

IN THE COURT OF APPEALS 09/03/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-01145 COA

**ROSA CRUZ ORTEGA, ON BEHALF OF HERSELF AND ALL OTHER WRONGFUL
DEATH BENEFICIARIES OF BABY BOY CRUZ**

APPELLANTS

v.

W.L. PRICHARD, M.D.

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. GRAY EVANS

COURT FROM WHICH APPEALED: SUNFLOWER COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

CHARLES MERKEL

ATTORNEY FOR APPELLEE:

CLINTON M. GUENTHER

NATURE OF THE CASE: WRONGFUL DEATH - MEDICAL MALPRACTICE

TRIAL COURT DISPOSITION: JURY VERDICT FOR DEFENDANT

BEFORE THOMAS, P.J., BARBER, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

This civil action involves a claim of wrongful death and medical malpractice brought by Rosa Cruz Ortega against Dr. W.L. Prichard. The jury returned a verdict in favor of Dr. Prichard and Ortega appeals. We find that error existed in the lower court proceedings and therefore reverse and remand for a new trial.

FACTS

Ortega's son, Cruz, was strangled to death during childbirth by his own umbilical cord. Dr.

Prichard, Ortega's obstetrician/gynecologist, attended her during labor. A fetal heart monitor attached to Ortega monitored Cruz's heart. At trial, Ortega stated that the monitor indicated "decelerations" in Cruz's heart rate during key stages of delivery. Ortega argued that Dr. Prichard failed to read and interpret the readings properly, causing him to further fail to see that Cruz was having serious problems. She contends, had Dr. Prichard properly done this, that these factors would have led him to deliver the baby by caesarian section.

Dr. Prichard did not dispute the fact that the baby would have lived if he had been delivered by caesarian section. His argument was that the fetal heart monitor strip showed nothing indicating fetal distress. The litigation centered on the issue of whether Dr. Prichard's interpretations of the fetal heart monitor readings fell below the applicable standard of care.

Ortega presented the expert testimony of Dr. Albert Alexander, an obstetrician/gynecologist who practices in Memphis, Tennessee. Dr. Prichard testified for himself and utilized testimony from two other obstetrician/gynecologists: Dr. James Dale Martin, Jr. from the University of Mississippi Medical School and Dr. Donald James Blackwood, a practicing physician from Cleveland, Mississippi. The jury ultimately returned a nine-to-three verdict in favor of Dr. Prichard.

ARGUMENT

Ortega contends that two evidentiary rulings by the trial judge, involving the medical expert witnesses, damaged her case to the extent of justifying a new trial. She argues that the case turned on a "battle of the experts" and that the rulings improperly favored the defense. The first ruling

allowed Dr. Prichard to inquire into Dr. Alexander's previous personal litigation history. The second ruling precluded Ortega from inquiring into the fact that Dr. Martin utilized the same medical malpractice insurance carrier as Dr. Prichard.

I. DID THE TRIAL COURT ERR BY ALLOWING DR. PRICHARD TO INQUIRE INTO THE HISTORY OF DR. ALEXANDER'S PERSONAL LITIGATION AGAINST MEMBERS OF THE MEMPHIS MEDICAL COMMUNITY?

Dr. Alexander had previously filed two lawsuits against members of the Memphis medical community in response to what he believed to be a conspiracy against him in retaliation for his service as a plaintiff's expert in various other medical malpractice actions. The first lawsuit was directed toward the Memphis Individual Practice Association, a physician-insurance referral network, for allegedly delaying his application and acceptance into that organization. The second lawsuit involved the

University of Tennessee and its alleged attempt to revoke Dr. Alexander's hospital "scrubbing privileges" and to defame him among his student physician-residents.

On cross-examination of Dr. Alexander, the trial judge allowed Dr. Prichard to question him about the details of these two lawsuits. Dr. Prichard now argues that allowing this questioning was proper because it showed Dr. Alexander's bias as an expert witness. He contends that it indicated Dr. Alexander's plan or vendetta against fellow medical professionals. On the other hand, Ortega argues that allowing this questioning was improper because any probative value it may have had regarding bias was far outweighed by the prejudicial effect it created in harming Dr. Alexander's credibility. She contends that the questioning gave the jury the impression that the situations that prompted Dr. Alexander to file his previous personal lawsuits indicated that he had lost credibility

and peer respect within the medical community in which he practiced.

Mississippi Rule of Evidence 616 states that "[f]or the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against *any party to the case* is admissible." M.R.E. 616 (emphasis added). Moreover, the Mississippi Supreme Court has stated that "the trial court should allow liberal cross-examination of experts regarding bias, interest, and prejudice in medical negligence cases." *McCarty v. Kellum*, 667 So. 2d 1277, 1285-86 (Miss. 1995). The *McCarty* court stated that liberal cross-examination concerning bias, interest, and previous experience as an expert in medical malpractice cases should be allowed. *Id.* (citing *Hall v. Hilbun*, 466 So. 2d 856, 875 (Miss. 1985)). It also quoted Mississippi Rule of Evidence 616 in an attempt, we believe, to provide some limits to a wide-open cross-examination of expert medical witnesses. By quoting Rule 616, the court brought attention to the fact that evidence of bias, prejudice, or interest of a witness for or against *any party to the case* is admissible.

A trial court error admitting or excluding evidence of bias, prejudice, or interest of a witness for or against a party may or may not require reversal. *W.J. Runyon & Son, Inc. v. Davis*, 605 So. 2d 38, 48 (Miss. 1992). This Court will not reverse for an error admitting or excluding evidence unless a substantial right of the party is affected. *Id.* (citing M.R.E. 103(a)). Additionally, Mississippi Rule of Civil Procedure 61 states that "[n]o error in either the admission or the exclusion of evidence . . . is ground for granting a new trial . . . or for . . . disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice." M.R.C.P. 61. This Court must disregard any error or defect in the proceeding that does not affect substantial rights of the parties. *Id.* Mississippi Rule of Civil Procedure 1 and Mississippi Rule of Evidence 101 both state that the rules govern proceedings in all courts of this state, and cover both civil and criminal

litigation. *See* M.R.C.P. 1; M.R.E. 101 cmt. This same standard of review therefore has been applied in criminal cases as well. *See Tillis v. State*, 661 So. 2d 1139, 1142 (Miss. 1995) (court will apply standard of clear abuse of discretion regarding admission of evidence offered to suggest bias, evidence of which is also a function of relevancy under Rule 401); *Lacy v. State*, 629 So. 2d 591, 594 (Miss. 1993) (former Supreme Court Rule 11, which stated that no judgment shall be reversed on the ground of improper admission or exclusion of evidence unless it resulted in a miscarriage of justice, is

still reflected in trial court evidence Rule 103(a) and procedural Rule 61).

In the present case, Dr. Alexander had previously been involved in litigation against medical professionals that in no way was connected to the present case or to Dr. Prichard. Evidence of bias, interest, or prejudice against Dr. Prichard, as a party to the case, would certainly have been admissible. However, Dr. Alexander's cross-examination questioning was not even remotely related to possible bias or prejudice against any party to the case, specifically not against Dr. Prichard. This line of questioning, and the subsequently admitted testimony, was clearly inadmissible if simply based upon nothing more than Mississippi Rule of Evidence 616. Dr. Alexander's prior litigation concerned parties involved with his membership in medical organizations and with hospital privileges, and was unconnected to bias or prejudice against any party to the present litigation. Dr. Prichard's argument that Dr. Alexander's testimony showed bias against doctors and medical professionals, and therefore against him, simply does not comport with the admissibility requirements of Rule 616. We believe that the admission of the details of Dr. Alexander's prior personal litigation history was therefore reversible error. Ortega's defense may have been adversely affected by the evidence of alleged bias, which we believe was irrelevant to and which did not involve a party to the present litigation. The trial judge clearly abused his discretion to Ortega's

detriment by admitting this testimony. The result of admission was possible negative implications regarding Ortega's medical expert and his credibility. Finally, a Mississippi Rule of Evidence 403 balancing test--that the admitted evidence was clearly prejudicial and that this prejudice substantially outweighed any probative value of Dr. Alexander's bias--is simply added support for our determination that this line of questioning was inadmissible.

Dr. Prichard mentions that Ortega makes much of the small percentage of testimony that Dr. Alexander's impeachment constituted. Dr. Prichard believes that this testimony simply could not have been so highly prejudicial. However, an improperly disarmed expert makes for an unbalanced legal battle. We believe that Dr. Alexander's cross-examination testimony regarding his previous personal lawsuits was inadmissible and reverse and remand this case for a new trial on Ortega's first issue.

II. DID THE TRIAL COURT ERR IN REFUSING TO ALLOW ORTEGA TO PRESENT EVIDENCE THAT DR. MARTIN WAS INSURED BY THE SAME MEDICAL MALPRACTICE INSURANCE CARRIER THAT INSURED DR. PRICHARD?

Dr. Martin, one of Dr. Prichard's medical experts, employed the same medical malpractice insurance carrier that insured Dr. Prichard. Ortega attempted to reveal this on cross-examination to show Dr. Martin's bias as a witness for Dr. Prichard. Ortega argues that, because the carrier is a mutual insurance company, Dr. Martin had incentive to ensure Ortega's loss in this case since any judgment in her favor could decrease profits for the mutual company members or increase premiums paid by those same members, or both. Therefore, according to Ortega, Dr. Martin was biased in favor of Dr. Prichard because a loss on the latter's part would translate into a loss on the former's

as well. The trial judge prevented Ortega from questioning Dr. Martin regarding his involvement with the insurance carrier. Ortega believes that the trial judge was in error when he precluded her from this line of inquiry and that the evidence of liability insurance coverage was admissible.

Mississippi Rule of Evidence 411 states:

Evidence that a person was or was not insured against liability is not admissible upon the issue of whether he acted negligently or otherwise wrongfully. *This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.*

M.R.E. 411 (emphasis added). Additionally, the Mississippi Supreme Court has held that the likelihood of prejudice to a defendant by evidence of liability insurance has been diminished recently because most jurors now realize that liability insurance coverage is more common than in the past. *Meena v. Wilburn*, 603 So. 2d 866, 874 (Miss. 1992) (citation omitted). The trial judge is in the most advantageous position to determine whether prejudice, or the lack of it, would result from this type of evidence, and therefore has considerable discretion regarding admissibility. *Id.*

In the present case, we believe that testimony that Dr. Martin was covered by the same medical malpractice insurance carrier was admissible to show that he may have been biased toward Dr. Prichard and his case. To counter this testimony, Dr. Prichard's defense counsel could subsequently have asked Dr. Martin on redirect whether he actually knew that he had the same insurance carrier, to which Dr. Martin would have answered in the negative. Moreover, a limiting instruction could have been provided to the jury explaining that any evidence of insurance coverage could not be used to show Dr. Prichard's negligence, but only to show bias, if any, of Dr. Martin on Dr. Prichard's behalf.

Here Ortega wanted to use this line of questioning to show bias or prejudice, and therefore it should have been deemed admissible. Defense counsel clearly could have subsequently attacked this evidence in front of the jury, thereby minimizing its effect, by showing that Dr. Martin had no knowledge or that he had forgotten that his carrier was the same as Dr. Prichard's. Finally, Mississippi Rule of Evidence 616 clearly allows evidence of bias, prejudice, or interest of a witness for or against *any party* to the case. M.R.E. 616. Here, evidence of the common insurance carrier was also admissible under Rule 616 because Dr. Martin likely would have benefitted financially from a positive ruling in favor of Dr. Prichard, who was certainly a party to this case. Whether Dr. Martin knew his carrier and Dr. Prichard's were in fact the same entity, and the effect of any bias resulting from that knowledge, were issues for the jury to weigh and consider. Any harmful effect of that evidence could have been minimized or eliminated on redirect through a showing by defense counsel that Dr. Martin was ignorant of the commonality of carriers, or by a limiting instruction to the jury.

Here we utilize the same abuse of discretion standard of review that we cited in Ortega's first issue. The admission or exclusion of evidence is ground for reversal and a new trial if inconsistent with substantial justice such that a substantial right of the party is affected. *Runyon*, 605 So. 2d at 48; M.R.C.P. 61. However, here we apply that standard to the trial court's *exclusion* of bias evidence. We find that the trial judge abused his discretion in determining that this evidence was inadmissible. Under Rule 411 alone this evidence was admissible. Defense counsel's right to redirect examination could have minimized, or completely eliminated, any notion of bias. A limiting instruction could also have been provided to the jury explaining the nature of the evidence. We believe that the error in excluding this testimony resulted in a substantial right of Ortega's being denied--that being her right

to show that Dr. Martin may have been financially biased in favor of a party to the litigation. Although not committing as egregious an error as in Ortega's first

assignment, we believe that the judge abused his discretion and denied Ortega the right to show Dr. Martin's bias in favor of Dr. Prichard. We reverse and remand this case for a new trial on Ortega's second issue as well.

CONCLUSION

We reverse and remand this case for a new trial for the reasons outlined herein.

THE JUDGMENT OF THE SUNFLOWER COUNTY CIRCUIT COURT IS REVERSED AND REMANDED FOR A NEW TRIAL. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.

BARBER, COLEMAN, DIAZ, KING, JJ., CONCUR. THOMAS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY FRAISER, C.J., MCMILLIN, AND SOUTHWICK, JJ. BRIDGES, P.J., NOT PARTICIPATING.

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THOMAS, P.J., DISSENTING:

I respectfully dissent from the majority's ruling reversing this case for a new trial. There was no error in this case, and the jury verdict should be affirmed. While this case is tragic, we as an appellate court should not take the attitude that "if I were the trial judge I would let this evidence in and exclude this evidence" when such ruling by the trial court is largely discretionary in nature.

The key factual dispute in this case was the interpretation of the fetal monitor strips showing the heartbeats of the fetus and the contractions of the mother. This was a "battle of experts." Each side had an expert testify as to their interpretation of the fetal monitor strips. Dr. Prichard, along with Drs. James Dale Martin and Donald James Blackwood, testified that the fetal monitor strips were reassuring and that there was no sign of fetal distress. On the other hand, Dr. Albert Alexander, who testified for Mrs. Ortega, stated that the fetal monitor strips showed various "decelerations" which showed that the baby was in distress and that a cesarian should have been performed.

At trial, Dr. Prichard showed to the jury that from 1990 until the date of trial Dr. Alexander delivered on average thirty babies per year. On the other hand, Dr. Prichard, along with his experts, deliver that many babies in a good month. The reason why Dr. Alexander delivers so few babies each year is that he specializes mostly in infertility work, not delivering babies. Dr. Martin, who on behalf of Dr. Prichard, testified that not only has he been using the fetal monitor strips since the mid-70s, he trains resident physicians on the use of this machine. I go into these doctors credentials because that is what the jury considered when making its decision. We must conclude from the defense verdict that the jury found Dr. Prichard's experts to be more qualified in the interpretation of the fetal monitor strips than Dr. Alexander.

I.

During cross-examination of Dr. Alexander, the trial court allowed the defense to question Dr. Alexander concerning two previous lawsuits that he had filed against various doctors and medical associations. These two lawsuits, according to Dr. Alexander, were filed because he was being "blackballed" by the medical profession on account of his tendency to testify against his fellow doctors in medical malpractice cases, which according to Dr. Alexander resulted in his income being cut in half.

Dr. Prichard argues that this testimony was relevant in showing Dr. Alexander's bias against the medical profession and his financial need to become an expert witness in medical malpractice cases. The trial court, while not making a specific finding on the record, agreed with Dr. Prichard and allowed him to question Dr. Alexander concerning those areas.

On appeal, the majority holds that Dr. Alexander's prior litigation against the medical community in Tennessee was irrelevant and unrelated to Dr. Prichard, and therefore, inadmissible under Mississippi Rule of Evidence 616. I disagree. The admissibility of evidence under this rule is subject to the trial court's discretionary findings that the evidence is relevant under Rules 401 and 402. The trial court made a discretionary ruling that litigation against members of his fellow profession along with Dr. Alexander's financial need to become an expert witness was relevant in showing his bias against Dr. Prichard.

Mississippi Rule of Evidence 616 allows into evidence "[f]or the purpose of attacking the credibility

of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case." Furthermore, the decision to admit or exclude evidence is left to the sound discretion of the trial court and that decision will be upheld unless there is an abuse of discretion. *Walker v. Graham*, 582 So. 2d 431, 432 (Miss. 1991); *Federal Land Bank v. Wolfe*, 560 So. 2d 137, 140 (Miss. 1989).

Under Rule 616, this evidence could be admitted for two purposes: (1) to show Dr. Alexander's bias towards other members of the medical profession, and (2) to show Dr. Alexander's financial need to testify at trials on account of his income being dramatically cut in half. The trial court made a ruling that this evidence should be admitted, and so our focus must necessarily turn to whether the trial court abused its discretion in making that ruling.

Under the laws of this State, it is clear that the trial court did not abuse its discretion in allowing this into evidence. Just because the majority may have ruled differently had it been the trier of fact in this case does not mean that the trial court abused its discretion.

Time and time again, our supreme court has taken the position that "the trial court should allow liberal cross-examination of experts regarding *bias, interest, and prejudice in medical negligence cases.*" *McCarty v. Kellum*, 667 So. 2d 1277, 1285-86 (Miss. 1995) (emphasis added).

Even though we must view the decision to admit evidence under our abuse of discretion standard and considering that the trial court is to allow liberal cross-examination in medical malpractice cases, the majority finds error in the admission of this testimony. Even if I were to agree with the majority in finding that the trial court abused its discretion in admitting the evidence in question, the error should be considered harmless, and should not be considered grounds for reversing this case.

This Court must look at all of the evidence presented to decide whether this testimony prejudiced the Plaintiff's case. "The rule is that in passing on a ruling of a lower court this court will look to the whole record, and, if in the light thereof no harm appears to have resulted to the appellant from the ruling complained of, the judgment will be affirmed, though the ruling may have been erroneous when made." *Planters' Lumber Co. v. Sibley*, 130 Miss. 26, 93 So. 440, 441 (1922).

The testimony elicited at trial was five volumes long encompassing six hundred and twenty-four pages. Out of that six hundred twenty-four pages, Dr. Alexander testified for approximately one hundred and twenty pages. The testimony that Mrs. Ortega complains, which the majority finds to be reversible error, encompasses only four pages. This is approximately three percent of Dr. Alexander's testimony, and only 6/10 of one percent of the entire testimony elicited at trial. This testimony was a very small piece of a large trial.

As our supreme court stated: "No trial, of course, is free of error. '[T]o require reversal the error must be of such magnitude as to leave no doubt that the appellant was unduly prejudiced.'" *Hatcher v. Fleeman*, 617 So. 2d 634, 639 (Miss. 1993) (citing *Davis v. Singing River Elec. Power Ass'n*, 501 So. 2d 1128, 1131 (Miss. 1987)). Not only must Ortega show to this Court that she was unduly prejudiced by the admission of this testimony she must also show that her case was harmed. *Terrain Enters., Inc. v. Mockbee*, 654 So. 2d 1122, 1131 (Miss. 1995).

Even though Ortega must show that she was without a doubt unduly prejudiced by the admission of this testimony, the majority only finds that "Ortega's [case] *may* have been adversely affected by the

evidence of alleged bias." Under our laws that is not good enough. Ortega must show that her case *was* unduly prejudiced, not that her case *may* have been unduly prejudiced.

Mrs. Ortega has not been able to show, without a doubt, that she was unduly prejudiced by this small piece of testimony, nor has she shown to this Court that admission of this evidence harmed her case. "Any errors or irregularities were insubstantial under the facts of this case and had no material bearing on its outcome." *Hatcher*, 617 So. 2d at 639.

II.

The majority next takes issue with the fact that the trial court would not allow Mrs. Ortega to impeach one of Dr. Prichard's experts with the fact that he and Dr. Prichard had the same insurance carrier. This according to the majority was admissible as showing bias under Rule 411 of the Mississippi Rules of Evidence.

However, in making her proffer of evidence outside the jury's presence, Ortega asked Dr. Martin if he knew that he had the same insurance carrier as Dr. Prichard; Martin replied that he did not know. It would appear that Ortega's proffer would have been of little, if any, benefit to Ortega in attacking Martin's credibility in front of the jury. For this Court to reverse the trial court's ruling, Ortega must show that some harm resulted. In *Century 21 Deep South Properties Ltd. v. Keys*, 652 So. 2d 707, 716 (Miss. 1995), our supreme court stated:

In the interest of the orderly administration of justice and for the avoidance of useless expense to litigants, it is a fundamental principle of appellate procedure which is universally recognized and applied that a party cannot assign as error that which is not prejudicial to him; and harmless error, that is, error as such, unaccompanied by prejudice or injury, is not ground for reversal. There is no reversible error flowing from this issue because there is no harm to undo.

It is clear that Ortega was not prejudiced or harmed by the trial court's ruling. Dr. Martin testified that he did not know whether he had the same insurance carrier as Dr. Prichard, and therefore no bias could have been shown. The only thing that Ortega could have accomplished by asking this question in front of the jury was to bring out the fact that Dr. Prichard had liability insurance.

Unlike the previous issue there is a hard and fast rule which generally denies admission of liability insurance except in rare cases such as to show bias or prejudice of the witness. *See* M.R.E. 411. If Ortega was to impeach Dr. Martin's credibility she first must overcome the hurdle of the balancing test of Rules 401-403 which allows the trial court to determine relevancy/prejudice questions. The trial court made a judicious determination that this testimony was inadmissible, and now on appeal the majority would hold that liability insurance should be brought out in front of the jury even though the witness had no idea that they had the same insurance carrier.

In this State, there are only a few insurance companies that handle medical malpractice cases. In any given case there will be at least one witness who has the same insurance carrier as the defendant. If this is all it takes to bring out the fact that a defendant in a case has liability insurance than the rule prohibiting such should be abolished.

The majority simply does not apply our standard of review in finding the trial court in error on this issue. We cannot reverse the trial court's admission or exclusion of evidence unless we find that the trial court abused its sound discretion. *Walker v. Graham*, 582 So. 2d 431, 432 (Miss. 1991); *Federal Land Bank v. Wolfe*, 560 So. 2d 137, 140 (Miss. 1989). There was no error here.

CONCLUSION

In both instances, the trial court made a judicious determination that evidence of the fact that Dr. Martin and Dr. Prichard had insurance with the same company should not be admitted, and evidence of Dr. Alexander's bias should be admitted. The majority is simply substituting its judgment for that of the trial court, without applying our standard of review.

I fear that the tragedy of this case has made the majority lose site of its objectivity. It is ironic that the majority agrees with Ortega's arguments that the above "rulings improperly favored the defense" and yet in its opinion the majority is reversing the trial court on both issues, in effect slanting its opinion toward the Plaintiff. Considering the fact that this Court must apply an abuse of discretion standard, this case should be affirmed.

FRAISER, C.J., MCMILLIN AND SOUTHWICK, JJ., JOIN THIS DISSENT.