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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-198

Filed: 6 November 2018

Catawba County, No. 14-CVS-2977

JOYLYNN JONES, Administratrix of the Estate of CHARLENE JONES, Plaintiff,

v.

ROBERT D. BOYD, M.D., Defendant.

Appeal by Plaintiff from Orders entered 7 September 2017 and 28 November 2017 by Judge Richard L. Doughton in Catawba County Superior Court. Heard in the Court of Appeals 6 September 2018.

Charles G. Monnett III & Associates, by Charles G. Monnett III, for Plaintiff-Appellant.

Nelson Mullins Riley & Scarborough, LLP, by G. Gray Wilson and Linda L. Helms, for Defendant-Appellee.

INMAN, Judge.

Plaintiff Joylynn Jones ("Plaintiff") brought suit against Defendant Dr. Robert Boyd ("Defendant") for medical negligence. Plaintiff appeals the denials of her motions for mistrial and new trial. After careful review of the record and applicable law, we hold that the trial court did not err in denying Plaintiff's motions and affirm.

I. FACTUAL AND PROCEDURAL HISTORY

On 5 December 2012, Defendant performed surgery on Charlene Jones ("Jones"). Jones experienced complications, allegedly caused by Defendant's negligence, and a second surgery was performed on 6 December 2012. The second surgery was not successful. Jones' condition deteriorated and she died on 12 December 2012. Plaintiff, as administratrix of Jones' estate, filed suit against Defendant for medical negligence.

Plaintiff's action proceeded to trial on 14 August 2017. After the parties presented their respective cases over 10 days, the trial court delivered its instructions to the jury and excused jurors to deliberate. The jury sent two notes to the trial court requesting medical records and photographs entered into evidence. Without objection from either party, the trial court delivered the exhibits to the jury. After a 15-minute recess, the jury resumed deliberations for 55 minutes and returned a third note that read, "As of now, 4:59, the jury is deadlocked. Please let us know how to proceed." The jury returned to the courtroom and the jury foreperson reported that jurors were divided ten to two. Rather than address the inquiry immediately, the court recessed for the evening and instructed jurors to return the next morning.

The following day the trial court gave the jury the pattern instruction for a jury that has reported it has failed to reach a verdict (an "*Allen* charge").[1] Following these instructions, the jury continued to deliberate for 18 minutes, when it requested further instructions on "ruling law[.]" The trial court sought clarification, and the jury specified it was asking only for the definition of negligence. The trial court repeated the original jury instructions in relevant part to the jury and returned it to its deliberations. One hour and 40 minutes later, the jury submitted the following note: "Your Honor, we regret to inform you that the jury is deadlocked at ten to two. The two have expressed that their opinions will not change. No amount of time will change the viewpoint of these jurors. Please instruct us how to proceed. Thank you."[2]

Following this note, Plaintiff's counsel moved for a mistrial. The trial court denied the motion.

The trial court then called the jury to the courtroom and repeated the *Allen* charge. The trial court also instructed the jury that "in this case, five hours is not a

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[1] "The term '*Allen* charge' is derived from the case of *Allen v. United States*, [164 U.S. 492, 41 L. Ed. 2d 528 (1896),] in which the United States Supreme Court approved the use of jury instructions that encouraged the jury to reach a verdict, if possible, after the jury requested additional instructions from the trial court." *State v. Gettys*, 219 N.C. App. 93, 101, n 1 724 S.E.2d 579, 585, n 1 (2012).

[2] The jury's note states that only two of the ten jurors were entirely unwilling to change their votes. It is conceivable that the remaining ten were open to agreeing with the two unwavering jurors and were ultimately convinced of the minority's view on the merits. We are unable to make such a statement with certainty, however, as the maintenance of the "sanctity of the jury room" is fundamental to "the integrity of the [trial] proceedings[,]" *State v. Ross*, 207 N.C. App. 379, 391, 700 S.E.2d 412, 420 (2010) (citations and quotations omitted), and judges, attorneys, and other non-jurors are constitutionally prohibited from "invad[ing] the sanctity, confidentiality, and privacy of the jury process[.]" *State v. Bindyke*, 288 N.C. 608, 627, 220 S.E.2d 521, 533 (1975).

long time to consider the volume of material that we covered in this case." After 53 minutes of deliberation following the second *Allen* charge, and a total of six hours of deliberation, the jury returned a verdict in favor of Defendant.

Following the jury's verdict, Plaintiff timely filed a motion for new trial, contending that the trial court's repeated *Allen* charge after the jury sent a note declaring that no amount of time would change the view of two jurors "had the effect of requiring the jurors in the minority to surrender their well-founded convictions or judgment to the views of the majority." The trial court denied the motion.

Plaintiff timely appeals from the trial court's denial of the motions for mistrial and for a new trial.

II. ANALYSIS

A. Standard of Review

The parties contest the applicable standard of review. We hold it proper to apply an abuse of discretion standard in reviewing this appeal. "[A]n appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). While a motion for new trial may be subject to *de novo* review where it involves an error of law, *i.e.,* a "question of law or legal inference[,]" *Chiltoski v. Drum*, 121 N.C. App. 161, 164 464 S.E.2d 701, 703 (1995), no question of law or legal inference was raised by

the motion for mistrial. "The decision to *give* an *Allen* change is discretionary and therefore reviewed for abuse of discretion." *State v. Gettys*, 219 N.C. App. 93, 101, 724 S.E.2d 579, 585–86 (2012) (emphasis in original); *see also Lumley v. Capoferi*, 120 N.C. App. 578, 584, 463 S.E.2d 264, 267 (1995) (holding trial court's decision in a medical malpractice action to deny a motion for mistrial in favor of issuing an *Allen* charge "was not a manifest abuse of discretion").

B. Motion for Mistrial

Plaintiff's principal argument on appeal asserts that the trial court erred in denying her motion for mistrial and issuing a second *Allen* charge instead, and that doing so "forced [jurors] to surrender their well-founded convictions to the views of the majority" after the jury was deadlocked. We disagree. In determining if a trial judge coerced a jury into making a decision after declaring they were deadlocked, we look to a totality of the circumstances. *State v. Patterson*, 332 N.C. 409, 415-16, 420 S.E.2d 98, 101 (1992). Factors include "whether the trial court 'conveyed an impression to the jurors that it was irritated with them for not reaching a verdict and whether the trial court intimated to the jurors that it would hold them until they reached a verdict.'" *State v. Baldwin*, 141 N.C. App. 596, 608, 540 S.E.2d 815, 823 (2000) (citing *State v. Porter*, 340 N.C. 320, 335, 457 S.E.2d 716, 723 (1995)). The Supreme Court of North Carolina has held that even in instances in which the jury declared that it was deadlocked and would not change its votes, the trial judge merely

repeating the *Allen* charge to encourage further deliberation was not an abuse of discretion. *Patterson*, 332 N.C. at 415-16, 420 S.E.2d at 101. Additionally, our Court does not make determinations on the proper length of jury deliberations. *Baldwin*, 141 N.C. App. at 608, 540 S.E.2d at 823.

In the instant case, the trial judge instructed the jury twice with an *Allen* charge to continue deliberating. Plaintiff fails to show any instance of coercion, and "[t]he rulings, orders and judgments of the trial judge are presumed to be correct, and the burden is on the appealing party to rebut the presumption of verity on appeal." *Stone v. Stone*, 96 N.C. App. 633, 634, 386 S.E.2d 602, 603 (1989). Furthermore, "[t]he law presumes that jurors follow the court's instructions[,]" *State v. Tirado*, 358 N.C. 551, 581, 599 S.E.2d 515, 536 (2004) (citing *Parker v. Randolph*, 442 U.S. 62, 73, 60 L. Ed. 2d 713, 723 (1979)), and the *Allen* charge given in this case included the instruction that "[n]o juror should surrender an honest conviction as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict." Lastly, at the time of Plaintiff's motion for mistrial, the jury had deliberated for a total of five and a half hours, excluding the several fifteen-minute breaks, a lunch recess, and an overnight recess. It was not unreasonable for the trial court to find that the jury needed more time to consider the evidence. Given the presumptions applicable here, and absent any other showing, we

hold that the trial judge did not abuse his discretion in denying the motion for mistrial in favor of issuing a second *Allen* charge.

C. Motion for New Trial

Plaintiff argues that the trial court erred in denying her motion for new trial on the ground that it erred in failing to declare a mistrial in the first instance. Because we hold that the trial court did not err in denying the motion for mistrial in favor of delivering a second *Allen* charge, we hold the trial court did not err in denying Plaintiff's motion for new trial.

III. CONCLUSION

For the foregoing reasons, we hold that the trial court did not err in denying Plaintiff's motions for mistrial and new trial.

AFFIRMED.

Judges TYSON and BERGER concur.

Report per Rule 30(e).