

SUPREME COURT OF VIRGINIA

Galumbeck v. Lopez

Galumbeck v. Lopez · No. 102416 · Decided March 2, 2012

SUMMARY

The Supreme Court of Virginia affirmed a jury verdict in favor of Joseph Lopez, administrator of the estate of Maritess Q. Lopez, in a wrongful-death medical-malpractice action against Dr. Matthew Galumbeck and Plastic Surgery of Tidewater, P.C. The court held that the appellant failed to preserve or provide a sufficient record for review of several evidentiary and procedural claims, including issues concerning a surgical log and Dr. Flor’s board certification. The court also held that the trial court did not abuse its discretion in admitting the medical bills or denying a mistrial based on alleged juror misconduct.

CASE DETAILS

COURT	Supreme Court of Virginia
WRITING FOR THE COURT	Justice Cleo E. Powell; Chief Justice Kinser; Justice Lemons; Justice Goodwyn; Justice Millette; Justice Mims; Justice Powell; Senior Justice Lacy
JURISDICTION	Virginia
DECIDED	March 2, 2012
DOCKET	102416
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendants appealed a judgment entered on a jury verdict in favor of the administrator in a wrongful-death action arising from outpatient surgery. The Supreme Court of Virginia reviewed claims concerning juror misconduct, excluded evidence, preservation of objections, and admission of medical bills.
STANDARD OF REVIEW	The denial of a mistrial based on alleged juror misconduct is reviewed under an abuse-of-discretion framework, with the moving party bearing the burden of proving probable prejudice. Evidentiary rulings are reviewed for abuse of discretion. Unpreserved issues and assignments affected by an insufficient record are waived and are not considered.
PRECEDENTIAL VALUE	Published opinion; precedential

PARTIES

Dr. Matthew A. Galumbeck, Plastic Surgery of Tidewater, P.C. v. Joseph Lopez, administrator of the estate of Maritess Q. Lopez, deceased

TOPICS

appellate procedure

preservation of error

evidence

standard of review

medical malpractice

PRACTICE AREAS

appellate procedure

civil procedure

evidence

medical malpractice

wrongful death

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion by denying a mistrial based on alleged juror misconduct and bias.
2. Whether the trial court erred in excluding or declining to consider evidence concerning the surgical log and payment records.
3. Whether the defendants preserved their challenge to evidence concerning Dr. Flor's lack of board certification and the contents of Dr. Galumbeck's website.
4. Whether the trial court abused its discretion by admitting Maritess Lopez's medical bills into evidence.

HOLDINGS

1. A mistrial is not automatic upon a showing of juror misconduct; the trial court must determine whether the conduct demonstrates that prejudice might result, and the party moving for a mistrial bears the burden of proving probable prejudice. Because the trial court found Juror Conway's explanations credible and Dr. Galumbeck did not establish prejudicial misconduct, denial of the mistrial was not error.
2. An appellate court will not consider an assignment of error when the appellant fails to provide a record sufficient to evaluate the alleged error. Off-the-record sidebar discussions and a unilateral post-adjudgment statement made outside opposing counsel's presence did not preserve the evidentiary issues.
3. An issue raised in a pretrial motion in limine is waived when the party fails to obtain a ruling, and an objection made during trial is not reviewable when the actual objection and its grounds were made off the record. A party also waives an objection to evidence by introducing evidence of the same character.
4. The trial court did not abuse its discretion by admitting the medical bills because they were relevant to the plaintiff's theory of the case, even though they were not offered to prove damages or the amount paid to Dr. Galumbeck.

KEY QUOTATIONS

"Thus, the law is clear that an empanelled juror is presumed impartial and the burden to prove prejudice is on the party moving for a mistrial." (6)

“A necessary corollary to this rule is that we will not consider an objection made to the trial court without a proper showing of what that objection was.” (8)

“Thus, the evidence was arguably relevant to the plaintiff’s theory of the case.” (12)

FACTUAL BACKGROUND

Maritess Q. Lopez underwent outpatient surgery performed by Dr. Matthew Galumbeck on July 30, 2008, and died the following day from aspiration pneumonia secondary to the surgery. Evidence at trial concerned her condition after surgery, a telephone call to Galumbeck's office, Galumbeck's website representations about board-certified anesthesiologists, and medical bills associated with the procedure. During trial, defense counsel sought to challenge or introduce evidence concerning a surgical log, payment records, and Dr. Flor's credentials, but relevant sidebar discussions were off the record.

PROCEDURAL HISTORY

Joseph Lopez brought a wrongful-death action against Dr. Galumbeck, Dr. Carl Flor, and Plastic Surgery of Tidewater, P.C. The claims against Dr. Flor were nonsuited before trial. The jury returned a verdict for Lopez, and the Circuit Court of the City of Virginia Beach entered judgment on that verdict after denying defendants' motion to set it aside. The Supreme Court of Virginia affirmed.

DISPOSITION

affirmed

CASES CITED

- Haddad v. Commonwealth of Virginia, 229 Va. 325, 330, 329 S.E.2d 17, 20 (1985)
- Commonwealth Transportation Commissioner v. Target Corp., 274 Va. 341, 348, 650 S.E.2d 92, 96 (2007)
- O'Dell v. Commonwealth, 234 Va. 672, 697, 364 S.E.2d 491, 505 (1987)
- Whittaker v. Commonwealth, 217 Va. 966, 968-69, 234 S.E.2d 79, 81 (1977)
- Lenz v. Commonwealth, 261 Va. 451, 463, 544 S.E.2d 299, 306 (2001)
- Saunders v. Commonwealth, 211 Va. 399, 401, 177 S.E.2d 637, 638 (1970)
- Snead v. Commonwealth, 138 Va. 787, 801-02, 121 S.E. 82, 86 (1924)
- Culbertson v. Commonwealth, 137 Va. 752, 757-58, 119 S.E. 87, 88 (1923)
- Hutchinson v. Commonwealth, 133 Va. 710, 716-17, 112 S.E. 624, 626 (1922)
- Snarr v. Commonwealth, 131 Va. 814, 818-19, 109 S.E. 590, 592 (1921)
- Hinkley v. Koehler, 269 Va. 82, 91, 606 S.E.2d 803, 808 (2005)
- Norfolk & Western Railway Co. v. Puryear, 250 Va. 559, 563, 463 S.E.2d 442, 444 (1995)
- Coe v. Commonwealth, 231 Va. 83, 87, 340 S.E.2d 820, 823 (1986)
- Peacock Buick, Inc. v. Durkin, 221 Va. 1133, 1136, 277 S.E.2d 225, 227 (1981)
- Riverside Hospital, Inc. v. Johnson, 272 Va. 518, 529, 636 S.E.2d 416, 421-22 (2006)

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