case. The trial court heard Ford's objection and found that Baptist Health made no erroneous statements during *voir dire*. Ford requested the trial court admonish the jury that Baptist's assertions regarding the burden of proof were incorrect. The trial court made no formal ruling but stated it would remind the jury "attorneys do not instruct on the law . . . and that the court has the sole obligation to provide the law and the instructions in the case." The trial court indicated it would rule on the issue prior to opening statements. Ford failed to request a ruling at that time, so the trial court never directly ruled on the issue. "Our case law is well established that a failure to press a trial court for a ruling or an admonition on an objection or on a motion for relief operates as a waiver of that issue for purposes of appellate review." *Perkins v. Commonwealth*, 237 S.W.3d 215, 223 (Ky. App. 2007). Thus, Ford waived this issue, so we cannot address her argument on appeal.

For the foregoing reasons, we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

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