RECEIVED
Feb 18 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Thomas L. Hughston, Jr., Circuit Court Judge

Appellate Case No. 2023-001703

Mia Anderson, on Behalf of the Estate of Jessie Heyward a/k/a Jessie Bell Anderson — Appellant,

v.

Richard Miles Thompson, M.D., and ACS Primary Care Physicians – Southeast, P.C. — Respondents.

BRIEF OF APPELLANT

LAW OFFICES OF BROOKS R. FUDENBERG, LLC

Brooks R. Fudenberg
S.C. Bar #72019
14 Ashe Steet
Charleston, SC 29403
(843) 416-2558
Brooks.R.Fudenberg@Fudenberglaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statement of the Issue on Appeal

Whether the lower court erred in its handling of revelations regarding premature deliberations and juror hostility?

Statement of the Case

This wrongful death and medical malpractice action began June 9, 2020 with the filing of a Summons and Complaint. An Amended Complaint was filed August 8, 2020. The Amended Complaint alleged four causes of action by Mia Anderson, individually and on behalf of the estate of her mother, Jessie Anderson. These were for (1) Negligence-Medical Malpractice, (2) 42 U.S.C. §2000d; 45 C.F.R., Part 80, (3) Wrongful Death, and (4) Survival.

Named as Defendants were Trident Medical Center, LLC d/b/a Moncks Corner Medical Center; Richard Miles Thompson, M.D.; ACS Primary Care Physicians–Southeast P.C; and Jane Doe Defendants 1-5 and John Doe Defendants 1-5.

The second cause of action and the Jane and John Doe Defendants were dismissed by agreement before opening statements. Trident Medical Center, LLC d/b/a Moncks Corner Medical Center was dismissed by stipulation on October 31, 2023.

The remaining Defendants, Respondents Richard Miles Thompson, M.D., and ACS Primary Care Physicians–Southeast P.C., jointly filed their Answer on October 12, 2020. (R. pp. 31-41). The Answer denied liability and denied any deviation from the standard of care. (E.g., *id.* p. 33). These Defendants raised ten affirmative defenses: (1) No Deviation from Standard of Care; (2) Improper Service; (3) No Proximate Cause; (4) Failure to State a Claim; (5) Limitation on liability/Noneconomic Damage Awards Act; (6) Application of S.C. Code Ann. § 15-38-10, et seq.; (7) Superseding/Intervening Causes; (8) Punitive Damages Unconstitutional; (9) Punitive Damages Limited pursuant to S.C. Code § 15-32-530; and (10) Reservation and Non-Waiver. (R. pp. 38-40).

A five-day trial before the Honorable Thomas Hughston, Jr., from September 11 through September 15, 2023, resulted in a defense verdict. (R. p. 159).

Plaintiff's Motion for a New Trial was denied on October 2, 2023. Plaintiff's Notice of Appeal was served on October 31.

Statement of Facts

Background Facts

Jessie Anderson (Jessie) was diagnosed by Respondent Richard Miles Thompson, M.D. with bilateral leg pain on April 12, 2016, after she went to the emergency room where he worked, complaining of pain in both legs and weakness. (R. p. 172). He gave her some Flexeril and Tylenol, and sent her home. (R. p. 185). As Appellant's expert Dr. Michael Streiff testified, "That's not a diagnosis; it's a symptom." (R. p. 102, lines 17-18).

She was sent home, and died the next day, after being rushed to another emergency room.

An issue running throughout the trial was why no autopsy had been done. An autopsy would have shown whether Jessie died from pulmonary embolism that should have been diagnosed by Dr. Thompson, as Appellant contended, or from other causes, as urged by the Respondents.[1]

[1] ACS Primary Care Physicians - Southeast, P.C., the other Respondent, was Dr. Thompson's employer.

To Naomi Tenpenny, Jessie "was a mama. She was somebody that, you know, you met, and you just automatically loved. She was someone that I considered to be my additional mom." (R. p. 47, lines 19-22).

More generally, Jessie

> was the neighborhood mom. She was bubbly. She was the person that anybody can go to. She didn't care who you are, she would feed you. She didn't care who you are. She's the neighborhood mom. There was nothing that you couldn't go to her and talk about. Her door was always open to anybody. She didn't care if she knew you or not, she would welcome you with open arms to come on in.

(R. p. 50, line 20 – p. 51, line 2).

So when Ms. Tenpenny got a call at work on April 13, 2016, from Mia Anderson's (Mia) employer that Mia was hysterical, that there was something going on with Jessie, Mia's mom, Ms. Tenpenny dropped everything to get Mia and take her to the hospital. (R. p. 51, lines 3-13).

Then – and the jury was not allowed to hear this – the doctor and coroner came out, and in the presence of both Mia and Ms. Tenpenny, each said the cause of death was a pulmonary embolism – a blood clot. (R. p. 52, line 13 – p. 55, line 8). Mia asked for an autopsy. (R. p. 96,

line14 – p. 97, line 19). The doctor and coroner explained that no autopsy was needed, because they knew why Jessie had died. (R. p. 55, lines 10-22).

The court similarly refused to allow Mia to testify as to what the coroner and doctor told her as to why there was no autopsy. Outside the presence of the jury, the trial Court instructed, "[S]he shouldn't talk about what the coroner told her, or anything like that, why there was an autopsy or no autopsy, or anything like that." (R. p. 92, line 24-p. 93, line 2).

Operative Procedural Facts

When the Judge dismissed the jury for a break, and instructed the jury not to discuss the case, the forelady stood up and said "F*** you" to the Judge. (R. p. 104, line 17 - p. 109, line 3). Then, coming from the jury room, was heard, "I'll discuss this case, if I want to. What is he going to do to me, throw me in jail?" (*Id.*) (See generally p. 104, line17 – p. 113, line 13, p. 117, line 9 – p. 120, line 16).

After the above was brought out, the Judge announced outside the presence of the jury his intention "to admonish them again . . . in as strong a language that I can." (R. p. 109, lines 17-19).

Counsel for Appellant immediately protested that admonishment was insufficient. "If they have begun deliberating or discussing the case, I think that's completely inappropriate. Either way, they might be in our favor; they might be in their favor. But I don't think you can go on with the jury, if they've already started deliberating." (R. p. 109, line 21 – p. 110, line 3).

The Court responded, "Well, I appreciate that, but I'm going to admonish them[.]" (R. p. 110, lines 4-5). Counsel for Appellant asked if he would at least try to determine whether the juror who announced her unwillingness to follow the Court's instructions was the same juror who said "F*** you" to the judge. (R. p. 110, lines 8-14). Counsel for Defendants supported the request. (*Id.*) The Judge again refused. ("I don't want to say anything about that[.]") (*Id.* lines 17-18). He then brought the jury in, again instructed them not to discuss the case among themselves until they are instructed to begin deliberations, and directed that testimony resume. (R. p. 111, line 6 - p. 113, line 13).[2]

---

[2] The Court ended the discussion thusly,

> That's when you are to discuss it, in the privacy of the jury room and not before. I want to make sure you understand that. All right. We'll go on with the rest of the trial. Doc, I believe

At the first opportunity, Counsel for Plaintiff, again with the support of Defense Counsel, moved to replace the forelady with an alternate. (R. p. 117, line 25 - p. 121, line 2). Or at least to check in on her. (R. p. 119, line 2). In addition to her misconduct before the judge "admonished" the jury, she had continued to raise concerns after the admonishment. With the first witness to testify after the judge's admonition not to discuss the case, the forelady gave a big eye roll, shot daggers at counsel for both parties, which was "Very disruptive, not just to the jury, but also to the witnesses and to the lawyers" (R. p. 118, lines 15-17) (Appellant's counsel); "looked like she was having an internal temper tantrum" (R. p. 120, line 3) (Respondent's counsel). "I don't think she wants to be here at all, Your Honor, because she shot the same daggers at both of us" (R. p. 118, lines 8-10) (Appellant's counsel), "Yes" (*id.*, line 11) (Respondent's counsel). "[W]e have two alternates who appear to be listening attentively and certainly capable." (*Id*, lines 20-22) (Respondent's counsel). The trial judge declined to

---

> you were on the stand, come on back up. All right. Finish the direct -- cross.
>
> MS. MASON: Thank you, Your Honor.

(R. p. 113, lines 8-14).

remove or question her (R. p. 120, lines 6-9), and refused the renewed motion after the conclusion of the evidence. (R. p. 157, lines 4-24).

Standard of Review

The standard of review is abuse of discretion. *State v. Zeigler*, 364 S.C. 94, 108, 610 S.E.2d 859, 866 (Ct. App. 2005) ("A denial of a new trial based on alleged jury misconduct is reviewed for an abuse of discretion"). The phrase "abuse of discretion" "does not mean any reflection upon the presiding Judge" but merely "indicate[s] that the appellate Court is simply of the opinion that there was commission of an error of law[.]" *State v. Wallace*, 440 S.C. 537, 543 n.2, 892 S.E.2d 310, 313 n.2 (2023). Generally speaking, an abuse of discretion occurs "when the ruling is not supported by the evidence or is controlled by an error of law." *Wallace*, 440 S.C. at 542, 892 S.E.2d at 312. "[A]n 'arbitrary' or 'unreasonable' ruling clearly is outside of a court's discretion." *Id.* at 543 n.3, 892 S.E.2d at 313 n.3.

Argument

There was credible evidence that

a) A juror was overheard stating, "I'll discuss this case, if I want to. What is he going to do to me, throw me in jail?"

b) When the Judge dismissed the jury for a break, and instructed the jury not to discuss the case, the forelady stood up and said "F*** you" to the Judge.

The exchange between Court and counsel here is virtually identical to the exchange in *State v. Hurd*, 325 S.C. 384, 480 S.E.2d 94, 97 (Ct. App. 1996) (emphasis added),

> THE COURT: Anything further from the defense?
>
> DEFENSE COUNSEL: Your Honor, I don't have any objection to the charge, but I'm very concerned about the juror who was in the green multicolored shirt there on the front row. He <u>appeared to be</u> asleep during most of it.
>
> THE COURT: I noticed that, but what can I do about that?
>
> DEFENSE COUNSEL: Well, I would ask the court to remove him and replace him with the alternate. Or bring him in and question him as to whether he knows what you said because I think it's important that he—
>
> THE COURT: I noticed him nodding off a couple of times, but he was alert during most of the charge. I'm not going to remove him.

Holding that "a juror who has not heard all the evidence in the case or the court's instructions as to the applicable principles of law is grossly unqualified to render a verdict," *id.* (quoting *People v. Valerio*, 141 A.D.2d 585, 529 N.Y.S.2d 350, 351 (1988)), this Court reversed.

> Thus, we hold that "it is incumbent upon the trial court to conduct a probing and tactful inquiry to determine whether a sworn juror is unqualified," and "the court must not speculate ... but must ascertain the juror's state of mind and must place its reasons for excusing or retaining the juror on the record." *Valerio,* 529 N.Y.S.2d at 351. *State v. Reevey,* 159 N.J .Super. 130, 387 A.2d 381 (App.Div.1978). *Cf. State v. Holland,* 261 S.C. 488, 201 S.E.2d 118 (1973) (stating that "[i]t is the duty of the trial judge to assure himself that each and every prospective juror is unbiased, fair, and impartial"). Just because a juror closed his eyes does not necessarily mean that he was asleep, but a trial judge should at least attempt to make this determination whenever a juror appears to be asleep. The trial judge committed reversible error by refusing defense counsel's request to question the juror as to whether he heard all of the charge.

Id. (emphasis added).

So too here. If a juror who has not heard all the court's instructions is grossly unqualified, so too is a juror who has heard the instructions but declares her refusal to follow them. A juror who says "F*** you" to the Judge in the courtroom indicates an unwillingness to follow the Court's directives. A juror who announces in the jury room her refusal to follow the Court's directions does so explicitly. For the same reasons this Court explained in *Hurd*, Ms. Anderson should "be given a new trial." *Id.*

Other cases may be less directly on point, but share *Hurd's* reasoning. *State v. Rowell*, No. 2022-000571, 2024 WL 4287252, at *3 (S.C. Sept. 18, 2024) ("We hold it was error for the circuit court to decline the request for an evidentiary hearing so Juror 164 could be examined as to whether his pending charges could have caused him to be biased."); *State v. Zeigler*, 364 S.C. 94, 108–09, 610 S.E.2d 859, 866–67 (Ct. App. 2005) (where evidence supporting juror misconduct is credible, "the trial court must conduct an evidentiary hearing to determine if misconduct occurred") (emphasis added) (citing *State v. Aldret,* 333 S.C. 307, 315, 509 S.E.2d 811, 815 (1999)). See also *Ethier v. Fairfield Mem'l Hosp*., 429 S.C. 649, 656, 842 S.E.2d 355, 359 (2020) ("Because *Vestry* stands for the principle that less than twelve fair and impartial jurors is perfectly acceptable and is an anomaly in our jurisprudence, we overrule it.") (medical malpractice action).

The Court should follow the authorities above.

Conclusion

The Court should remand for a new trial.

Respectfully submitted,

LAW OFFICES OF BROOKS R. FUDENBERG, LLC

s/*Brooks R. Fudenberg*
Brooks R. Fudenberg
S.C. Bar #72019
14 Ashe Steet
Charleston, SC 29403
(843) 416-2558
Brooks.R.Fudenberg@Fudenberglaw.com