

2000

Geraldine Kay Harding v. Carl T. Bell, M.D. : Reply Brief

Utah Supreme Court

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GERALDINE KAY HARDING,)	
)	
Appellant,)	Priority 15
)	
v.)	Supreme Court No. 20000766
)	
CARL T. BELL, M.D.,)	
)	
Appellee.)	
)	

PAT BARTHOLOMEW
CLERK OF THE COURT

GERALDINE KAY HARDING,)	
)	
Appellant,)	Priority 15
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CARL T. BELL, M.D.,)	
)	
Appellee.)	
)	

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ADDITIONAL STATEMENTS OF FACT

14. During jury selection, Appellant challenged Juror No. 2, Sue Sanft, for cause. This juror was seated and served as foreperson. [It is uncontested that Harding challenged Mrs. Sanft for cause during voir dire in chambers because of very strong biases expressed in the Questionnaire and an oral voir dire. Immediately upon discovering that this challenge for cause was not included in the original record prepared for appeal, Appellant moved to supplement the record. The official transcript memorializing Appellant's challenge to Mrs. Sanft for cause has been prepared and either filed with this Court or awaits filing in the Fourth District Court. Though Harding holds an original copy of this transcript, she felt uncomfortable attaching it until it was officially included.]

15. At trial, Dr. Bell openly argued that evidence of Appellant's conduct prior to consulting Dr. Bell should be considered as comparative negligence on her part. R. 1412:15.

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ARGUMENT

REPLY POINT I

– Significant Prejudice –

APPELLANT SUFFERED MATERIAL PREJUDICE AT TRIAL AS A RESULT OF THE TRIAL COURT’S ERRONEOUS DENIALS OF HER CHALLENGES FOR CAUSE.

A. Introduction.

When contesting a jury verdict for improprieties in jury selection, a party must show that the trial court committed legal error by failing to dismiss a juror for cause and that the failure to strike prejudiced the losing party. *State v. Menzies*, 889 P.2d 393, 398 (Utah 1994). This Court should review the trial court’s decision not to strike the three potential jurors for cause under an abuse of discretion standard. See *Jenkins v. Parrish*, 627 P.2d 533, 536 (Utah 1981). However, the Court should review the decision, “in light of the fact that it is a simple matter to obviate any problem of bias simply by excusing the prospective juror and selecting another.” *Id.*

Prejudice may be shown by demonstrating multiple, cumulative errors in for-cause challenges:

To that end, we will ***take into account on a cumulative basis all erroneous rulings*** with respect to rulings on voir dire and for-

cause challenges for the purposes of determining whether there is reversible error.

State v. Saunders, 1999 UT 59, 992 P.2d 951 at 965 (Utah 1999) (emphasis added). Prejudice may also be demonstrated by showing that, as a result of the erroneous failure to excuse on a for-cause challenge, a biased juror sat. *State v. Wach*, 2001 UT 35 ¶ 40, 24 P.3d 948 at 957 (2001). This may be shown by proving that a juror who actually sat had been challenged for cause. *Id.* at ¶ 36.

B. The Wach Standard.

Dr. Bell relies heavily on a new case, *Wach*, but interprets it far too narrowly. In *Wach*, this Court clarified the requirements for a party which alleges that impropriety in jury selection produced an unlawful verdict. Dr. Bell seems to interpret *Wach* as having overruled or severely limited *Saunders* and other recent precedents by this Court dealing with for-cause jury challenges. This is unjustified.

In *Wach*, the defendant was charged with kidnaping and assaulting his mother. During voir dire, the trial court asked whether any of the potential jurors had been involved in a similar crime. Juror No. 3 indicated she had been the victim of an assault by a female, nonrelative roommate and that the situation had been resolved over two years before the *Wach* trial. *Id.* at ¶ 16.

The trial court asked whether that experience would affect her ability to be fair and impartial and the juror's response was that it would not. *Id.*

Juror No. 21 in *Wach*, when questioned about whether she had any experience in observing a criminal offense, answered that she worked at a hospital and then stated, "Well, I guess I am biased." *Id.* at ¶ 17. The trial court attempted to rehabilitate the witness by asking her if she thought she could set her bias aside and the juror failed to respond. The court then briefly explained the presumption of innocence and the requirement of a unanimous verdict and then again asked the juror if she could set her perceived bias aside, to which she responded that she thought she could. *Id.* The trial court denied the defendant's challenges for cause as to both Juror Nos. 3 and 21. *Id.* at ¶ 18. Wach then used two of his four peremptory challenges to remove these jurors. Significantly, however, Wach did not seek additional voir dire of either juror, nor did he challenge for cause or indicate any displeasure with the other members of the jury as seated. *Id.* at ¶¶ 17-18. In these respects, *Wach* is considerably different than the case *sub judice*, where additional voir dire exposed the bias yet further, and a sitting juror was challenged for cause.

On appeal, Wach alleged that the failure of the trial court to strike the two jurors for cause forced him to use two of his peremptory challenges to strike jurors who should have been stricken for cause. The Supreme Court

found that while the trial court did not abuse its discretion in overruling the objection for cause on Juror No. 3, it had abused its discretion in failing to strike No. 21 for cause. Justice Russon noted that even though Juror No. 3 had been the victim of an assault, the circumstances surrounding the crimes were quite different, and the juror's assurance of impartiality completely rebutted the initial indication of possible bias. However, the Court did find an abuse of discretion for the trial court's decision not to strike Juror No. 21. Justice Russon keyed in on a vital excerpt of dialogue from the voir dire proceedings. The trial court asked the prospective jurors whether they "had any experience in terms of observing a criminal offense." *Id.* at ¶ 17, 953. The question precipitated the following exchange:

[Juror No. 21]: I ... have worked in hospitals for twenty years
and –

The Court: Uh-huh.

[Juror No. 21]: And I feel pretty strongly about that and I
don't – well, *I guess I am biased.*

The Court: I can appreciate that. Can you set it aside?

[Juror No. 21]: (No response.)

The Court: If you're selected as a juror, can you listen to
the evidence? Again, you know, nobody is
guilty of anything at this stage. We have a
great Constitution that says we all have a
presumption of innocence until proven guilty
beyond a reasonable doubt and that is where
we ask eight jurors to listen to the evidence
and, based upon the evidence, reach whatever
conclusion they deem appropriate. It has to

be unanimous. And that will be discussed more as this case goes on. Can you or can you not?
[Juror No. 21]: I believe I could.
The Court: You think you could?
[Juror No. 21]: Yes.
The Court: Okay.

Id. Thus, Juror No. 21 in *Wach* explicitly declared a bias, in very similar language to Jurors 11 and 7 in *Harding*. Juror No. 21 was “rehabilitated” by the court, in essence telling the juror how important it was to be fair (“we have a great Constitution . . . presumption of innocence . . . ,” etc.), which is very comparable to the trial court’s “rehabilitation” in *Harding*. The juror had *life experiences* in a hospital with those injured by criminal activity and thought she was biased. The Supreme Court found that the juror made statements that “facially raise a question of partiality or prejudice, [and] an abuse of discretion occurs unless the challenged juror is removed by the court or unless the court or counsel investigates further and finds the inference rebutted.” *Id.* at ¶ 27, 954 (internal quotes omitted). Rebuttal is accomplished by a showing that the juror’s statement was “merely the product of a light impression and not one that would close the mind against the testimony that may be offered in opposition.” *Id.* (quotations omitted).

With regard to Juror No. 21, the court found that “[a] *statement made by a juror that she intends to be fair and impartial loses much of its*

meaning in light of other testimony and facts which suggest a bias.” *Id.* at ¶ 34, 955 (emphasis added). Even though the trial court twice asked the prospective juror whether she could objectively view the evidence, her faint assurance that she could, when viewed in light of her previous statement of bias did not give the trial court sufficient evidence to deny the challenge for cause. *Id.* Justice Russon noted:

[A]lthough juror No. 21 stated that she “believed” she could remain fair and impartial, her statement does not alter the fact that she indicated that as a result of her experience working at a hospital she had witnessed numerous instances of criminal behavior and was therefore “biased.”

Id. From this precedent, it is clear that a trial court’s voir dire must go beyond simply asking a juror if she can set aside her stated bias and view the evidence objectively. The court must have sufficient evidence for its independent finding that the prospective juror can be impartial.

C. Challenges for Cause – Admissions of Bias by Social and Family Ties to the Defense.

In the case at hand, three prospective jurors were biased because of family and social ties directly to the defendant. The quality and impact of this “personal favoritism” type bias is potentially far more prejudicial to the concept of a fair trial than general life experiences by the two challenged jurors in *Wach*. Two of these *Harding* jurors, Nos. 11 and 7, openly admitted that

they were biased. No. 11, Mrs. Todd, would maybe “tend to favor [the chief defense liability expert’s] testimony” as opposed to someone who had a different view because the defense expert was her second cousin, and she was very close to the doctor’s mother, her first cousin. *See* Fact 2, Appellant’s Brief at 5-6. Juror No. 7, Mrs. Vance, had numerous close social and school associations with Dr. Bell’s wife and daughter because the juror’s daughter was in the same elementary school class with Dr. Bell’s daughter. Mrs. Vance associated with Dr. Bell’s wife in the PTA, and had even been on a school-sponsored overnight activity with Dr. Bell’s wife and their respective daughters. Further, if she were called to serve, “I may feel inhibited around his family in the future.” R. 1411:8-:3-12. She twice stated that she might tend to “favor his testimony” and could not “guarantee” that she could be fair, before she was “rehabilitated.” Fact 3, Appellant’s Brief at 7-8; R. 1410:20:20-24. This type of personal association and bias is definitely the product of more than a “light impression.” It would surely tend to “close the mind” of the juror to the other side. There was no need to pick this juror.

Juror No. 11, a second cousin of the principal defense expert witness, Dr. Kim Bateman, repeatedly admitted bias, yet the trial court failed to resolve the issue. Mrs. Todd was “very close” and first cousin to the

witness's mother (R. 1410:16:19-21; 20:9); had heard other people including the mother make favorable comments about the witness (R. 1410:20:10-12); and had "a very high opinion of him." R. 1410:20:13-17. Given these circumstances, even an express acknowledgment by Juror No. 11 that she could be impartial should have been rejected by the trial court. The trial court did not successfully rebut the presumption of bias that such an admission raises. Indeed, given these facts any statement by Juror No. 11 that she could view the evidence impartially meant very little. In light of the fact that another juror could easily have been substituted, the trial court abused its discretion by denying plaintiff's challenge for cause.

Juror No. 12 (Marilyn Wursten) admitted that her best friend was a *current patient* of Dr. Bell's. R. 1411:29:14-15; R. 1423. This social relationship clearly demonstrated her bias as well. She also admitted receiving favorable information about Dr. Bell through her friend. Fact 4, Appellant's Brief. This social tie to the defendant shows an ongoing risk that Ms. Wursten could not be impartial despite her claim to the contrary. Clearly, information she received from a trusted friend made her predisposed to favor the defendant and give more credibility to his testimony.

The indicia of bias in *Harding* are far stronger than those shown by the jurors in *Wach* because ***personal, family, or social*** ties are inherent characteristics which have a fundamental impact on how jurors view facts and assess credibility. The *Wach* jurors were only challenged because they had ***life experiences*** that ***may*** indicate bias. Obviously, a juror who is directly related to a key defense witness and who is close to the witness's mother has a far greater potential for bias favoring the credibility of that witness than a juror who has only witnessed medical consequences of a crime similar to the one charged. Close family, social, and personal ties are seldom, if ever, "merely the product of a light impression and not one that would close the mind against the testimony that may be offered in opposition." *Wach*, 2001 UT 35 at ¶ 27, 24 P.3d at 954 (citations and quotations omitted). Family and friendship must truly be two of the strongest associations known to man. The inference of bias was never rebutted and it was error to not excuse all three for cause.

D. Material Prejudice Shown.

Being forced to use her three peremptory challenges on jurors with close family and social ties to the defense was prejudicial for two reasons: a) the cumulative effect of the errors; and b) biased jurors ultimately sat, one of whom was challenged for cause. Under the *Wach* standard, the complaining

party must show that it challenged a juror who actually sat to prove that there was prejudice. *Wach*, 2001 UT 35 at ¶ 36. As a result of the failure to dismiss Juror Nos. 7, 11, and 12 (*see* Harding's Brief at 8), Appellant was forced to use her peremptory challenges to dismiss these jurors. This resulted in Juror Nos. 1 and 2 sitting, one of whom was challenged for cause (No. 2), with the other (No. 1) strongly opposed by the Appellant.

Appellant challenged Juror No. 2 (Mrs. Sanft) for cause, alleging strong biases. Fact 14. The challenge was denied and since Plaintiff had used all three of her peremptory challenges to remove prospective jurors with family, social, or personal ties to the defendant, she was unable to remove Mrs. Sanft. R. 1192, 1207-6. As a result, Mrs. Sanft sat on the jury and, in fact, served as foreperson. R. 1207-4. This indicated that not only did Mrs. Sanft have the immediate influence of her one vote, but that she was looked on as a leader among the jurors and likely influenced the views of others. **Plaintiff challenged Mrs. Sanft for cause** because of her apparent bias, disfavoring awarding damages in personal injury suits. *See* Appellant's Brief at 26. This was the actual prejudice suffered by Harding.

Dr. Bell rejects the idea that Harding may also demonstrate prejudice by showing the cumulative effect of the court's improper denial of

three for-cause challenges, implying that *Saunders* has been overruled or modified by *Wach*. Such is not the case. *Saunders*, a 1999 case, stands squarely for the proposition that prejudice may be shown by the “cumulative effect” of multiple erroneous for-cause rulings. The case was cited with approval in *Wach* at ¶ 37, fn. 4. Apparently, the only reason it was not applied in *Wach* was that there was only one for-cause error. *Wach*, ¶ 37 (“Therefore, because this case involves only one erroneous for-cause ruling, Wach’s cumulative error argument fails”).

The jury panel in *Harding* was heavily skewed ideologically toward the defendant and plaintiff had no real ability to influence or balance its composition.

REPLY POINT II

– Appellant Appropriately Marshaled the Evidence –

APPELLANT HAS SUCCESSFULLY MARSHALED THE EVIDENCE SHOWING INSUFFICIENCY OF THE EVIDENCE OF HER COMPARATIVE NEGLIGENCE.

The evidence was insufficient to support the jury’s verdict, considered without the irrelevant facts occurring before Jeri’s first appointment with Dr. Bell on January 13, 1997. Dr. Bell makes a bevy of inaccurate claims regarding Appellant’s insufficiency argument, where are addressed here.

A. Appellant Has Successfully Marshaled the Evidence.

Dr. Bell criticizes Harding because she “fails to cite to the testimony of either of defendant’s experts,” and “did not even request transcription of the trial testimony of Dr. Ganellen, one of Dr. Bell’s expert witnesses on the issues of negligence and causation.” Bell’s Brief at 16. Furthermore, Dr. Bell alleges that the testimony of plaintiff’s expert witnesses, Drs. Icenogle and Rosenthal, was favorable “for the defense on cross-examination,” and also should have been marshaled on appeal. *Id.* Dr. Bell misunderstands the requirement of marshaling evidence on appeal.

The requirement of marshaling evidence on appeal is simply to collect the evidence “in support of the [challenged] verdict” and then demonstrate that it is insufficient when viewed in a light most favorable to the verdict. *State v. Boyd*, 2001 UT 30 ¶ 2, 25 P. 3d 985 (Utah 2001). The obligation is not to marshal evidence supporting a portion of the verdict *favorable to the appellant*, which obviously is not appealed. Nor is the obligation to marshal evidence favoring positions advocated by the appellee, but which are not relevant to the portion of the judgment appealed by Harding.

In this case, both parties received, in part, a favorable verdict from the jury. Mrs. Harding obtained a jury verdict to the effect that Dr. Bell was

45% at fault, and that his negligence was a proximate cause of her injuries. R. 1049-51. That means that the jury believed Harding's evidence that Dr. Bell failed to meet the standard of care in treating a person with Ms. Harding's presenting symptoms. Appellant has no quarrel with this finding and is not appealing it. Therefore, she has no obligation to marshal evidence supporting this finding. Yet, Dr. Bell criticizes Ms. Harding for failure to marshal evidence "on the issues of negligence and causation." Yet, these are not issues in the case on appeal.

Dr. Bell is understandably upset that he was also found negligent, but he did not appeal the sufficiency of the evidence on this issue. Had Dr. Bell appealed this issue, it would begin *his obligation to marshal* the evidence in favor of a finding of negligence and causation against him, and then demonstrate that it was insufficient to show negligence and causation of Ms. Harding's heart attack. However, Dr. Bell has failed to appeal this issue and thus waived it. It is an irrelevant issue for Harding on appeal, where her claim is that there was *insufficient evidence of her negligence*, such that there was no basis at law to compare her non-negligent actions to the negligence of Dr. Bell, who was found by the jury to be negligent. Accordingly, there is no need to examine the transcript of testimony of Dr. Ganellen. His testimony dealt

only with causation, but even if it had addressed negligence, it was obviously rejected by the jury because Dr. Bell was found negligent and a proximate cause. Harding has no obligation to marshal evidence of Dr. Bell's negligence because she is not appealing that favorable finding.

Likewise, even if Harding's witnesses, Drs. Icenogle and Rosenthal, allegedly testified "favorably for the defense" on cross-examination,¹ as claimed by Dr. Bell, it would be irrelevant to this appeal. Such testimony would only go to *the negligence and causation of Dr. Bell*, which are not at issue here for the reasons set forth above. It is not incumbent on Appellant to exonerate Dr. Bell, as he claims. Bell's Brief at 17.

B. Prior Evidence Improperly Considered in Determining Comparative Negligence.

Appellant is only contesting the consideration of the evidence prior to January 13th in determining her *comparative negligence*. [Other evidence of lack of comparative negligence after 1/13/97 was addressed adequately in Appellant's main Brief.] Dr. Bell's contention that evidence of Jeri's condition prior to January 13th should be considered for comparative negligence is a tautological nightmare designed to obfuscate valid legal precedent. Dr. Bell argues Harding's claim here is really a challenge to the

¹ They didn't so testify.

trial court's ruling on *admissibility* of Jeri's prior history, which objection was "waived." Bell's Brief at 19. Not so.

Harding is challenging the use of the "prior health history" for the determination of comparative negligence on her part. Dr. Bell's contention that Harding contests its "admission" is a gross mischaracterization of her argument. Bell's Brief at 19. Dr. Bell argues:

According to Harding, her conduct prior to January 13, 1997, could not be a contributing factor in causing her injury and thus this evidence *should not have been admitted* and considered by the jury and, without this evidence, the jury could not have found any comparative negligence by Harding. Substantively, this is a challenge to the jury verdict based on the *admission of evidence* for consideration by the jury, not for insufficiency of the evidence.

Bell's Brief at 19. Dr. Bell contends that because Harding did not object to "admission" of the evidence that the issue was improperly preserved. *Id.* at 20. Appellant is not complaining about *admission* of the evidence. To the contrary, Harding's medical history, including the occurrence on at the truck stop and her smoking, go directly to prove notice and thus negligence on the part of Dr. Bell for failing to assess her risk factors for heart attack and to diagnose and treat her unstable angina. Put in this context, the fact that Appellant herself introduced evidence of her smoking is of little significance. Bell's Brief at 19. Harding only contests the **consideration of the evidence**

of prior health problems by the jury in determining her alleged **comparative negligence**. Harding's Brief at 33-38.

This Court has solidly held that a professional may not invoke *comparative negligence* based on facts occurring before the professional was consulted. See *Steiner Corp. v. Johnson & Higgins*, 996 P.2d 531 (Utah 2000). Harding has already thoroughly addressed this issue in her main brief. Appellant's Brief at 33-35. To allow Dr. Bell to use pre-visit evidence to show comparative fault would allow doctors to make an end run around virtually all claims of malpractice by claiming that something the patient did before consulting them was a greater cause of the harm. Of course, the result is absurd and cannot be allowed. It was unlawful for the jury to consider any facts regarding Harding's *comparative negligence* that occurred before January 13, 1997. Accordingly, there is no evidence to support the jury's finding of 55% comparative negligence on Jeri's part. The trial court should have granted Harding's motion for a directed verdict as to her lack of negligence.

C. Dr. Bell Openly Argued That Prior Evidence Demonstrated Appellant's Negligence.

Dr. Bell asserts that "evidence of Harding's smoking and other risk factors predating January 13, 1997, was not introduced for the purpose of establishing comparative fault: This evidence was presented for the purpose

of establishing damages and relevant medical issues.” Bell’s Brief at 20. This is disingenuous since Dr. Bell argued exactly the opposite at trial. For example, Dr. Bell argued that the pre-January 13th evidence, like the truck stop incident, clearly demonstrated Ms. Harding’s comparative negligence:

I think most people would agree, given the symptoms she described at the truck stop, that ***a reasonable person would go see the doctor that day***; at a minimum you would go to an Instacare, an emergency room or go see your own doctor. Dr. Bell’s number is listed in the phone book, his home number. But instead she doesn’t do that. She goes up to Morgan and just completely decides she is not going to do anything on the 4th. Now the testimony is undisputed that after the 4th she continued to do all of her chores and had no chest pain.

R. 1412:15:6-15 (Defense Closing Argument). Thus, Dr. Bell clearly intended that this pre-visit evidence be considered by the jury for *comparative negligence*.

CONCLUSION

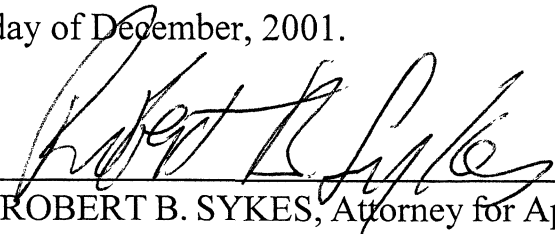
Harding was denied a fair trial because the trial court improperly refused to excuse three jurors that were challenged for cause. The focus of the for-cause challenges was *personal bias* in favor of Dr. Bell (and his only liability expert). This type of bias (family and friendship) is far more ominous and less likely to be “rehabilitated” than the general life experience bias in *Wach*. Furthermore, the cumulative effect of three failures to excuse jurors

who should have been excused for cause was extremely prejudicial and devastating to Harding's case and denied her a fair trial.

In order to prove insufficiency of the evidence in this case, Harding was required only to marshal and show the insufficiency of the evidence supporting the 55% liability verdict in favor of Dr. Bell. Harding is not required to marshal evidence opposing the 45% favorable verdict demonstrating Dr. Bell's negligence. Dr. Bell could have appealed the jury's verdict wherein he was found 45% at fault and a proximate cause of the damage, but he chose not to lodge such an appeal and therefore has waived any objection thereto. Had he lodged such an appeal, it would have been his burden to marshal the evidence supporting the 45% finding for Harding and show that it was insufficient to support that verdict.

Additionally, it was error for the trial court to allow the jury to consider facts occurring prior to the visit to Dr. Bell for the purpose of comparative fault. The court should have granted Harding's motion for a directed verdict on this issue because there was no evidence that Harding was negligent.

DATED this 19th day of December, 2001.


ROBERT B. SYKES, Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of **Appellant's Reply Brief** were served upon all parties of record, at the address listed below, by hand-delivery on this 19th day of December, 2001:

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A handwritten signature in black ink, appearing to read "David B. Ferguson", is written over a horizontal line.