RENDERED: JULY 3, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001766-MR

JOHN RUSSELL BROWN
AND
KEITHA BROWN — APPELLANTS

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 01-CI-00937

RANDAL H. PAUL, M.D.;
GILBERT, BARBEE, MOORE &
MCILVOY, P.S.C., D/B/A
GRAVES-GILBERT CLINIC — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; BARBER AND DYCHE, JUDGES.

BARBER, JUDGE: Appellants, John Russell Brown ("Brown") and his wife, Keitha Brown, appeal from a judgment rendered upon a jury verdict in favor of Appellees, Dr. Randal H. Paul ("Dr. Paul") and Gilbert, Barbee, Moore & McIlvoy, P.S.C, d/b/a Graves Clinic, in this medical negligence case. Appellants seek review

of the trial court's order denying their motion for new trial, on ground that during deliberations the jury should not have been permitted to review an audio-visual presentation that was not in evidence. Concluding that any error was harmless, we affirm.

This lawsuit arose out of medical treatment Brown received from Dr. Paul for outpatient cataract surgery in July 2002, and post-surgical treatment the following week. During an office visit when Dr. Paul informed Brown of a surgical option, a computer-generated audio-visual presentation about cataract surgery ("the presentation") and an audiotape disclosure/informed consent were played for Brown. These were later played for the jury during the Appellees' opening statement.

Following closing statements, the trial court informed the jury it would replay portions of the trial videotape, if they wanted to review something. No objections were made. An hour into deliberations, the jury asked to have the presentation and the audiotape informed consent replayed. Appellants objected on ground the presentation had not been admitted as evidence. Appellees explain that a written transcript of the audio portion had been admitted into evidence; however, the video explaining the cataract procedure was "inadvertently not offered into evidence during the trial." The trial court

allowed the jury's request. Approximately five hours later, the jury returned an eleven to one verdict in favor of Appellees. On June 18, 2002, the trial court entered judgment on the verdict. On August 2, 2002, the trial court entered an order denying Appellants' motion for new trial:

> This matter is before the Court on Plaintiff's motion for new trial. On June 6, 2002, the jury returned a verdict finding in favor of the Defendant. The Plaintiffs argue that the Court erred in allowing the jury to view and hear certain exhibits after the jury had begun deliberating. The Plaintiffs argue that said exhibits were presented in opening statements only and were not introduced into evidence.
>
> The subject video and audio tapes were played for the jury during opening statements without objection [1] from the Plaintiffs. Furthermore, Plaintiff John Russell Brown testified on direct that he had reviewed the video tape prior to the surgery and that he remembered the subject audio tape as well. Accordingly, the Court concludes that any error in allowing the jury to review these materials for a second time was not prejudicial to the Plaintiffs' case. See: Maclin v. Horner, Ky. App., 357 S.W.2d 325, 328 (1962).

[1] Whether Appellants actually objected to the video prior to opening statements is contested. Appellants contend that they did object, but that the objection was not recorded in the trial transcript. There is a 12 minute gap in the trial videotape; following the gap, the video shows the court reassuring appellants' counsel that everything was on record. An objection or at least a discussion regarding the presentation can be inferred from the video and from the "events log" of the court. Appellants suggest that the trial court was unaware of the twelve minute gap and had simply forgotten about the objection in denying the motion for new trial. Appellants did not mention this in their motion for a new trial, or in their reply to the Appellees' response to the motion.

> Accordingly, IT IS HEREBY ORDERED that Plaintiffs' motion for a new trial is DENIED. (Emphasis original).

This appeal followed. Abuse of discretion is the standard of review of a trial court's denial of a motion for new trial. The trial court's decision is presumed correct and will not be reversed, absent clear error. This rule recognizes that a ruling on a motion for a new trial depends, to great extent, on factors and impressions not included in the appellate record.[2]

Appellants rely upon *Smith v. Commonwealth*[3] to support their contention that the court committed reversible error by allowing the jury to review information not properly in evidence. There, the jury was allowed to take into the jury room a piece of plasterboard ostensibly cut from the wall of the victim's home. The plasterboard had scratches upon it that may have been made by appellant's belt buckle. The piece of plasterboard was never admitted in evidence. No foundation was laid for its admission. It was never shown that the plasterboard actually came from the Wilson residence or when or where the markings upon it were made. *Smith* is readily distinguishable on its facts.

---

[2] Shortridge v. Rice, Ky. App., 929 S.W.2d 194, 196 (1996).
[3] Ky., 645 S.W.2d 707 (1983)

Kentucky law holds that that where a witness has testified concerning an exhibit, it may be considered part of the record, although not formally introduced.[4] Deeds, checks, and even a coat have been allowed into evidence under this rule. To hold otherwise, would be a "species of judicial ritualism." [5] In *Thompson v. Walker*,[6] the issue involved the propriety of the jury's taking cards, with physical information about the defendant, into the jury room during deliberations. Noting the judge's substantial discretion regarding the introduction of evidence, the court explained that "if the proper oral testimony was offered in support of [the] cards and if they were relevant to an issue in the case, then it could not be improper to allow the cards to be introduced as exhibits."[7]

In *Maclin v. Horner*,[8] cited by the trial court, the jury was allowed to review a chart prepared for use in closing argument by the plaintiff's attorney containing his calculations of the client's damages, which were not properly admitted as evidence at trial. *Maclin* holds that absent prejudice such error is not reversible. In *Maclin,* the verdict did not reflect

---

[4] *Jones v. Driver*, Ky. App., 137 S.W.2d 729, 731 (1940).
[5] *Id.*
[6] Ky. App., 565 S.W.2d 172,175 (1978).
[7] *Id.*
[8] *supra.*

that the chart was a "substantial influencing factor upon the jury." [9]

Appellants contend that replaying the presentation was prejudicial, because the trial court effectively "vouched" for exhibits not in evidence. Appellants assert that based upon "the Trial Court's actions and comments during deliberations, it was reasonable for the jury to infer that the Court thought Appellees' exhibits were important and it was important for the jury to consider them in reaching a verdict." A court's comments indicating that one portion of evidence is more highly valued than another may constitute reversible error.[10]

Our review of the trial videotape reflects that the court's comments functioned only to introduce the video and verify that the video was the exhibit the jury wanted to review. The comments do not suggest that the presentation was somehow more important or held a greater value than other evidence presented at trial.

Here, the jury had already seen the presentation during opening statement,[11] and both Brown and Dr. Paul had

---

[9] *Id.*

[10] *Commonwealth v. Eubank*, Ky. App., 369 S.W.2d 15, 16 (1963).

[11] The fact that the trial court incorrectly noted that it was played during opening statement without objection, makes little difference in the outcome of the case. The court committed a harmless error, which without more, is insufficient ground to overturn a verdict. *Commonwealth v. Christie*, Ky., 98 S.W.3d 485, 491 (2002).

authenticated it. We are not persuaded that replaying the presentation during deliberations was a substantial influencing factor upon the jury. The evidence was in conflict and expert medical opinion was presented that Dr. Paul did not deviate from the standard of care. We find no prejudicial error, and conclude that the trial court did not abuse its discretion. Accordingly, we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Charles D. Greenwell
Louisville, Kentucky

BRIEF FOR APPELLEE:

John David Cole
Bowling Green, Kentucky

Matthew P. Cook
Bowling Green, Kentucky