

STATE OF MICHIGAN
COURT OF APPEALS

ANTHONY HAYTON,

Plaintiff-Appellant,

v

JAMES MCLACHLAN, HENRY FORD
HEALTH SYSTEM, and HENRY FORD
MEDICAL CENTER,

Defendants-Appellees.

UNPUBLISHED
December 17, 2002

No. 230508
Macomb Circuit Court
LC No. 98-000832-NH

Before: Griffin, P.J., and White and Murray, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff, Anthony Hayton, the personal representative of David Hayton (“Hayton”), appeals as of right from the judgment of no cause of action entered following a jury trial, and from the trial court’s order denying his motion for a new trial and/or for a judgment notwithstanding the verdict (JNOV). We affirm.

Plaintiff argues that the trial court erroneously denied his motion for a new trial. Specifically, plaintiff contends that a new trial is required because a juror committed misconduct. On appeal, a trial court’s decision whether to grant a new trial is reviewed for an abuse of discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001). We find that the trial court did not abuse its discretion in denying plaintiff’s motion for a new trial based on juror misconduct.

Plaintiff contends that he should receive a new trial because juror Kurt Isbill lied during voir dire about his relationship with plaintiff’s attorney, Christopher Pencak. According to plaintiff’s undocumented assertions,¹ Pencak previously represented Isbill in 1996 on a felony case (though not to completion) and refused to handle a civil matter for Isbill during that same time. Plaintiff claims that Isbill committed misconduct by not disclosing this prior relationship with Pencak during voir dire.

¹ Plaintiff has submitted no evidence to support any of his assertions on this issue. Rather, plaintiff has simply relied upon his counsel’s statements and arguments before the trial court to support his argument.

In *Bynum v The ESAB Group, Inc.*, 467 Mich 280, 283; 651 NW2d 383 (2002), our Supreme Court reiterated the long-standing rules in regard to juror misconduct:

Jurors are presumed to be qualified. The burden of proving the existence of a disqualification is on the party alleging it. *People v Collins*, 166 Mich 4, 9; 131 NW 78 (1911). Voir dire is the process by which litigants may question prospective jurors so that challenges to the prospective jurors can be intelligently exercised. *People v Harrell*, 398 Mich 384, 388; 247 NW2d 829 (1976). Prospective jurors are subject to challenge for cause under MCR 2.511(D). . . .

In *Citizens Commercial & Sav Bk v Engberg*, 15 Mich App 438, 439-440; 166 NW2d 661 (1968), this Court noted the general proposition that “[t]here is no question that a litigant is entitled to a truthful answer from a perspective juror during his voir dire examination.” However, this Court later stated that, “upon discovery of a juror’s false statements after a trial and verdict, a moving party must present to the court something more than the mere fact of the falsity of the answers.” *Id.* at 440. More specifically, we held that “[t]here must either be a showing of actual prejudice or it must be established to the satisfaction of the trial court that the moving party would have successfully challenged for cause or otherwise dismissed the juror in question had the truth been revealed prior to trial.” *Id.* In addition, courts must be mindful that it is “the duty of counsel to ferret out potential bases for excusing jurors.” *Bynum, supra*, 467 Mich at 284.

Although plaintiff’s counsel contends that he did not recognize Isbill in the jury panel until Isbill read the verdict in favor of defendants with a vengeful smirk on his face,² we question Pencak’s timing in his recognition of Isbill as a former client. Indeed, plaintiff’s reasoning would create an appellate parachute of sorts by allowing plaintiff’s counsel to harbor the potential for error until such time as it advantaged his client’s case. See *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991). In addition, accepting as true Pencak’s representation that he did not notice Isbill until the rendering of the verdict, we cannot assume that Isbill in fact remembered Pencak when Pencak claims not to have recognized Isbill. Furthermore, *the facts* in evidence reveal Isbill stated at voir dire that he could be impartial, that he would look to the evidence in rendering a verdict, and that he would follow the court’s instructions.³ Additionally, as the trial court noted, Isbill received a very favorable plea in his

² There is no finding by the trial court of any such “smirk.” Moreover, defendant submitted in response to plaintiff’s motion two affidavits wherein defense personnel testified that they saw no facial expression on Isbill while rendering the verdict.

³ The record reflects that plaintiff must have believed Isbill. During voir dire Isbill had responded affirmatively when asked if he thought plaintiffs were “opportunists” and that doctors should not be sued as much as they are now. Isbill also informed plaintiff and the court that he felt strongly about heart disease because doctors had saved his father from dying of heart disease. After making these seemingly “pro-defense” comments, plaintiff did not utilize his available challenges on juror Isbill. At oral argument, plaintiff’s counsel indicated that he chose to leave Isbill on the jury because of Isbill’s appearance, and because Isbill (like plaintiff) was a smoker. These factors led plaintiff’s counsel to believe Isbill would be a favorable juror. In light of these uncontested strategic decisions, we cannot conclude that plaintiff would have attempted to remove Isbill from the jury even if Pencak had recognized Isbill earlier in the proceedings..

prior criminal matter, thus negating in part Pencak's assertion that Isbill was a "disgruntled" former client.

Moreover, and most importantly, there is no evidence in the record which reveals that Isbill was biased against plaintiff's counsel or that his alleged familiarity with plaintiff's counsel had any impact on the verdict. *Bynum, supra* at 286 ("absent proof of actual prejudicial effect on the verdict or proof that a challenge for cause would be successful, it [is] an abuse of discretion to grant a new trial"). In the absence of such evidence, and in light of the fact that a juror's acquaintance with counsel does not in and of itself require removal under MCR 2.5111(D) or under the case law, see, e.g., *United States v Nadaline*, 471 F2d 340, 344 (CA5, 1973), and because we presume jurors are impartial, *Bishop v Interlake Inc*, 121 Mich App 397, 401; 328 NW2d 643 (1982), we hold that plaintiff has failed to demonstrate that Isbill would have been removed for cause for having bias against, or for allegedly knowing, Pencak.

Plaintiff also contends that Isbill would have been removed for cause because he was a felon. However, the mere fact that Isbill had a felony record would not preclude Isbill from serving as a juror. In *Froede v Holland Ladder & Mfg Co*, 207 Mich App 127, 130; 523 NW2d 849 (1994), this Court stated:

Pursuant to the jury selection statute, a juror is qualified to serve if, among other things, not "under sentence for a felony at the time of jury selection." MCL 600.1307a(1)(e). . . . Pursuant to court rule, a party may challenge for cause a juror who "has been convicted of a felony." MCR 2.511(D)(2). Neither the jury selection statute nor the court rule expressly mandates that a convicted felon be disqualified per se from sitting on a jury in a civil case." [*Froede, supra* at 130.]

Thus, even if Isbill was convicted of a felony, this alone would not mandate his disqualification as a juror.

Although plaintiff contends that Isbill lied during voir dire, it is not clear from the record whether Isbill actually lied during voir dire. Isbill was never directly asked if he had been involved in criminal proceedings or whether he was a felon. The questions that lend impropriety to Isbill's answers are based on whether the jurors recognized any of the people introduced by plaintiff's counsel, including himself and all witnesses to be called by plaintiff,⁴ and whether the jurors had been involved in any proceedings as a party, witness, etc. However, in accordance with *Bynum*, and for the reasons previously articulated, we hold that plaintiff is not entitled to a new trial for we are not convinced that counsel would have exercised challenges if Isbill fully disclosed his background, and that there was no proof of an actual prejudicial effect on the verdict or proof that a challenge for cause would have been successful. Therefore, we conclude that the trial court did not abuse its discretion in denying plaintiff's motion for a new trial based on juror misconduct.⁵

⁴ We note that the question about recognizing counsel, the parties or any witnesses was somewhat ambiguous, as it could have been construed as only asking whether the prospective jurors knew any of the named witnesses.

⁵ We find plaintiff's reliance upon *People v Manser*, 250 Mich App 21; 645 NW2d 65 (2002),
(continued...)

Finally, plaintiff argues that the trial court erroneously denied his motion for JNOV, arguing that the verdict was against the great weight of the evidence. We disagree because, as discussed below, there was sufficient evidence before the jury from which reasonable juror's could have reached different conclusions.

This Court reviews de novo the grant or denial of a directed verdict and a trial court's decision on a motion for JNOV. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 395; 628 NW2d 86 (2001). "A verdict may be overturned on appeal only when it was manifestly against the clear weight of the evidence, and substantial deference will be given by this Court to a trial court's determination that a verdict is not against the great weight of the evidence." *Watkins v Manchester*, 220 Mich App 337, 340; 559 NW2d 81 (1996) (citations omitted). "In reviewing a motion for JNOV, this Court views all evidence in a light most favorable to the nonmoving party." *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995). "If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand." *Id.*

"In a medical malpractice case, the plaintiff bears the burden of proving: (1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995), citing MCL 600.2912a. "Failure to prove any of these elements is fatal." *Id.* In this case, plaintiff's decedent, David Hayton, went to see defendant, Dr. James McLachlan, on November 25, 1996, for a follow-up appointment from an earlier visit. On November 29, 1996, Hayton arrived at the emergency room of a local hospital complaining of chest pain and respiratory distress. Hayton's condition worsened and he eventually died on December 2, 1996.

At trial, Dr. Paul Warshawsky, a witness for plaintiff, opined that Dr. McLachlan was negligent in the care and treatment of Hayton on November 25, 1996. Dr. Warshawsky further opined that, more likely than not, there was a causal connection between Dr. McLachlan's negligence and Hayton's death. Dr. Warshawsky also indicated that it was a breach of the standard of care to fail to account for the possibility that a diabetic patient is suffering from a heart attack, and that it was a breach of the standard of care to not investigate or document significant risk factors, such as smoking, obesity, and high blood pressure. Finally, Dr. Warshawsky testified that Dr. McLachlan should have performed diagnostic studies and objective tests on November 25, 1996, when Hayton complained of heartburn and fatigue.

On the other hand, Dr. McLachlan testified that Hayton came to his office on November 25, 1996, for a follow-up appointment for his diabetes. Dr. McLachlan found that Hayton's

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misplaced. In that case, unlike the instant case, the juror had failed to disclose that she had been a repeated victim of sexual improprieties, and had "strong opinions" on the issue. *Manser, supra*, at 26-29. Criminal sexual abuse was the issue involved in *Manser*. Although Isbill indicated he had opinions regarding malpractice lawsuits, plaintiff did not object. More importantly, what plaintiff did object to had no relation to the issues being tried. Moreover, unlike in *Manser*, given plaintiff's use of his challenges, we are not convinced plaintiff would have used a peremptory challenge on Isbill.

diabetic condition was under control. According to Dr. McLachlan, Hayton also presented symptoms consistent with gastroesophageal reflux disease or heartburn, which consisted of pain in the upper gastric region that became worse with eating and lying down. Dr. McLachlan found no signs of a failing or damaged heart during the appointment and ruled out heart disease because Hayton had no shortness of breath with exercise, no edema, no waking in the middle of night with shortness of breath, no crackles in the chest that would suggest fluid buildup, no gallup, and no symptoms other than the pain became worse after eating and subsequently lying down.

Additionally, Dr. Ashok Gupta (a witness called by plaintiff) testified that the main reason Hayton saw Dr. McLachlan on November 25, 1996, was for a follow-up appointment for his diabetic condition. Dr. Gupta saw no complaints related to chest pain in Dr. McLachlan's chart notes, a fact also conceded to by Dr. Warshowsky. Dr. Gupta opined that if Hayton indicated pain that felt like heartburn, with no shortness of breath and no radiation, it would be reasonable for Dr. McLachlan to make a diagnosis of gastroesophageal reflux disease. Dr. Gupta opined that Dr. McLachlan complied with the standard of practice for internal medicine.

Dr. Daniel Panish testified that Hayton presented on November 25, 1996, to Dr. McLachlan for a routine follow-up regarding his diabetes mellitus. Dr. Panish also testified that if Hayton's prior pain episodes were cardiac in nature, he would have displayed the same symptoms as he presented in the earlier episodes, which did not occur between November 25, 1996, and November 29, 1996. Dr. Panish stated that the standard of practice did not require an EKG if the patient was non-symptomatic and had no symptoms that were suggestive of cardiac pain, as was represented in this case. Dr. Panish also noted that the diagnosis for heartburn was an incidental finding, and it was not the primary reason for Hayton's visit with Dr. McLachlan on November 25, 1996.

Finally, Dr. Nicholas Karan determined that Hayton presented symptoms of reflux disease on November 25, 1996, which related to Hayton's description of heartburn symptoms that occurred after eating and then lying down. Dr. Karan indicated that if a person was preinfactional or had angina pectoris, the person would continue to have the same pain with a change in intensity or duration, but no change in location and radiation. Dr. Karan opined that if a forty-four-year-old male who was a diabetic, a smoker, and had a family history suggestive of heart disease complained of a history of eating and lying down with no exertional pain, no radiation, no shortness of breath, and no diaphoreses, a gastrointestinal workup would be required rather than a cardiac workup.

"[C]redibility is a question for the jury," and "the trial court may not substitute its judgment for that of the trier of fact." *Arrington v Detroit Osteopathic Hospital Corp (On Remand)*, 196 Mich App 544, 553; 493 NW2d 492 (1992). In the instant case, there was evidence presented by both plaintiff and defendants regarding the proper standard of care. In light of the above evidence, it would be reasonable for the jury to determine that Hayton did not complain of chest pain at his November 25, 1996, appointment, but instead, indicated that he had pain in the epigastric region that occurred after eating and then lying down. Additionally, although the experts did agree that earlier intervention may have saved Hayton's life, there was ample testimony that Dr. McLachlan did not breach the standard of care in diagnosing Hayton with gastrointestinal reflux disease when no other symptoms were presented. Accordingly, plaintiff has failed to demonstrate that the verdict was against the great weight of the evidence.

Affirmed.

/s/ Richard Allen Griffin
/s/ Christopher M. Murray