Code of Laws of South Carolina 1976 Annotated
Title 14. Courts
Chapter 7. Juries and Jurors in Circuit Courts
Article 9. Objections and Challenges to Jurors; Impanelling of Juries

Code 1976 § 14-7-1030

§ 14-7-1030. Time for making objections to jurors.

Currentness

All objections to jurors called to try prosecutions, actions, issues, or questions arising out of actions or special proceedings in the various courts of this State, if not made before the juror is impaneled for or charged with the trial of the prosecution, action, issue, or question arising out of an action or special proceeding, is waived, and if made thereafter is of no effect.

Credits

HISTORY: 1962 Code § 38-203; 1952 Code § 38-203; 1942 Code § 639; 1932 Code § 639; Civ. P. '22 § 579; Civ. C. '12 § 4047; Civ. C. '02 § 2946; G. S. 2265; R. S. 2406; 1871 (14) 693; 1899 (23) 39; 1986 Act No. 340, § 3, eff March 10, 1986.

Code 1976 § 14-7-1030, SC ST § 14-7-1030
Current through End of 2015 Reg. Sess.

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EXHIBIT
1

Code of Laws of South Carolina 1976 Annotated
Title 14. Courts
Chapter 7. Juries and Jurors in Circuit Courts
Article 9. Objections and Challenges to Jurors; Impanelling of Juries

Code 1976 § 14-7-1140

§ 14-7-1140. Effect on verdict of irregularity in venire, drawing, and the like of jurors.

Currentness

No irregularity in any writ of venire facias or in the drawing, summoning, returning, or impaneling of jurors is sufficient to set aside the verdict, unless the party making the objection was injured by the irregularity or unless the objection is made before the returning of the verdict.

Credits

HISTORY: 1962 Code § 38-214; 1952 Code § 38-214; 1942 Code § 640; 1932 Code § 640; Civ. P. '22 § 580; Civ. C. '12 § 4048; Civ. C. '02 § 2947; G. S. 2266; R. S. 2407; 1797 (5) 358; 1986 Act No. 340, § 3, eff March 10, 1986.

Code 1976 § 14-7-1140, SC ST § 14-7-1140
Current through End of 2015 Reg. Sess.

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EXHIBIT 2

315 S.C. 431
Court of Appeals of South Carolina.

Helen L. WILSON, as Personal Representative of the Estate of Joe Wilson, Appellant,
v.
Paul E. CHILDS, M.D., Respondent.

No. 2049. | Heard May 10, 1993. | Decided July 6, 1993.

Patient's widow, as personal representative of patient's estate, brought wrongful death and survival action against doctor alleging medical malpractice. The Circuit Court, Orangeburg County, John Hamilton Smith, J., entered judgment for doctor on jury verdict, and patient's widow appealed. The Court of Appeals, Cureton, J., held that: (1) patient's widow failed to demonstrate that she was prejudiced by noncitizen on jury; (2) trial court did not abuse its discretion in refusing to exclude certain jurors for cause; (3) trial court properly exercised its discretion in refusing to permit additional voir dire of prospective jurors; and (4) trial court properly excluded hearsay evidence of statements doctor allegedly made to patient and statements patient allegedly made to his daughter.

Affirmed.

West Headnotes (14)

[1] **Criminal Law**
Impaneling Jury in General

Service of an alien on jury does not per se invalidate jury's verdict.

Cases that cite this headnote

[2] **Jury**
Objections and Exceptions

If an objection to juror is made after impanelment, objecting party must demonstrate he could not have discovered ground for objection through due diligence. Code 1976, § 14-7-1030.

1 Cases that cite this headnote

[3] **Jury**
Objections and Exceptions

Patient's widow in medical malpractice action failed to exercise due diligence in discovering service of noncitizen on jury, and thus was not entitled to object after impanelment of jury, where noncitizen juror stated his place of birth was "Aleppo, Syria," on his juror information card which he returned to court prior to trial, and where venire list prepared by court listed juror's race as "unknown." Code 1976, § 14-7-1030.

1 Cases that cite this headnote

[4] **Jury**
Discretion of Court

Decision to disqualify juror for bias is within discretion of trial judge.

1 Cases that cite this headnote

[5] **Jury**
Relationship to Attorney or Counsel

There is no absolute rule of disqualification based on juror's relationship to attorney in case.

Cases that cite this headnote

[6] **Jury**
Relationship to Attorney or Counsel

Trial court did not abuse its discretion in refusing to exclude jurors for cause in medical malpractice action, even though two prospective jurors had previously been represented by doctor's attorneys, and eight stated they were personally acquainted with these attorneys, where jurors voluntarily disclosed their potentially disqualifying relationships, where all jurors indicated they were able to give parties fair and impartial trial, and where patient's widow identified no circumstances which suggested any juror was dishonest in his declaration of impartiality.

1 Cases that cite this headnote

[7] **Jury**

EXHIBIT 3

Relationship to Attorney or Counsel

In reviewing trial court's decision on whether to disqualify jurors for cause, there is no reason to apply different rule when several jurors have disclosed prior relationship with counsel, although number of these jurors may exceed four peremptory strikes allowed each party, as proper focus of Court of Appeals' inquiry is whether trial judge refused to exclude juror whom counsel had identified as biased.

Cases that cite this headnote

[8] **Jury**
Discretion of Court

Jury
Extent of Examination

Responsibility of trial court is to focus scope of voir dire examination of prospective jurors as described in statute, and manner in which these questions are pursued and scope of any additional voir dire is within sound discretion of trial court. Code 1976, § 14-7-1020; Rules Civ.Proc., Rule 47(a).

4 Cases that cite this headnote

[9] **Jury**
Extent of Examination

In voir dire examination of prospective jurors, trial court is not required to ask every question submitted by counsel. Code 1976, § 14-7-1020; Rules Civ.Proc., Rule 47(a).

2 Cases that cite this headnote

[10] **Jury**
Extent of Examination

Trial court did not abuse its discretion in medical malpractice action in refusing to permit additional voir dire examination of prospective jurors who had identified themselves as friends or former clients of doctor's attorneys, and there was no prejudice to patient's widow. Code 1976, § 14-7-1020; Rules Civ.Proc., Rule 47(a).

2 Cases that cite this headnote

[11] **Appeal and Error**
Selection and Impaneling of Jurors

There is no reversible error in impaneling of jury unless it appears that objecting party was prejudiced.

Cases that cite this headnote

[12] **Evidence**
Nature and Admissibility

Hearsay within hearsay, or "double hearsay," is excluded unless each part of combined statement falls within an exception to hearsay rule. Fed.Rules Evid.Rule 805, 28 U.S.C.A.

Cases that cite this headnote

[13] **Evidence**
Statements Made for Purpose of Medical Diagnosis or Treatment

Trial court properly excluded testimony by witnesses in medical malpractice action as to statements made by deceased patient regarding what doctor allegedly had told him where patient's widow did not offer evidence to suggest that doctor's statements qualify as res gestae, and what doctor allegedly said to patient was not indicative of patient's state of mind.

Cases that cite this headnote

[14] **Evidence**
Not Contemporaneous with Occurrence

Trial court did not abuse its discretion in excluding testimony by patient's daughter in medical malpractice action, that shortly before patient's death, he stated he had told doctor about his rectal bleeding; testimony was hearsay and was not admissible as present sense impression as patient had made this statement in reflection of past events.

Cases that cite this headnote

Attorneys and Law Firms

****288 *433** Fred Thompson, III, of Scardato & Thompson, Charleston, and William deForest Thompson, of Thompson & O'Brien, Fort Lauderdale, FL, for appellant.

C. Bradley Hutto and Charles H. Williams, of Williams & Williams, Orangeburg, for respondent.

Opinion

CURETON, Judge:

In this wrongful death and survival action, the Appellant, Helen Wilson, alleged medical malpractice by the Respondent, Dr. Paul Childs, in his treatment of her deceased husband. The jury returned a verdict for Childs. On appeal, Wilson asserts the jury's verdict should be vacated because a non-citizen served on the jury. She also appeals the trial court's refusal to exclude certain jurors for cause, its failure to permit additional *voir dire,* and its refusal to admit certain evidence. We affirm.

The decedent was diagnosed as diabetic by Childs in January 1985. Childs testified the decedent never requested a complete physical although one was offered. On April 1, 1986, Childs scheduled the decedent for an x-ray of the gastrointestinal tract after the decedent complained of rectal bleeding and other symptoms. On April 3rd, after examining the x-ray, ***434** Childs prescribed medication to treat duodenitis, and scheduled the decedent for another appointment on May 13th.

On April 22nd, while Childs was on vacation, the decedent was examined by another physician and immediately hospitalized. Tests revealed cancer of the colon, which had metastasized to the decedent's lungs, bone, and liver. On May 13th, he died as a result of complications following surgery to his colon.

Wilson alleged Childs departed from the appropriate standard of care in his treatment of her husband. She further alleged the decedent's colon cancer would have been treatable if diagnosed in January 1985, when the decedent first visited Childs, or if diagnosed in the fall of 1985, when the decedent stated to several acquaintances, and allegedly to Childs, that he was experiencing rectal bleeding.

Among other defenses, Childs asserted the decedent had been contributorily negligent by failing to report his rectal bleeding and other symptoms.

I.

Wilson asserts the trial court erred by failing to grant her motion for a new trial when, approximately one month subsequent to trial, she discovered that a Syrian national and resident of Orangeburg County, Mohamed K. Hloubi, had served on the jury. We disagree.

Relying on *Moore v. Jenkins,* 304 S.C. 544, 547, 405 S.E.2d 833, 835 (1991) for the proposition that denial of the right to trial by jury of one's peers is prejudicial as a matter of law, and upon ****289** S.C.Code Ann. § 14-7-130 [1] for the proposition that a juror must be a United States citizen, she urges this Court to ***435** adopt a per se rule that a non-citizen's service on a jury is ground to vacate the jury's verdict. Alternatively, she argues that should this court not adopt a per se rule, we should nonetheless, hold she was not negligent in failing to discover Hloubi's disqualification prior to verdict.

[1] It is unnecessary for this Court to reconcile the conflicting interpretations of § 14-7-130 urged by the parties. The service of an alien on a jury does not per se invalidate the jury's verdict. *Kohl v. Lehlback,* 160 U.S. 293, 301-02, 16 S.Ct. 304, 307, 40 L.Ed. 432 (1895) (objection to a juror's alienage may be waived); *State v. Quarrel,* 2 S.C.L. (2 Bay) 150, 152 (1798) (although a juror may be challenged as a noncitizen, this challenge is waived once the juror is sworn); 47 Am.Jur.2d *Jury* § 217 (1969) (the right to challenge a juror's disqualification because of alienage may be waived); *cf. State v. DeYoung,* 209 S.C. 482, 483-84, 41 S.E.2d 100, 101 (1947) (although juror was not a county resident as required by statute, this objection was waived when not made before impaneling of the jury); *Mew v. Charleston & Savannah Ry. Co.,* 55 S.C. 90, 95-96, 32 S.E. 828, 830 (1899) (although the state constitution required each juror to be a registered voter, this objection was waived when its assertion was untimely); *Gomez v. United States,* 245 F.2d 344, 346 (5th Cir.1957) (when an objection to a juror relates to a statutory disqualification, the objection may be waived); *Pogue v. State,* 429 So.2d 1159, 1161 (Ala.Crim.App.1983) (although a juror who is not a county or state resident may be challenged for cause, this objection is waived once the jury is sworn); 50 C.J.S. *Juries* §§ 269, 270 (1947) (although a

juror's disqualification is a ground to challenge him for cause, this challenge must ordinarily be urged before verdict).

*436 [2] S.C.Code Ann. § 14-7-1030 provides objections to jurors not made prior to impanelment are waived. If an objection is made after impanelment, the objecting party must demonstrate he could not have discovered the ground for the objection through due diligence. *Southern Welding Works, Inc. v. K & S Constr. Co.*, 286 S.C. 158, 162, 332 S.E.2d 102, 105 (Ct.App.1985); *see Thompson v. O'Rourke*, 288 S.C. 13, 14, 339 S.E.2d 505, 506 (1986).

[3] On his juror information card, Hloubi stated his place of birth was "Aleppo, Syria," suggesting he could have been a foreign national. He returned this card to the court prior to trial, where it was available to the parties. Additionally, Wilson has not challenged Childs's assertion that the venire list prepared by the court, and available to the parties, listed Hloubi's race **290 as "unknown." During *voir dire*, Wilson was able to observe the prospective jurors and state her objections to the trial judge. Although Wilson submitted *voir dire* questions to the trial judge, and was given an opportunity to submit additional questions, she did not inquire in regards to nationality. We, therefore, conclude that prior to impanelment of the jury, Wilson could have discovered Hloubi's nationality through the exercise of due diligence. *Southern Welding Works*, 286 S.C. at 163, 332 S.E.2d at 105.

Moreover, in response to a *voir dire* question, Hloubi stated he could give both parties an impartial trial. Wilson does not indicate otherwise. Accordingly, we conclude Wilson has not demonstrated she was prejudiced by Hloubi's service on the jury. S.C.Code Ann. § 14-7-1140 (1976) as amended.

II.

Wilson alleges she was prejudiced by the trial court's failure to excuse several jurors for cause, and that the trial court erred by failing to permit additional *voir dire* of those members of the jury panel who had identified themselves as friends or former clients of Childs's attorneys. We disagree.

The trial judge's *voir dire* of the venire included all questions required by statute and submitted by the parties. At the beginning of *voir dire*, the trial judge excused one person at her own request because Childs had been her physician. Two prospective jurors stated they had been represented by *437 Childs's attorneys, and eight stated they were personally acquainted with these attorneys. All indicated they were able to give both parties a fair and impartial trial. Of the twenty whose names were drawn by the clerk, one, who worked at the same hospital as Childs, was excused for cause. Seven others had been previously represented by or were acquainted with Childs's attorneys. The trial court refused Wilson's request to excuse these seven prospective jurors for cause or to conduct additional *voir dire* to determine the nature of their relationships with Childs's attorneys. One juror who had previously been represented by Childs's attorneys and another juror acquainted with the attorneys were seated on the trial jury.

[4] [5] Wilson concedes the decision to disqualify a juror for bias is within the discretion of the trial judge. *Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 125, 341 S.E.2d 622, 624 (1986) (refusal to disqualify jurors who had been patients of plaintiff physician was within the trial court's discretion). She also concedes there is no absolute rule a juror is disqualified because of the juror's relationship with an attorney in the case. *Thompson*, 288 S.C. at 15, 339 S.E.2d at 506. However, she asserts these authorities and others involved at most two potential jurors with a disqualifying attribute. She also asserts the trial court is not bound to accept a juror's declaration of impartiality but must look to all circumstances to discern prejudice. *Gray v. Bryant*, 298 S.C. 285, 288, 379 S.E.2d 894, 896 (1989) (the trial court abused its discretion by refusing to grant a new trial when a juror had failed to disclose she was a patient of the defendant physician and she was predisposed against malpractice cases).

[6] Because the jurors voluntarily disclosed their potentially disqualifying relationships and stated their ability to be impartial, there is sufficient evidence to support the trial judge's refusal to exclude these jurors for cause. *Abofreka*, 288 S.C. at 125, 341 S.E.2d at 624 (there is no abuse of discretion when the jurors have stated they are able to give the parties a fair trial); *State v. Spann*, 279 S.C. 399, 402, 308 S.E.2d 518, 520 (1983); *State v. Thompson*, 278 S.C. 1, 9-10, 292 S.E.2d 581, 586 (1982) (an appellate court will rely on the wisdom and judgment of the trial judge, who was *438 able to observe the character and demeanor of the jurors, "unless the record firmly establishes an abuse of discretion."). Additionally, Wilson has identified no circumstances which suggest a juror was dishonest in his declaration of impartiality. *See State v. Smart*, 278 S.C. 515, 522, 299 S.E.2d 686, 690 (1982). Accordingly, we find no abuse of discretion.

**291 [7] We find no reason to apply a different rule when several jurors have disclosed a prior relationship with counsel, although the number of these jurors may exceed the four peremptory strikes allowed each party. The proper focus of our inquiry is whether the trial judge refused to exclude a juror whom counsel had identified as biased. Again, we find no abuse of discretion where the trial judge's refusal to exclude each juror was in each instance supported by the evidence.

Wilson argues she was prejudiced in the exercise of her peremptory strikes by the trial court's refusal to permit further *voir dire* after the panel of twenty was drawn. She contends that although the trial judge is given discretion in regards to the conduct of *voir dire,* S.C.Code Ann. § 14-7-1020 directs the court, on the motion of either party, to inquire as to each juror's impartiality.

[8] [9] The responsibility of the trial court is to focus the scope of *voir dire* examination as described in S.C.Code Ann. § 14-7-1020. The manner in which these questions are pursued and the scope of any additional *voir dire* is within the sound discretion of the trial court. *State v. Lucas,* 285 S.C. 37, 39, 328 S.E.2d 63, 64-65 (1985) (*voir dire* regarding the jurors' possible association with the solicitor's office was outside the scope of § 14-7-1020); *Crosby v. Southeast Zayre, Inc.,* 274 S.C. 519, 521-22, 265 S.E.2d 517, 519 (1980) (the refusal to make *any* inquiry regarding the possible bias of jurors is reversible error); *Norris v. Ferre,* 315 S.C. 179, 432 S.E.2d 491 (1993) (Rule 47(a), SCRCP, provides the trial judge broad discretion in regards to *voir dire*). The trial court is not required to ask every question submitted by counsel. *State v. Middleton,* 266 S.C. 251, 257, 222 S.E.2d 763, 765 (1976) (citing *State v. Britt,* 237 S.C. 293, 117 S.E.2d 379 (1960) (determination of when *voir dire* shall cease and refusal to ask additional questions proposed by parties is within the discretion of the trial judge)).

[10] [11] In rejecting the additional *voir dire* requests submitted by Wilson's counsel, the trial judge properly exercised *439 his discretion in regards to the scope of *voir dire.* Additionally, we discern no prejudice. There is no reversible error in the impaneling of a jury unless it appears that the objecting party was prejudiced. *Moore,* 304 S.C. at 547, 405 S.E.2d at 835; 50 C.J.S. *Juries* § 277 (1947) (prejudice will not be presumed).

III.

Wilson asserts the trial court erred by refusing to admit the testimony of several witnesses regarding statements made by Childs to the decedent. We disagree.

The trial court allowed the testimony of several witnesses regarding statements made by the decedent in which he described his symptoms to them and related what he had told Childs. However, it refused to admit testimony by these witnesses as to statements in which the decedent described what Childs allegedly had told the decedent.

[12] [13] Wilson asserts the statements made by the decedent regarding what Childs allegedly had told him were improperly excluded because they reflected the decedent's state of mind or physical condition when made. *See Ervin v. Myrtle Grove Plantation,* 206 S.C. 41, 46, 32 S.E.2d 877, 879 (1945); *Welch v. Brooks,* 44 S.C.L. (10 Rich.) 123, 125 (1856). However, hearsay within hearsay, or "double hearsay," is excluded unless each part of the combined statement falls within an exception to the hearsay rule. *Bain v. Self Memorial Hosp.,* 281 S.C. 138, 145, 314 S.E.2d 603, 607-08 (Ct.App.1984) (adopting Rule 805 of the Federal Rules of Evidence). Accordingly, because Wilson did not offer evidence to suggest that Childs's statements qualify as *res gestae,* and because what Childs allegedly said to the decedent is not indicative of the decedent's state of mind, the statements were properly excluded.

[14] The trial court also excluded testimony by Rose Ann Leiner, the decedent's daughter, that shortly before his death, the decedent stated he had told Childs about his rectal bleeding. The trial court reasoned this testimony was hearsay and was not admissible as a present sense impression **292 because the decedent had made this statement in reflection of past events. The trial judge's ruling is supported by the evidence. We find no abuse of discretion. *See Powers v.* *440 *Temple,* 250 S.C. 149, 162, 156 S.E.2d 759, 765 (1967).

Finally, Wilson asserts because Childs alleged in his answer that the decedent had assumed a known risk or had withheld information from his physician, the statements made by the decedent regarding what Childs allegedly had told him were admissible not for their truth, but to show the decedent did not intend to voluntarily assume the risk or to intentionally withhold information.[2] Because Childs

abandoned his affirmative defense of assumption of the risk prior to trial, we reject this and all remaining assertions as being without merit. S.C.Code Ann. § 14-8-250 (1976) as amended; Rule 220(b)(2), SCACR.

Accordingly, the decision of the trial court is

AFFIRMED.

SHAW and GOOLSBY, JJ., concur.

All Citations

315 S.C. 431, 434 S.E.2d 286

Footnotes

1 This section provides in part:

> In November ... the South Carolina Department of Highways and Public Transportation shall furnish the State Election Commission a computer tape of ... citizens of the United States residing in each county who hold a valid South Carolina driver's license.... In December ... the State Election Commission shall furnish a jury list to [the] county jury commissioners consisting of a tape or list derived by merging the list of registered voters in the county with county residents appearing on the tape furnished by the department, but only those licensed drivers ... who are eligible to register to vote may be included in the list. Prior to furnishing the list, the commission shall make every effort to eliminate duplicate names and names of persons disqualified from registering to vote.... *As furnished to the jury commissioners by the State Election Commission, the list or tape constitutes the roll of eligible jurors in the county.* (emphasis added).

Only South Carolina and United States citizens may register to vote. S.C.Code Ann. § 7-5-120 (1976) as amended. S.C. Const. art. V, § 22 (formerly § 18) requires that "[e]ach juror must be a resident of this State and have such other qualifications as the General Assembly may prescribe." Prior to its amendment in 1989, this section required that "[e]ach juror must be a qualified elector...."

The statutory disqualifications for jury service do not include non-citizenship. S.C.Code Ann. §§ 14-7-810 through -830 (1976) as amended.

The amendment to S.C. Const. art. V, § 22, and S.C.Code Ann. § 14-7-130, were both effective on February 8, 1989. In contrast to the circuit court, a juror in magistrate's court, under § 22-2-50, must be a qualified elector. S.C. Att'y Gen. Op. No. 89-139, 1989 S.C. Att'y Gen. Ann. Rep. 377, 379.

2 At trial, she argued these statements were admissible because Childs had asserted the decedent's contributory negligence. While we have difficulty discerning her argument on appeal, she argues Childs had asserted the decedent's contributory negligence in *assuming a known risk or intentionally withholding information* from his physician. (emphasis added). Although she frames this argument as contributory negligence, its focus is not the decedent's contributory negligence, but "his lack of intent to voluntarily assume a risk, or to intentionally withhold information from [Childs]."

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286 S.C. 158
Court of Appeals of South Carolina.

SOUTHERN WELDING WORKS, INC., Respondent/Appellant,
v.
K & S CONSTRUCTION COMPANY, Appellant/Respondent.

No. 0497. | Heard Feb. 20, 1985. | Decided June 11, 1985.

Welder brought action against owner of wastewater treatment plant on account stated for repair of pump. The Court of Common Pleas, Dorchester County, Ernest A. Finney, Jr., J., entered judgment for welder, but denied claim for prejudgment interest. Both parties appealed. The Court of Appeals, Bell, J., held that: (1) trial court did not abuse its discretion in refusing to disqualify juror who admitted knowledge of plant owner's corporate president and witness where no prejudice to plant owner was shown; (2) plant owner was not entitled to additional peremptory challenge for such juror where problem could have been discovered prior to trial through exercise of due diligence; (3) court did not err in refusing to recall witness where prior testimony was inconsistent with proposed supplementary testimony; and (4) welder was not entitled to prejudgment interest where agreement to the account as stated was not proved.

Affirmed.

West Headnotes (12)

[1] **Appeal and Error**
Effect of Failure to Assign Particular Errors

Appellant's failure to include complete assignment of error in its exceptions, in violation of Supreme Court Rule 4, § 6, did not mandate dismissal of appeal as to issues which were reasonably clear from argument and which were ruled on by trial court. Sup.Ct.Rules, Rule 4, § 6.

2 Cases that cite this headnote

[2] **Appeal and Error**
Selection and Impaneling of Jurors

Irregularities in empanelling of jury will not constitute reversible error unless it affirmatively appears that objecting party was prejudiced thereby. Code 1976, § 14-7-1140.

1 Cases that cite this headnote

[3] **Jury**
Failure to Investigate, Challenge, or Object in General

Objection to juror made after jury has been empanelled is deemed waived unless objecting party shows that he could not, in the exercise of due diligence, have discovered ground for objection before jury was empanelled.

2 Cases that cite this headnote

[4] **Jury**
Personal Relations in General

Trial court did not err in seating juror who admitted knowing officer of corporate party who was proposed witness in the case, where that party did not establish prejudice. Code 1976, § 14-7-1140.

Cases that cite this headnote

[5] **Jury**
Pecuniary Interest and Prejudice

Corporate party was not entitled to additional peremptory challenges for two jurors who discovered that they knew corporate officer, who was potential witness in the case, upon seeing him in court after jury was sworn but before commencement of case, where corporate party had jury list available to it prior to trial and could have discovered ground for objection earlier through exercise of due diligence.

3 Cases that cite this headnote

EXHIBIT 4

[6] **Witnesses**
Recalling Witnesses

In action on account stated for repair of water pump, trial judge did not abuse its discretion in

refusing to permit defendant to recall witness to testify that condition of pump had not been altered from time of repairs until time of trial, after defendant's expert witness admitted during cross-examination that he only examined pump within three days before trial and could not verify its condition when repairs were completed, in light of earlier testimony by witness sought to be recalled that he was unsure of when he observed pump after repairs were done.

Cases that cite this headnote

[7] **Interest**

Liquidated or Unliquidated Claims in General

Prejudgment interest is allowed on liabilities to pay money from the time when, either by agreement of parties or operation of law, payment was demandable, if sum is certain or capable of being reduced to certainty.

13 Cases that cite this headnote

[8] **Interest**

Settled or Stated Accounts

Interest is allowable on an account stated.

Cases that cite this headnote

[9] **Interest**

Prejudgment Interest in General

Right of a party to prejudgment interest is not affected by rights of discount or setoff claimed by opposing party.

3 Cases that cite this headnote

[10] **Interest**

Prejudgment Interest in General

Character of claim, and not defense to it, determines whether prejudgment interest is allowable.

2 Cases that cite this headnote

[11] **Account Stated**

Nature and Subject-Matter in General

Essential elements of an account stated are that account is actually stated and that parties either expressly or impliedly agreed that it is a true statement and is due to be paid at some specified time.

Cases that cite this headnote

[12] **Interest**

Particular Cases and Issues

In action on account stated, plaintiff's failure to prove agreement to the account as stated justified denial of prejudgment interest.

2 Cases that cite this headnote

Attorneys and Law Firms

*159 **104 Frank S. Potts, of Lewis, Lewis, Bruce & Truslow, of Columbia, for appellant/respondent.

G. Trenholm Walker, of Wise & Cole, of Charleston, for respondent/appellant.

Opinion

*160 BELL, Judge:

These cross appeals arise from an action on an account stated. Southern Welding Works sued K & S Construction Company for services and materials furnished in connection with the repair of an internal lift pump at a private waste water treatment plant in Dorchester County. K & S, the owner of the plant, denied liability, alleging the repairs were negligently performed. The jury returned a verdict of $7,520.80 for Southern. K & S appeals, alleging errors in the selection of the jury and in the exclusion of certain testimony. Southern cross appeals from the denial of its claim for prejudgment interest. We affirm.

I.

[1] Southern argues the appeal should be dismissed because K & S's exceptions violate Rule 4, Section 6 of the Rules of the Supreme Court. The exceptions are in plain violation of the rule, because they fail to contain a complete assignment

of error. However, we elect to consider those issues which are reasonably clear from K & S's argument and which were ruled on by the trial court. *See* Ramage v. Ramage, 283 S.C. 239, 322 S.E.2d 22 (Ct.App.1984); *Bartles v. Livingston*, 282 S.C. 448, 319 S.E.2d 707 (Ct.App.1984); *Perkins v. Parkins*, 279 S.C. 508, 309 S.E.2d 784 (Ct.App.1983).

II.

The principal issue before us is whether K & S was denied its statutory right to four peremptory challenges in striking the jury. *See* Section 14-7-1050, Code of Laws of South Carolina, 1976.

The case was set for trial on September 21, 1982. After the venire had been seated, the circuit judge conducted voir dire by asking the usual statutory questions. At the conclusion of the court's examination, Southern moved to have certain additional questions asked. Among these was whether the jurors personally knew Everett Knight, the president of K & S and a proposed witness in the case. Without objection ***161** from K & S, the judge granted Southern's request and asked the additional questions. None of the jurors responded affirmatively to the question regarding personal knowledge of Everett Knight. At the conclusion of the additional examination, the judge asked counsel for K & S if there was anything further on voir dire. Counsel answered in the negative.

Everett Knight arrived in the courtroom just prior to striking the jury. At the request of counsel for K & S, the court permitted a brief recess so counsel could confer with Knight about the jury list before the jury was struck. It is conceded the jury list was available to Knight and K & S before the day of trial. Counsel conferred with Knight. He then informed the court he was ready to strike the jury. The jury was struck. The judge then asked counsel if there was anything further before the jury was sworn. Counsel for K & S stated there was nothing further.

After the jury was sworn, but before the commencement of the case, two jurors advised the Clerk of Court that when Knight entered the courtroom they recognized him as a person they knew. Upon learning this fact, the circuit judge permitted counsel to examine both jurors under oath for potential bias. At the conclusion of this additional voir dire, the judge ruled that both jurors were qualified to serve. No appeal is taken from that ruling. However, counsel for K & S did object to the seating of the two jurors on the ground that Knight had "a problem" with them and would have struck them had they acknowledged they knew him before the jury was struck. In response to this objection, the circuit judge permitted each side one additional peremptory strike. Southern waived its additional strike. K & S used its additional strike to challenge one of the jurors who knew Knight. The judge then seated an alternate juror and the case proceeded to trial.

****105** K & S argues that the procedure employed by the circuit judge denied it the right to exercise four peremptory strikes in selecting the jury. Since K & S in fact exercised five peremptory strikes, the argument is actually an assertion that it would have exercised its strikes differently if it had known the two jurors knew Everett Knight.

***162** [2] [3] Irregularities in the empanelling of the jury will not constitute reversible error unless it affirmatively appears that the objecting party was prejudiced thereby. Section 14-7-1140, Code of Laws of South Carolina, 1976; *Smith v. Oliver Motor Co.*, 174 S.C. 464, 177 S.E. 791 (1935); *Graham v. Columbia Ry., Gas & Electric Co.*, 103 S.C. 468, 86 S.E. 952 (1915). Moreover, all objections to jurors, if not made before the juror is empanelled, are deemed waived. Section 14-7-1030, Code of Laws of South Carolina, 1976; *State v. Williams*, 266 S.C. 325, 223 S.E.2d 38 (1976); *Altman v. Efird Bros. Co.*, 180 S.C. 205, 185 S.E. 543 (1936). If objection is made after the jury has been empanelled, the objecting party must show that he could not, in the exercise of due diligence, have discovered the ground for objection before the jury was empanelled. *Smith v. Oliver Motor Co., supra; Senterfeit v. Shealy*, 71 S.C. 259, 51 S.E. 142 (1905).

[4] K & S has failed to show any prejudice from the seating of the juror who knew Knight. After permitting extensive voir dire by counsel, the circuit judge found the juror was impartial and refused to disqualify him. No objection was made to that ruling. In the absence of prejudice to K & S, it was not reversible error to seat the juror.

[5] Moreover, we find no denial of the right to exercise peremptory challenges. Knight had "problems" with the two jurors because they lived in a residential subdivision where one of his companies had built houses. Apparently, he had also discussed building a house for one of the jurors some sixteen years before trial, but had decided against taking the job. Neither juror was well acquainted with Knight or had any discernible personal bias against him.

If the facts upon which counsel subsequently based his objection were important to K & S in deciding how to exercise its peremptory challenges, K & S had the means available to ascertain those facts before the jury was empanelled. Counsel for K & S submitted no additional questions to the court before or during voir dire, although the record clearly shows he was given the opportunity to do so. Moreover, the facts upon which K & S later grounded its objection were either known to Knight or, in the exercise of ***163** due diligence, could have been discovered before the jury was empanelled. It is inferable from the record that if Knight had arrived in court on time, he would have recognized the two jurors he found objectionable and could have exercised peremptory challenges to strike them. In any case, the jury list contained sufficient information to permit discovery of the facts upon which Knight afterwards claimed to base his objection. Where a party fails to make use of the means available to him to ascertain the qualifications of each juror, he should not afterward be permitted to take advantage of his own negligence. *Mew v. Charleston & Savannah Ry. Co.*, 55 S.C. 90, 32 S.E. 823 (1899).

III.

K & S also argues that the trial judge erred when he refused to permit Knight to be recalled as a witness.

Southern presented testimony that the repairs to the pump had been properly performed and the work had been accepted by K & S. When an expert witness for K & S admitted during cross examination he had only examined the pump within three days before trial and could not verify its condition in May 1979 when the repairs were completed, K & S recalled Knight as a witness. Counsel for K & S stated Knight would testify the condition of the pump had not been altered from the time of the repairs until the time of trial. The trial judge refused to permit the testimony because ****106** Knight had previously testified he did not have general day-to-day supervision and control of the plant where the pump was located, but simply visited about "once every two weeks." Knight also testified he was not familiar with what went on when Southern did the repairs to the pump and that he was unsure when he had observed the pump in the three months after the repairs were done.

[6] The admission of evidence is largely within the discretion of the trial judge. His decision will not be reversed on appeal unless it appears he clearly abused his discretion and the objecting party was prejudiced thereby. *Cudd v. John Hancock Mut. Life Ins. Co.*, 279 S.C. 623, 310 S.E.2d 830 (Ct.App.1983). In this instance we find no abuse of discretion. There was a reasonable basis for the trial judge to conclude the witness was not competent to ***164** give the proffered testimony. He therefore properly excluded it.

IV.

The final issue is whether Southern was entitled to prejudgment interest on its claim.

[7] [8] [9] [10] Prejudgment interest is allowed on liabilities to pay money from the time when, either by agreement of the parties or operation of law, the payment was demandable, if the sum is certain or capable of being reduced to certainty. *Ancrum v. Slone*, 29 S.C.L. (2 Speers) 594 (1844). Under this rule, interest is allowable on an account stated. *Id.; cf.* Section 34-31-20(A), Code of Laws of South Carolina, 1976, as amended. The right of a party to prejudgment interest is not affected by rights of discount or setoff claimed by the opposing party. *Robert E. Lee & Co. v. Commission of Public Works of the City of Greenville*, 248 S.C. 92, 149 S.E.2d 59 (1966); *Tappan v. Harwood*, 29 S.C.L. (2 Speers) 536 (1844). It is the character of the claim and not of the defense to it that determines whether prejudgment interest is allowable. *Robert E. Lee & Co., supra; City of Seattle v. Dyad Construction, Inc.*, 17 Wash.App. 501, 565 P.2d 423 (1977).

[11] [12] In this case, we discern no error in the circuit judge's refusal to add interest to the judgment. Although Southern pleaded an account stated, it apparently failed to prove the elements of an account stated at trial. The essential elements of an account stated are (1) that the account is actually stated; and (2) that the parties either expressly or impliedly agreed that it is a true statement and is due to be paid then or at some other specified time. *Wakefield v. Spoon*, 100 S.C. 100, 84 S.E. 418 (1915). Southern proved the account was actually stated. However, in its answer K & S specifically denied the parties ever agreed it was a true account. Consequently, the burden was on Southern to prove agreement to the account as stated. In the record before us there is no evidence that K & S expressly or impliedly agreed there was at any specified time due to Southern the sum of money specified in the account. Likewise, we find no evidence that the parties agreed to a contract ***165** price

for the repairs before they were performed. Accordingly, prejudgment interest was properly disallowed.

The judgment of the circuit court is

AFFIRMED.

SANDERS, C.J., and SHAW, J., concur.

All Citations

286 S.C. 158, 332 S.E.2d 102

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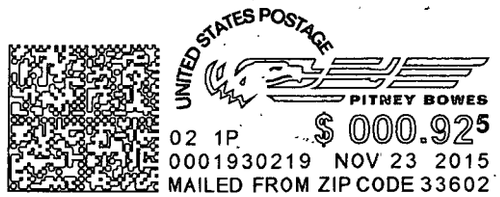

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