



NUMBER 13-03-397-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

KEITH BAKER, INDIVIDUALLY, IAN
BAKER, INDIVIDUALLY AND AS
REPRESENTATIVE OF THE ESTATE
OF JEAN BAKER,

Appellants,

v.

DR. SALAH EL HAFI, AND
CARDIOLOGY CLINIC, P.A.,

Appellees.

On appeal from the Probate Court No. 1 of Harris County, Texas.

MEMORANDUM OPINION

Before Justices Hinojosa, Yañez, and Garza
Memorandum Opinion by Justice Garza

Appellants, Keith Baker, individually, and Ian Baker, individually and as independent executor of the estate of Jean Baker, deceased, brought a medical malpractice suit against appellees, Dr. Salah El Hafi and Cardiology Clinic P.A., for the death of their mother. The case was tried before a jury, and a take-nothing judgment in favor of appellees was

returned. Appellants now appeal the trial court's judgment and the subsequent denial of their motion for a new trial. They contend that the trial court erred in refusing to dismiss for cause three jurors who, appellants allege, openly admitted bias in favor of appellees during the voir dire process. Because we conclude that one of these jurors expressed bias during the voir dire examination, we reverse and remand.

I. Standard of Review

We use the abuse-of-discretion standard to review a trial court's ruling on a challenge for cause. *Kiefer v. Continental Airlines, Inc.*, 10 S.W.3d 34, 39 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). A party may raise a challenge for cause during jury selection in order to eliminate unfit jurors. See TEX. R. CIV. P. 228, 229. Bias and prejudice are statutory grounds for disqualification of a juror. See TEX. GOV'T CODE ANN. § 62.105(4) (Vernon 1998). In order to be disqualified for bias, a juror's state of mind must appear to create a natural inference that he or she will not act with impartiality. See *Gum v. Schaefer*, 683 S.W.2d 803, 807 (Tex. App.—Corpus Christi 1984, no writ) (per curiam) (citing *Compton v. Henrie*, 364 S.W.2d 179, 182 (Tex. 1963)). Whether a juror is biased is a factual determination for the court, see *id.*; however, if evidence conclusively establishes that a jury panelist would not act with impartiality, an appellate court must hold that the panelist was disqualified as a matter of law. *Garza v. Tan*, 849 S.W.2d 430, 432 (Tex. App.—Corpus Christi 1993, no writ). The trial court has no discretion to overrule a challenge for cause when the challenged juror is disqualified as a matter of law. See *Gum*, 683 S.W.2d at 808.

II. Discussion

During the voir dire examination, appellants' counsel elicited testimony from venire

members 25, 31, and 34. Appellants claim that the testimony of these venire members demonstrates that they were each biased in favor of the defendants. The trial court overruled appellants' motion to strike these venire members for cause, and appellants were ultimately forced to use peremptory strikes to remove the venire members. Consequently, appellants were unable to challenge four objectionable venire members who became jurors.¹

We begin with venire member 25, who appellants claim was biased as a matter of law based on the following testimony:

Juror 25: I'm not saying I want to be impartial. If I were in your shoes, I would want to know that I have spent most of my professional career on the defense side.

Counsel: Are you a lawyer?

Juror 25: Yes.

Counsel: Who are you with?

Juror 25: Preston and Calvert.

Counsel: Okay. And you actually defend health care operations.

Juror 25: Correct.

Counsel: Let me ask you: in all fairness, do you think that if this were a horse race so to speak, the plaintiff's [sic] are starting a little bit behind in your eyes?

Juror 25: I mean—I'm not saying that—I would do my best to be objective. I'm just saying that if I were in your shoes I might consider you towards as the attorney who spend [sic] most of his career defending malpractice lawsuits.

¹ In order to preserve error for appellate review in the denial of a challenge for cause, an appellant must (1) advise the trial court (2) before exercising his peremptory challenges (3) that the court's denial of the challenge for cause would force the party to exhaust his peremptory challenges and (4) that, after exercising these peremptory challenges, a specific objectionable juror will remain on the panel. See *Hallett v. Houston Northwest Med. Ctr.*, 689 S.W.2d 888, 890 (Tex. 1985). Our review of the record indicates that appellants properly preserved this error for our review.

Counsel: You feel like you can relate very much to the defendant's [sic] lawyers in this case? Is that fair?

Juror 25: That's correct.

Counsel: You feel like you would tend to look at it from their perspective as more of the plaintiff's [sic] perspective?

Juror 25: I think it would be natural.

This testimony disqualified venire member 25 as a matter of law. The trial court committed reversible error by failing to grant appellants' motion to strike. See *Dempsey v. Beaumont Hosp., Inc.*, 38 S.W.3d 287, 289–90 (Tex. App.—Beaumont 2001, pet. dism'd by agr.) (explaining that in cases involving juror disqualification, appellant need not establish that probable injury resulted therefrom before a new trial may be granted).

Venire member 25 stated that he has spent "most of his career" defending medical malpractice claims. He stated that he could "relate very much to the defendant's lawyers in this case" and that "it would be natural" for him "to look [at the case] from their perspective." These statements demonstrate bias because they show venire member 25 would not act with impartiality: he tended to favor defense counsel in this medical malpractice case because he has spent most of his career defending against such claims. Although he assured the court that he would do his best to be objective, venire member 25 continued to maintain that it would be natural for him to look at the case from the perspective of defense counsel. Juror 25 was not summoned to the bench to be further evaluated by the trial judge, nor did he ever say he could be "fair and impartial."

We find the words of our sister court particularly insightful on this issue:

In this country, where fair and impartial jurors can be had so readily, there is really no reason why questions of this character should arise, and in all cases where there is a possibility for serious doubt as to the impartiality of

a juror, from whatever cause, the trial court, in the exercise of the discretion conferred upon it, should properly discharge the juror.

Lumbermen's Ins. Corp. v. Goodman, 304 S.W.2d 139, 144-45 (Tex. Civ. App.—Beaumont 1957, writ ref'd n.r.e.).

Given this Court's disposition of appellants' first issue, it is unnecessary to address whether venire members 31 and 34 should have been struck for cause. See TEX. R. APP. P. 47.1.

III. Conclusion

We reverse the judgment of the trial court and remand the cause for a new trial.


DORI CONTRERAS GARZA
Justice

Memorandum Opinion delivered
and filed this the 30th day of August, 2004.

COURT OF APPEALS

Thirteenth District

Corpus Christi, Texas

Below is the JUDGMENT in the numbered cause set out herein to be Filed and Entered in the Minutes of the Court of Appeals, Thirteenth District of Texas, at Corpus Christi, as of the 30th day of August, 2004. If this Judgment does not conform to the opinion handed down by the Court in this cause, any party may file a Motion for Correction of Judgment with the Clerk of this Court.

CAUSE NO. 13-03-00397-CV

(Tr.Ct.No. 312543401)

KEITH BAKER, INDIVIDUALLY, IAN BAKER,
INDIVIDUALLY AND AS REPRESENTATIVE
OF ESTATE OF JEAN BAKER,

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On appeal to this Court from Harris County, Texas.

* * * * *

JUDGMENT

On appeal from the Probate Court No 1 of Harris County, Texas, from a judgment signed March 25, 2003. Memorandum Opinion by Justice Dori Contreras Garza.

THIS CAUSE was submitted to the Court on December 5, 2003, on oral argument, the record, and briefs. These having been examined and fully considered, it is the opinion of the Court that there was some error in the judgment of the court below, and said judgment is hereby REVERSED AND REMANDED.

Costs of the appeal are adjudged against appellees, DR. SALAH EL HAFI, AND CARDIOLOGY CLINIC, P.A. It is further ordered that this decision be certified below for observance.

* * * * *

CATHY WILBORN, CLERK

CHIEF JUSTICE
ROGELIO VALDEZ

JUSTICES
FEDERICO HINOJOSA
LINDA REYNA YANEZ
NELDA V. RODRIGUEZ
ERRLINDA CASTILLO
DORI CONTRERAS GARZA

CLERK
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Court of Appeals
Thirteenth District of Texas

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August 30, 2004

TO ALL ATTORNEYS OF RECORD:

Re: Cause No. 13-03-00397-CV
Tr.Ct.No. 312543401
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DR. SALAH EL HAFI, AND
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Dear Attorneys:

The judgment of the trial court in the above cause was this day REVERSED AND REMANDED by this Court. Copies of the memorandum opinion and judgment are enclosed.

Very truly yours,

Cathy Wilborn, Clerk

CW:ng
Enc.

cc: Hon. Timothy D. Riley
Hon. Jack E. McGehee
Hon. James V. Pianelli
Hon. Joelle G. Kenney
Hon. Trace Sherer
Probate Court No 1
Hon. Beverly B. Kaufman, County Clerk
Hon. Olen Underwood, Administrative Judge