

# ARKANSAS COURT OF APPEALS

DIVISION IV  
No. CA 08-1445

LINDA BURDICK

APPELLANT

V.

LITTLE SWITZERLAND REALTY, INC.,  
BUTCH ATKINSON, and NANCY  
ATKINSON

APPELLEES

**Opinion Delivered** SEPTEMBER 2, 2009

APPEAL FROM THE PULASKI  
COUNTY CIRCUIT COURT,  
FIRST DIVISION [NO. CV2005-9029]

HONORABLE MARION A.  
HUMPHREY, JUDGE

AFFIRMED

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**JOHN B. ROBBINS, Judge**

Appellant Linda Burdick brought a lawsuit against appellees Little Switzerland Realty, Inc., and its owners Butch and Nancy Atkinson, alleging negligent maintenance on the grounds of Little Switzerland that resulted in Ms. Burdick falling down a hill and sustaining injuries. A jury trial was held, and during jury voir dire Ms. Burdick moved to strike three prospective jurors, Ms. Abbott, Ms. Fox, and Mr. Churchill, for cause. The trial court denied Ms. Burdick's request, and Ms. Burdick used all three of her allotted peremptory strikes to remove the objectionable jurors. At the conclusion of the jury trial, the jury returned a verdict in favor of the appellees, with eleven jurors signing the verdict form. The trial court subsequently entered a judgment dismissing appellant's claim with prejudice, and Ms. Burdick has timely appealed.

On appeal, Ms. Burdick raises one point. She argues that the trial court erred in denying her motion to strike the three prospective jurors for cause because the jurors were unable to state during voir dire that they would follow the trial court's instructions. We affirm.

The representations of the prospective jurors at issue in this case can be summarized as follows:

PROSPECTIVE JUROR MS. ABBOTT: If I hear from the witnesses and the evidentiary depositions and if I hear by a preponderance of the evidence that there is convincing force and it is more probably true and accurate that this defendant failed to use ordinary care, I can render a judgment in favor of Linda Burdick. I am married to a claims adjuster so, I hear a lot. He works with Safeco. If I hear the evidence that leads me to believe that the defendants in this hotel called Little Switzerland failed to exercise ordinary care, I could probably render a verdict and find them liable for the damages suffered as a result. I would probably begin my deliberations with a little bit of bias in favor of the defendant. I hope I would be able to set that aside in the event that I am chosen and make my decision based upon the evidence that I hear from that chair. I'm not completely certain. . . . If I'm fairly well convinced that they failed to exercise ordinary care, I would not feel uncomfortable having to explain my verdict with my husband.

PROSPECTIVE JUROR MS. FOX: I work for Farm Bureau. I would probably be biased on the defendant. I would hope that if the evidence presented to me convinces me that the defendants in this case failed to exercise ordinary care that I would be able to render a verdict in favor of the plaintiff, Linda Burdick. I feel like I could make a decision based on the evidence. If I'm fairly well convinced that they failed to exercise ordinary care, I would not feel uncomfortable having to explain my verdict when I met with the people I work with.

PROSPECTIVE JUROR MR. CHURCHILL: I'm fairly uncomfortable with the idea that if a defendant fails to exercise ordinary care and a plaintiff is hurt as a result, that Ms. Burdick ought to be able to get money damages as a result. If you prove in fact Little Switzerland did fail to exercise ordinary care, I would be able to set aside my feelings of uncomfortableness and render a verdict in favor of Ms. Burdick. . . . I think I can fairly and honestly evaluate the evidence before me today, but I'm in the construction business. So, I will probably see the other side.

I am comfortable with the idea of exercising ordinary care to make sure that people are not hurt in the places where my company is working.

Ms. Burdick now argues that the three questionable prospective jurors should have been struck for cause pursuant to her request because they were unable to state with any certainty that they would be able to set aside their impartiality and decide the case based on the facts presented. Ms. Burdick cites *Moran v. Clarke*, 443 F.3d 646 (8th Cir. 2006), where the appeals court held that appellants must clear a high hurdle to obtain reversal of a trial court's decision regarding the dismissal of a juror for cause, and that courts presume that a prospective juror is impartial, and a party seeking to strike a venire member for cause must show that the prospective juror is unable to lay aside his or her impressions or opinions and render a verdict based on the evidence presented in court. To fail the standard for impartiality with respect to dismissal for cause, a juror must profess his inability to be impartial and resist any attempt to rehabilitate his position. *Id.* On appeal, a review of a denial of a jury strike for cause is done under an abuse of discretion standard. *Id.*

In this case, Ms. Burdick contends that the burden of showing that the three prospective jurors were not impartial was met. She notes that after expressing their biases, two of them only indicated that they *hoped* they could follow the trial court's instructions. The remaining juror, Mr. Churchill, stated that he was uncomfortable in awarding damages to Ms. Burdick, and that he would probably see the defendants' side. Ms. Burdick submits that under these circumstances the trial court abused its discretion in denying her motion to strike the prospective jurors, and that she was prejudiced because she was forced to use all three of her peremptory strikes to remove them, thus denying her the ability to remove any

other jurors. As a result of the prejudicial error, Ms. Burdick asks this court to reverse and remand for a new trial.

We need not reach the issue of whether the trial court erred in refusing to strike the three jurors for cause because, even if error did occur, Ms. Burdick has failed to demonstrate any prejudice. Error unaccompanied by prejudice, commonly called harmless error, is not a ground for reversal. *Arkansas Gas Consumers v. Arkansas Pub. Serv. Comm'n*, 80 Ark. App. 1, 91 S.W.3d 75 (2002).

In *United States v. Ortiz*, 315 F.3d 873 (8th Cir. 2003), the federal appeals court held that the mere necessity of using a peremptory challenge does not establish actual prejudice. In that case, no prejudice was established where the prospective juror who allegedly should have been struck for cause was not actually seated on the jury. Moreover, in *Southern Farm Bureau Cas. Ins. Co. v. Daggett*, 354 Ark. 112, 118 S.W.3d 525 (2003), our supreme court held that to preserve for appeal an objection to an empaneled juror, a party is required to have exhausted his or her peremptory challenges and must show that he or she was forced to accept a juror who should have been excused for cause. And in *Irvin v. State*, 28 Ark. App. 6, 771 S.W.2d 26 (1989), we held that in order to prevail on an assignment of error for denying a challenge for cause of prospective jurors, the appellant must show that one of the jurors actually seated should have been excused for cause. We will not consider arguments concerning jurors either accepted by appellant while he had peremptory challenges remaining or those not accepted but excused by peremptory challenges. *Id.* (citing *Gardner v. State*, 296 Ark. 41, 754 S.W.2d 518 (1988)).

In the present case, Ms. Burdick removed all three jurors about which she now complains using her peremptory challenges. The trial court then asked both parties if the jury was satisfactory, and both replied that it was. Ms. Burdick made no assertion below that any of the jurors actually empaneled were objectionable, nor does she identify any juror on appeal that she would like to have removed. Because Ms. Burdick has not demonstrated prejudice any possible error was harmless, and we do not reverse for harmless error.

Affirmed.

GRUBER and BROWN, JJ., agree.