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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002095-MR

CHARLENE D. McCARTY, Individually and as Administratrix of the Estate of CHARLES CHRISTOPHER DYLAN McCARTY, and SHANNON McCARTY — APPELLANTS

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 99-CI-00064

KURT JAENICKE, M.D. and ASHLAND WOMEN'S CARE, P.S.C. — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM and TACKETT, Judges, and MILLER, SENIOR JUDGE.[1]

BUCKINGHAM, JUDGE: The issue in this case is whether the trial court erred in refusing to strike two jurors for cause in a trial in a medical negligence case even though the jurors were patients of the defendant doctor. We conclude the court erred and thus reverse and remand for a new trial.

[1] Senior Judge Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Charlene McCarty's pregnancy ended at approximately 37 weeks with the stillbirth of an infant male, Charles Christopher Dylan McCarty. Dr. Kurt Jaenicke was McCarty's obstetrician, and McCarty filed a civil complaint in the Boyd Circuit Court against Dr. Jaenicke and his group, Ashland Women's Care, P.S.C. McCarty filed the complaint individually and as administratrix of the infant male's estate, and her husband, Shannon McCarty, joined as a plaintiff in the suit. The complaint alleged negligence by Dr. Jaenicke in his care and treatment of McCarty.

The case was tried by a jury in the Boyd Circuit Court in May 2002. By a 9-3 vote, the jury returned a verdict in favor of Dr. Jaenicke and his group. This appeal followed.

During the voir dire proceedings, two of the prospective jurors, Nancy Kiger and Bonnie Prince, related that Dr. Jaenicke was their doctor. Juror Kiger stated several times that she would be uncomfortable if she were on the jury and it were to render a verdict against Dr. Jaenicke, but Juror Prince stated that "[i]t wouldn't make any difference to [her]." Juror Kiger also stated that all her family considered Dr. Jaenicke to be their doctor and that Dr. Jaenicke was also the doctor for all her female co-workers. Further, Juror Kiger stated that her niece had given birth to a baby the day before the trial began and that a nurse midwife employed by Dr. Jaenicke's group had delivered the child. In response to questions by the trial

judge, both jurors indicated that they could evaluate the evidence and render a verdict against Dr. Jaenicke as if he were not their doctor in the event the evidence warranted such.

McCarty's attorney moved the court to strike Juror Kiger for cause, but the court gave Dr. Jaenicke's attorney an opportunity to attempt to rehabilitate the juror. Juror Kiger and Juror Prince then responded to questions in a manner indicating that they could evaluate the evidence and render a verdict in a fair and impartial manner. At the conclusion of questioning by Dr. Jaenicke's attorney, one of McCarty's attorneys moved the court to strike all jurors that were patients of Dr. Jaenicke. He argued that "to require the Plaintiff to prove a case against a physician where the physician's own patients are sitting on the jury is a burden we don't believe we're capable of meeting. If these were clients of the lawyer they certainly wouldn't be sitting on the jury." The court denied the motion, and McCarty used all her peremptory challenges, two of which were used to strike Juror Kiger and Juror Prince.

Whether or not a juror should be stricken for cause is within the discretion of the trial court, and this court will not reverse the trial court's determination unless it abused its discretion or was clearly erroneous. Commonwealth v. Lewis, Ky., 903 S.W.2d 524, 527 (1995). "Irrespective of the answers

given on voir dire, the court should presume the likelihood of prejudice on the part of the prospective juror because the potential juror has such a close relationship, be it familial, financial or situational, with any of the parties, counsel, victims or witnesses." Ward v. Commonwealth, Ky., 695 S.W.2d 404, 407 (1985), quoting Commonwealth v. Stamm, 429 A.2d 4, 7 (Pa. Super. Ct. 1981). Once such a close relationship is established, the court must grant a request that the juror be stricken for cause. Id. This close relationship test applies to civil cases as well as criminal cases. See Davenport v. Ephraim McDowell Mem'l Hosp., Inc., Ky. App., 769 S.W.2d 56, 60 (1988).

Furthermore, the court in the Ward case noted that the juror should be stricken for cause once the close relationship is established "without regard to protestations of lack of bias." Id. In Montgomery v. Commonwealth, Ky., 819 S.W.2d 713 (1991), the Kentucky Supreme Court addressed the propriety of attempting to rehabilitate jurors who should be considered biased by asking whether they can put aside their personal knowledge, relationships, and opinions and decide the case solely on the evidence presented by the court and the court's instructions. In the following strong language, the court condemned the practice of allowing the rehabilitation of a biased juror by such means:

> The message from this decision to the trial court is the "magic question" does not provide a device to "rehabilitate" a juror who should be considered disqualified by his personal knowledge or his past experience, or his attitude as expressed on voir dire. We declare the concept of "rehabilitation" is a *misnomer* in the context of choosing qualified jurors and direct trial judges to remove it from their thinking and strike it from their lexicon.

Id. at 718.

Kentucky cases do not directly address the specific issue of whether a juror must be stricken for cause in the trial of a medical negligence action because the juror is currently a patient of the defendant doctor. However, several cases guide us in our conclusion that the trial court erred in not striking the two jurors for cause in this case.

Altman v. Allen, Ky., 850 S.W.2d 44 (1992), involved facts somewhat similar to those herein. The Altman case was a medical negligence action filed against two obstetricians, at least one of whom was retired, as a result of the treatment of an infant following his premature birth. During voir dire the trial court refused to strike three prospective jurors for cause even though they were former patients of the defendant doctors. A panel of this court reversed the verdict and judgment in favor of the doctors and remanded the case for a new trial on the ground that the trial court had abused its discretion in not excusing the jurors. However, our supreme court reversed this

court and reinstated the trial court's judgment in favor of the doctors. Id. at 46. The court held that there was no evidence that a close relationship between the jurors and doctors had been established. Id. Further, the court stated in dicta that "[n]o court should speculate so as to presume a special bond between a woman and her obstetrician."[2] Id. The court also noted that there was no current or continuing professional relationship between any of the jurors or members of their family with either of the doctors. Id.

Several other cases have relevance to this issue. In Mackey v. Greenview Hosp., Inc., Ky. App., 587 S.W.2d 249 (1979), this court affirmed the trial court's denial of a plaintiff's motion to strike three prospective jurors for cause in a medical negligence case even though each juror revealed a prior professional relationship with one or more of the defendant doctors. Id. at 253. Like the Altman case, the court in the Mackey case specifically noted that "[t]here was no current or continuing professional relationship between any of the jurors or members of their immediate family and any of the physicians involved in the case." Id.

[2] We consider this statement to be dicta and unnecessary to the court's opinion because it appears to include cases where prospective jurors are current patients of the defendant doctor as well as cases where prospective jurors were merely former patients.

In Riddle v. Commonwealth, Ky. App., 864 S.W.2d 308 (1993), this court reversed a criminal conviction where several prospective jurors had been represented by the prosecutors in the past and stated that they would seek their representation in the future. Id. at 312. The court first noted that the prior attorney-client relationship did not automatically cause a juror to be excused for cause under a presumed bias theory. Id. at 310. The court cited the Altman case to support that conclusion. However, the court further stated that the trial court abused its discretion in not striking the jurors for cause because each challenged juror stated that he or she would seek a future attorney-client relationship with the prosecutors. Id. at 311. Likewise, in Fugate v. Commonwealth, Ky., 993 S.W.2d 931 (1999), the Kentucky Supreme Court agreed with this court's conclusion in the Riddle case "that a trial court is required to disqualify for cause prospective jurors who had a prior professional relationship with a prosecuting attorney and[/or] . . . profess[ed] that they would seek such a relationship in the future." Fugate, 993 S.W.2d at 938.

McCarty urges this court to establish a rule holding that it is reversible error for a trial court to refuse to strike for cause jurors who are current patients of defendant obstetricians. On the other hand, Dr. Jaenicke argues that Kentucky has not adopted such a rule and notes the language in

the Altman case that "[n]o court should speculate so as to presume a special bond between a woman and her obstetrician." 850 S.W.2d at 46. Both parties have cited cases from other jurisdictions in an attempt to support their arguments.

In the Altman case the Kentucky Supreme Court indicated that it would not favor such a bright line or per se rule. It refused to presume a special bond between a woman and her obstetrician, and it also stated that a presumption of bias in situations involving psychiatrists, psychologists, clergy, and other counsel-type relationships with patients or clients would also be unwarranted. Id. Nevertheless, the supreme court appeared to approve such a rule in the Fugate case when it approved this court's decision in the Riddle case and held that it was reversible error not to excuse a juror for cause when the juror had been represented by the prosecutor in the past and stated that he or she might use him again in the future. Fugate, 993 S.W.2d at 938-39. In other words, in Kentucky there appears to be a bright line or per se rule that persons who are represented by an attorney in the case or who have been represented by the attorney in the past and might hire him or her again in the future should be stricken for cause at the request of a party or else reversible error will result.

In the case *sub judice*, we conclude that Juror Kiger should have been stricken for cause and that it was reversible

error not to do so.[3] Juror Kiger stated that she was currently a patient of Dr. Jaenicke's, that "my family all goes to him," that "all the girls I work with go too," and that she would be uncomfortable sitting on the jury and possibly returning a verdict against the doctor. Under these circumstances we believe Juror Kiger should have been presumed prejudiced or biased to the extent that rehabilitation as a prospective juror should have been out of the question. See Montgomery, 819 S.W.2d at 718.

Whether Juror Prince should have been stricken for cause by the trial court is more problematic. While Juror Prince stated she was currently a patient of Dr. Jaenicke, she consistently answered questions in a manner indicating that she could evaluate the evidence and render a verdict in a fair and impartial manner. The question we must face in regard to this juror is whether she should have been presumed prejudiced or biased by virtue of her current relationship with Dr. Jaenicke to the extent that she should have been stricken for cause despite well-intentioned rehabilitation efforts.

Direction given by our supreme court in earlier cases persuades us that it was error for the trial court not to strike

[3] See Thomas v. Commonwealth, Ky., 864 S.W.2d 252 (1993), wherein the Kentucky Supreme Court held that a party is denied the full use of peremptory challenges by having been required to use peremptory challenges on jurors who should have been stricken for cause where the party exhausted all his or her peremptory challenges. Id. at 259-60.

Juror Prince for cause. The Altman case is distinguishable because the jurors who were not stricken in that case were former patients of the defendant obstetricians. In fact, the Altman court noted that it would follow the Mackey case where there was no current or continuing professional relationship between the jurors and the doctors rather than the Davenport case where the relationship between the jurors and the parties was a current one. 850 S.W.2d at 45-46. Furthermore, in the Fugate case our supreme court emphasized that the failure of the trial court to strike the prospective juror was reversible error because the juror stated that he would seek to employ the prosecutor in the future. 993 S.W.2d at 938.

We are well aware that it is generally within the discretion of the trial court as to whether a juror should be stricken for cause. See Lewis, supra. However, that discretion is not unbridled, and the trial court abuses its discretion when it fails to strike jurors who have a "close relationship" with a party, counsel, victim, or witness. See Montgomery, supra. It simply does not make sense that a prospective female juror could be found to be unbiased and fit to serve as a juror in a trial against her obstetrician with whom she has a current ongoing doctor-patient relationship. It is no more logical to assume that such a juror would be fit to serve than it would be to assume that a prospective juror could serve on a jury in a case

where his attorney was one of the attorneys in the case. See Riddle and Fugate, supra. While we do not go so far as to say that our supreme court's dicta in the Altman case that there is no "special bond between a woman and her obstetrician" is "incredibly naive" or "ignores reality" as asserted by Justice Leibson in his dissent in that case, we do hold that the failure of the trial court to strike the two jurors who had a current doctor/patient relationship with the defendant doctor in this case warrants a new trial.

The judgment of the Boyd Circuit Court is reversed, and this case is remanded for a new trial.[4]

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

Elizabeth R. Overton
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[4] We decline to address the second issue addressed by McCarty in her brief because it has been rendered moot by our decision on the first issue.