REL: April 3, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180796

Jimmy Leftwich, Jr.

v.

Steven V. Brewster

Appeal from Etowah Circuit Court
(CV-16-900437)

MENDHEIM, Justice.

Jimmy Leftwich, Jr., appeals from the Etowah Circuit Court's denial of a motion for a new trial in his negligence action against Steven V. Brewster. Leftwich alleged that Brewster breached a duty to competently inspect a house that

Leftwich purchased. The jury returned a verdict in favor of Brewster. On appeal, Leftwich contends that the trial court erred in failing to disqualify two jurors for cause and that the trial court erroneously excluded vital evidence that provided estimated costs to repair the home. We affirm the judgment of the trial court.

I. Facts

In 2014, Leftwich and his wife began looking for a new house. They became interested in a property located on Washington Circle in Gadsden, Alabama ("the home"). The home was built in 1945, and Leftwich testified that, because of its age, he was concerned about the structural integrity of the home. Consequently, Leftwich hired Brewster, a licensed home inspector, to inspect the home before Leftwich made an offer on it.

On June 19, 2014, Brewster spent approximately three hours inspecting the home. He then drafted a written home-inspection report ("HIR") the same day that included several pictures of the property. Leftwich paid Brewster that same day. Brewster sent Leftwich the HIR the next day. The HIR stated that it was not intended to reflect the value of the

premises or to make any representation as to the advisability of purchasing the home and that it expressed Brewster's personal opinions as the inspector based upon visual impressions of the conditions that existed at the time of the inspection. The HIR did not identify any major defects with the home, though it did note that there was one improperly spliced rafter in the attic. Leftwich testified that he read the HIR and that he felt he was getting one of the best inspections a person could obtain.

Thereafter, Leftwich received in the mail a home-inspection agreement ("HIA") from Brewster that was dated June 30, 2014. Leftwich testified that he did not sign and return the HIA because he had already paid Brewster and he had received the HIR. Brewster testified that he received the HIA in the mail and that it contained Leftwich's signature. Brewster's copy of the HIA was received into evidence, but Leftwich denied that the signature on the document was his.

Both parties agree that the HIA stated that the inspection was "performed in a manner consistent with ASHI [American Society of Home Inspectors] Standards of Practice." Brewster also testified that he followed standards provided by

the Alabama Building Commission for home inspections. For his part, Leftwich argued that the 2003 International Residential Code ("IRC") applied to Brewster's home inspection because the HIR mentioned a portion of that building code. However, Brewster noted that the Alabama Building Commission standards did not require home inspectors to inspect for building-code compliance. He also observed that Leftwich's own home-inspection expert, Larry Brooks, testified that the IRC generally did not apply to home inspections.

Leftwich purchased the home for $77,000 on July 25, 2014. He testified that at the time he felt the home was actually worth more than he paid for it. According to Leftwich, within 90 days of moving into the home, the ceiling started to fall, the floors started to bow and sag, and the rafters in the kitchen started pushing down on the cabinets. Leftwich testified at trial that he eventually moved out of the home because he felt it was unsafe and that, in his opinion, because of the defects in the home's roof and its foundation, the home was worth only $5,000, which he stated was the value of the lot on which the home was situated.

On June 14, 2016, Leftwich filed an action in the Etowah Circuit Court against Brewster. Leftwich asserted claims of negligence and wantonness, and he sought compensatory and punitive damages, as well as damages for mental anguish and emotional distress. Leftwich alleged that Brewster had negligently and/or wantonly inspected the home, that Leftwich had purchased the home based on the assurance he gained from the HIR, which found no major defects in the home, that Leftwich discovered major defects with the home after he moved in, and that, if he had known of those defects beforehand, he would not have purchased the home.

The case proceeded to trial. During voir dire of the jury pool on April 1, 2019, two jurors -- Brad and Melissa Battles -- gave responses to questioning from Leftwich's counsel that revealed that they were married to each other. After that revelation, Leftwich's counsel did not direct any specific questions to either juror pertaining to potential bias. Instead, Leftwich's counsel later asked a generic question about bias to all the prospective jurors:

> "Does anyone have anything that you feel like would in fairness interfere with your ability to evaluate the evidence in this case and award a verdict for one side or the other based on the as law given to

> you by the Judge and the evidence that comes to you through the trial of this case?"

None of the prospective jurors responded to this question. At the close of his voir dire questioning, Brewster's counsel also asked to the prospective jurors a generic question pertaining to potential bias:

> "Is there some reason that you're thinking about, now, this dummy is not going to ask the question that pertains to me? It's something that you're thinking about or something that you've been through or some reason that might cause you to tilt one way or the other in this case that would prevent you, for some reason, from listening to the evidence and the legal charge that the Judge gives you in reaching a fair and impartial verdict for these parties, just something that, you know, [Brewster's counsel] could never think of this question to ask?"

None of the jurors responded to that question.

At the conclusion of voir dire, the trial court asked the parties if they had any motions to strike jurors for cause. Leftwich's counsel asked that the Battleses be stricken from the jury because they were related by marriage. The following exchange then occurred:

> "[Leftwich's counsel]: Your Honor, we've talked just a little bit, and the Battles[es] are related by marriage. I think that would create a problem for them to be on the jury.
>
> "THE COURT: I don't think that's an issue for cause, though --

"[Leftwich's counsel]: I honestly don't know.

"THE COURT: -- under the Code and the statute. [Brewster's counsel], anything on that?

"[Brewster's counsel]: Your Honor, I don't confess to be an expert at that, but it would seem to me that they would -- one of them would have to say I just can't sit on a jury with my spouse. I can't -- I mean, I've never had it before.

"THE COURT: I've never had it before either, but I don't know what --

"[Leftwich's counsel]: I think it would be hard for one of them to vote one way and the other one to vote the other way if they were both on the jury.

"THE COURT: Let me ask y'all this and see if we can nip it in the bud this way without going and looking and checking: Would anyone -- would folks stipulate or not stipulate as to having them removed from the panel? It's okay if you don't. There's no harm in it.

"[Brewster's counsel]: I do not stipulate to the --

"THE COURT: I understand. Okay.

"[Brewster's counsel]: -- mutual, no.

"THE COURT: I'll go ahead and make a ruling because I've never seen that or heard of that being an issue. I think it's like people -- to me, to a certain extent, people that work somewhere together or work closely together somewhere or have known each other for 20 years. How long have you known them? I've known Jack my whole life. We've worked at Goodyear the whole time. I know they'd be in the same home and things of that nature, but if they're given an instruction -- I mean, do y'all know of a case or a rule?

"THE COURT: I've never seen it.

"[Brewster's counsel]: You know, I just --

"THE COURT: Let me go check the statute, but as of now, I'm saying no. It's denied, but I'll let you know if I change my decision. I know, it may affect that, so I'll try to know something as quickly as possible. ...

"....

"THE COURT: Okay. For the record, I have reviewed Section 12-16-150, [Ala. Code 1975,] which is challenges of jurors for cause and grounds generally, and as to all 12 reasons, none of them cites anything about relationship of jurors, all right, and I guess it gives me discretion if I feel, though, based upon some bias or otherwise, but I don't find that that would be the case. There's nothing I see that would raise that issue for cause, at least, but I do understand. And I --

"[Leftwich's counsel]: It's just a situation we've never encountered before.

"THE COURT: It's interesting. I understand the issue because I feel like you've got -- if someone wishes to strike one, you may feel like you need to strike two. Of course, they won't know who struck them.

"[Brewster's counsel]: Well, if you struck one, then the issue doesn't exist anymore.

"THE COURT: Yeah, that's true.

"[Brewster's counsel]: You know?

"THE COURT: That's true. It could be, but if one party thinks that they need to strike the husband, it may very well be that they wish to strike the

> wife for the same reasons, so it may take you two strikes.
>
> "[Brewster's counsel]: Because she's the wife of the husband?
>
> "THE COURT: Not necessarily. Generally, as we know -- that doesn't always happen in my house either. Okay. So anyway in theory. I'm going to deny the motion, though, based upon the rule. It does not cite that within the rule. Okay.
>
> "[Brewster's counsel]: Thank you. Your Honor.
>
> "[Leftwich's counsel]: Thank you."

Thus, the trial court denied Leftwich's motion to strike for cause the two married jurors. Melissa Battles subsequently became the foreperson of the jury.

During the trial court's review of the parties' motions in limine, Leftwich submitted a motion in limine to prevent Brewster from asking questions about Leftwich's taking anything from the home. Brewster's counsel explained that, during his depositions, Leftwich revealed that he had removed the heat pump, the above-ground pool, a metal carport, fencing, light fixtures, the electrical wiring, and other fixtures from the home. Leftwich testified during depositions that he had sold most of the items for cash. Leftwich also testified that he had moved out of the home and had stopped

paying the mortgage, leading to the home going into foreclosure. Brewster's counsel argued that all of those responses from Leftwich were relevant to the market value of the home. Leftwich's counsel responded that Brewster was attempting to prejudice the jury against his client and that Leftwich's alleged removal of fixtures from the home was not relevant to damages because those alleged actions did not occur near the time of the home inspection.

> "[Leftwich's counsel]: ... [W]hat does the law say? It's black letter. I mean, it couldn't be clearer. What was the market value immediately after he bought this house, and what should the market value have been? Basically, he agreed to pay $77,000 for the house. That goes a long ways towards establishing the market value of the house --
>
> "THE COURT: Here's the deal: The damage is at that time.
>
> "[Leftwich's counsel]: At that time.
>
> "....
>
> "THE COURT: The window -- what was the time of the home inspection? What was the date?
>
> "[Brewster's counsel]: March -- excuse me. 6/19 of '14.
>
> "THE COURT: As to the before and after value, that's what we're looking at.
>
> "[Leftwich's counsel]: Yes, sir.

> "....
>
> "THE COURT: Hold on. This case is about this, as I understand. This case is about, one, was the report performed correctly, okay, all right; and then two, if it wasn't, all right, if there was a breach of duty on his part, what was the damage? At that time, the damage would be set as how did it affect the value of that home at that time. That's all we're looking at. I don't want any other stuff about -- on down the road about other things that could open the door at that point to what he's talking about."

The trial court precluded Brewster from asking about Leftwich's removal of fixtures unless Leftwich "opened the door" to such questioning during his trial testimony.

During Brewster's cross-examination of Leftwich's home-inspection expert, Brooks, Brewster's counsel attempted to ask Brooks if the home appeared to have been lived in when he visited the home in March 2018. Leftwich's counsel objected to the question, stating that Brewster was attempting to delve into matters the trial court had prohibited with respect to Leftwich's taking fixtures from the home and no longer occupying it. Leftwich's counsel reiterated why he believed those issues were irrelevant to the question of damages.

> "[Leftwich's counsel]: Okay. I feel like the law is what the condition of that property was at the time in question. That's what the law appears to me, in all honesty, to be.

"THE COURT: It is."

After a lengthy argument by counsel for both parties outside the presence of the jury, the trial court determined that Brewster's counsel could ask Brooks whether, if something was missing from the home, it would affect his view of its condition but that he could not be asked about whether certain fixtures were, in fact, missing when Brooks visited the home.

At the beginning of the next day's testimony, the trial court apprised the parties of its view on what the measure of damages would be in the case.

> "THE COURT: All right. The measure of damages in this case, if you get to damages, all right -- that will be for the jury to decide, understanding we may have some motions at the end of testimony and stuff like that, but for the matter of the jury, the measure of damages is going to be the difference between the reasonable market value of the land immediately before the harm and the reasonable market value of the land immediately after the harm.
>
> "Further stated, the difference in the market value of the residential home being purchased had to have been without defect and the market value of that residential home as it was with those defects. That will be the measure of damages. That will be the testimony we would receive as to damages. We won't go into anything further about damages, that includes the removal of items subsequent to that. We will not be going into that in this case unless, based upon the plaintiff's testimony in the case, the door is opened based upon something that is said in his direct testimony. That's my ruling. I note

> the defendant's exception, and that's where we're heading. Okay?"

Brewster's counsel then asked the trial court if he would be allowed to ask Leftwich about his moving out of the home and allowing it to be foreclosed upon. The trial court did not understand the relevance of that line of questioning. Brewster's counsel responded that it related to the fact that Leftwich was going to have a witness, homebuilder David Whyte, testify about repair costs to restore the home to what Leftwich said was a livable condition.

> "[Brewster's counsel]: He's going to offer estimates of repair to a home that he doesn't even have possessory rights to anymore. Your Honor.
>
> "[Leftwich's counsel]: That's unimportant. Your Honor. He --
>
> "THE COURT: Hold on a second. Who's going to offer evidence of repair?
>
> "[Brewster's counsel]: He is this morning. He's got a witness standing outside.
>
> "THE COURT: All right.
>
> "[Brewster's counsel]: He's going to offer a witness. He's going to testify that this house needs something to the tune of -- okay. I'm sorry. I'll sit down.
>
> "THE COURT: Before and after value, that's it. All right. He doesn't even have any possessory rights

at this time to talk about repairing it or fixing or anything else. We don't go there.

"[Leftwich's counsel]: Your Honor, I think in that case, you know, the cost of repairs could be relevant to a jury's determination of the damages, but it can't exceed --

"THE COURT: If you go into cost of repairs ... -- I just want you to understand. If you go into cost of repairs, that could very well open the door about what [Brewster's counsel] is talking about.

"[Leftwich's counsel]: Well, it could, except for the fact that all these estimates were a couple of years ago.

"THE COURT: Before anything was removed?

"[Leftwich's counsel]: Before any of this stuff happened.

"[Brewster's counsel]: What is 'this stuff happened'? I'm just curious.

"[Leftwich's counsel]: [Brewster's counsel] is talking -- if I understand right, he's talking about stripping of the house that occurred, at the earliest, sometime in early 2018. I don't think there's any evidence whatsoever anything was done before that time.

"THE COURT: I don't think -- my understanding of the law as it relates to before and after value, much like a vehicle or a home or things of that nature, is you testify as to the value of that vehicle. All right. You don't come in and say here's my repair costs and that shows you what your damage is.

"[Leftwich's counsel]: I think that is the measure of damages.

> "THE COURT: The repair costs?
>
> "[Leftwich's counsel]: No.
>
> "THE COURT: No. So I feel that's not relevant. I'm not going to let you go there."

Based on the trial court's ruling that evidence of repair costs would be excluded, Leftwich's counsel made offers of proof outside the presence of the jury during his questioning of Whyte and of Leftwich as to repair estimates for the home. The total from the written estimates Leftwich proffered added up to over $87,000.

At the close of Leftwich's case, Brewster moved for a judgment as a matter of law. The trial court denied the motion with respect to Leftwich's negligence claim but granted it as to the wantonness claim.[1]

The trial then proceeded with Brewster's presentation of witnesses. Brewster called Charles Whitley, a licensed engineer, as his home-inspection expert. Whitley testified that in his opinion Brewster had followed the standards required of him in his inspection of the home. Whitley also testified that, during his inspection of the home, he did not

[1]On the second day of trial, Leftwich voluntarily dismissed his claim for mental-anguish damages.

observe any structural issues with the roof and did not observe any significant problems with the foundation of the home.

At the close of all the evidence, both parties moved for a judgment as a matter of law; the trial court denied the motions from both parties. The case was submitted to the jury on April 4, 2019. The jury returned a verdict the same day in favor of Brewster. On May 6, 2019, Leftwich filed a motion for a new trial. The trial court denied that motion on May 23, 2019. Leftwich filed a timely appeal.

II. Standard of Review

> "'"It is well established that a ruling on a motion for a new trial rests within the sound discretion of the trial judge. The exercise of that discretion carries with it a presumption of correctness, which will not be disturbed by this Court unless some legal right is abused and the record plainly and palpably shows the trial judge to be in error."'
>
> "Curtis v. Faulkner Univ., 575 So. 2d 1064, 1065-66 (Ala. 1991) (quoting Kane v. Edward J. Woerner & Sons, Inc., 543 So. 2d 693, 694 (Ala. 1989), quoting in turn Hill v. Sherwood, 488 So. 2d 1357, 1359 ([Ala.] 1986))."

Baptist Med. Ctr. Montclair v. Whitfield, 950 So. 2d 1121, 1126 (Ala. 2006).

In addition to this general standard, this Court has also addressed the standard of review specifically applied to evidentiary rulings of a trial court:

> "'"The standard applicable to a review of a trial court's rulings on the admission of evidence is determined by two fundamental principles. The first grants trial judges wide discretion to exclude or to admit evidence."' Mock v. Allen, 783 So. 2d 828, 835 (Ala. 2000) (quoting Wal-Mart Stores, Inc. v. Thompson, 726 So. 2d 651, 655 (Ala. 1998)). ...
>
> "'"The second principle 'is that a judgment cannot be reversed on appeal for an error [in the improper exclusion of evidence] unless ... it should appear that the error complained of has probably injuriously affected substantial rights of the parties.'"' Mock, 783 So. 2d at 835 (quoting Wal-Mart Stores, 726 So. 2d at 655, quoting in turn Atkins v. Lee, 603 So. 2d 937, 941 (Ala. 1992)). See also Ala. R. App. P. 45. 'The burden of establishing that an erroneous ruling was prejudicial is on the appellant.' Preferred Risk Mut. Ins. Co. v. Ryan, 589 So. 2d 165, 167 (Ala. 1991)."

Middleton v. Lightfoot, 885 So. 2d 111, 113-14 (Ala. 2003) (emphasis omitted).

III. Analysis

Leftwich raises two issues in this appeal. First, he contends that the trial court erred in denying his motion to challenge for cause the two members of the jury panel who were married to each other. Second, he contends that the trial court erred in excluding from evidence the estimates of costs

to repair the home that Leftwich believes were relevant to determining the difference in the value of the home at the time Brewster inspected the home and after Leftwich discovered damage to the home.

A. Juror Bias

Leftwich contends that the married jurors, Brad and Melissa Battles, should have been struck from the jury for cause because of "implied bias," that is, "bias conclusively presumed as matter of law." United States v. Wood, 299 U.S. 123, 133 (1936). The doctrine of implied bias is based on the idea that in certain categories the law will presume a level of bias that automatically will preclude jury service.

> "To justify a challenge of a juror for cause, there must be a statutory ground as set forth in Ala. Code 1975, § 12-16-150, or some other matter that discloses absolute bias or favor and leaves nothing to the trial court's discretion. See, Nettles v. State, 435 So. 2d 146, 149 (Ala. Crim. App.), aff'd, 435 So. 2d 151 (Ala.1983). See also, Clark v. State, 621 So. 2d 309, 321 (Ala. Crim. App. 1992). The trial court's ruling on a challenge for cause is accorded great weight and will not be disturbed on appeal unless it is clearly shown to be an abuse of discretion. Nobis v. State, 401 So. 2d 191 (Ala. Crim. App.), cert. denied, 401 So. 2d 204 (Ala. 1981)."

Ex parte Myers, 699 So. 2d 1285, 1287 (Ala. 1997).

Section 12-16-150, Ala. Code 1975, lists 12 categories in which bias will be presumed for a prospective juror:

> "It is good ground for challenge of a juror by either party:
>
> > "(1) That the person has not been a resident householder or freeholder of the county for the last preceding six months.
> >
> > "(2) That he is not a citizen of Alabama.
> >
> > "(3) That he has been indicted within the last 12 months for felony or an offense of the same character as that with which the defendant is charged.
> >
> > "(4) That he is connected by consanguinity within the ninth degree, or by affinity within the fifth degree, computed according to the rules of the civil law, either with the defendant or with the prosecutor or the person alleged to be injured.
> >
> > "(5) That he has been convicted of a felony.
> >
> > "(6) That he has an interest in the conviction or acquittal of the defendant or has made any promise or given any assurance that he will convict or acquit the defendant.
> >
> > "(7) That he has a fixed opinion as to the guilt or innocence of the defendant which would bias his verdict.
> >
> > "(8) That he is under 19 years of age.

> "(9) That he is of unsound mind.
>
> "(10) That he is a witness for the other party.
>
> "(11) That the juror, in any civil case, is plaintiff or defendant in a case which stands for trial during the week he is challenged or is related by consanguinity within the ninth degree or by affinity within the fifth degree, computed according to the rules of the civil law, to any attorney in the case to be tried or is a partner in business with any party to such case.
>
> "(12) That the juror, in any civil case, is an officer, employee or stockholder of or, in case of a mutual company, is the holder of a policy of insurance with an insurance company indemnifying any party to the case against liability in whole or in part or holding a subrogation claim to any portion of the proceeds of the claim sued on or being otherwise financially interested in the result of the case."

The trial court denied Leftwich's motion to strike the Battleses for cause because marriage of jurors is not one of the categories listed as a disqualifier in § 12-16-150, and the trial court did not believe that marriage in itself otherwise imputed bias to the respective jurors.

Leftwich argues that, even though jurors being married is not specifically listed as a ground for challenge in § 12-16-

150, "[c]onsanguinity is the classic example of implied bias." Leftwich's brief, p. 33. Leftwich notes that a juror's being related to a party in the action or the prosecutor is an automatic disqualification from jury service. See § 12-16-150(4). Leftwich adds that there are rules in place in the federal appellate courts that prevent an appellate judge from reviewing the case of a trial judge to whom the appellate judge is related by blood or marriage. He also asserts that a prohibition on married couples for jury service did not exist at common law solely because women were not allowed to serve on juries in the common-law era. See Leftwich's brief, p. 36. Leftwich contends that, given the recognition of consanguinity as a legal basis for bias, and given that a "strong emotional influence of one spouse over another is an undeniable fact of married life," it follows that jurors who are married to one another should not be permitted to serve on a jury together under the doctrine of implied bias. Leftwich's brief, pp. 37-38.

Leftwich's arguments fail to explain why jurors being married to each other is it not listed as a ground for disqualification in § 12-16-150 if the implied bias between a

husband and a wife serving on the same jury is as obvious as he articulates it to be. Indeed, Leftwich does not cite a single authority that actually states that spouses should not simultaneously serve on a jury. Although the issue does not arise frequently, it has been addressed in other jurisdictions. For example, the Kentucky Supreme Court has ably discussed this exact issue:

> "'Bias, however, presumptive or otherwise, refers generally to a juror's favoring or disfavoring one side of the case or the other, a risk not posed by relationships between jurors. For that reason, the few courts to have addressed in published opinions the issue of married jurors have held that such jurors are not presumptively disqualified and that their independence may be adequately assured through voir dire. See for example, State v. Richie, 88 Hawai'i 19, 960 P.2d 1227 (1998); Russell v. State, 560 P.2d 1003 (Okla. Crim. App. 1977); State v. Wilkins, 115 Vt. 269, 56 A.2d 473 (1948); Savoie v. McCall's Boat Rentals, Inc., 491 So. 2d 94 (La. App. 1986). We agree that no presumption of undue influence or lack of independence arises from the fact of marriage alone. While a trial court would be within its discretion to avoid even the possibility of impropriety posed by married jurors by dismissing one or the other, the trial court did not abuse its discretion here.... [S]ince the jurors' responses included nothing that would have compelled a dismissal, the trial court cannot be said to have abused its discretion by permitting

> jurors 28 and 29 both to serve on Harris's jury.'
>
> "[Harris v. Commonwealth,] 313 S.W.3d [40,] 49-50 [(Ky. 2010)] (emphasis added).
>
> "Here, L.C. and her husband D.C. were both examined during individual voir dire by the Commonwealth, defense counsel, and the trial court. Defense counsel asked D.C. several questions about his ability to serve on the jury with his wife, although no such questions were asked of L.C. Defense counsel made no motion to strike either L.C. or D.C. based on their answers to counsel's questions. Rather, just before the fourteen jurors were to be drawn, defense counsel objected to the couple serving on the jury together. The trial court denied the motion, and counsel did not request any further voir dire of either juror.
>
> "Because their responses included nothing that would have required a dismissal of them individually, and because a married couple serving together on a jury is not presumptively biased, we conclude that the trial court did not abuse its discretion in denying Appellant's motion."

Dunlap v. Commonwealth, 435 S.W.3d 537, 586 (Ky. 2013) (footnote omitted). See also Russell v. State, 560 P.2d 1003, 1004 (Okla. Crim. App. 1977) ("Undoubtedly, married couples will be found that are unable to divorce one another's thoughts during a trial, but when voir dire uncovers no bias, partiality, or inability to form independent thought[,] a party should not be excluded.").

In addition to the facts that the law in Alabama does not address this issue and that the law in other jurisdictions does not support imputing an automatic presumption of bias on married couples serving on a jury, Leftwich's contention also lacks concrete evidence of any bias by the jurors in question. The Battleses' answers to generic questions from the parties' respective counsel did not reveal any tendency of bias that would preclude either of them from jury service. Moreover, Leftwich did not ask the Battleses any direct questions pertaining to their relationship and how it might impact their decision-making in the case. This is so even though near the conclusion of voir dire the parties asked questions to three other jury members outside the presence of the remaining jury pool to ensure that lingering doubts as to bias were extinguished. Based on the lack of legal authority and evidentiary support for Leftwich's claim of bias, we conclude that the trial court did not err in denying Leftwich's motion to strike the married jurors for cause.[2]

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[2]Leftwich also contends that failing to exclude the married jurors deprived him of a fair trial based on the marital privilege provided in Rule 504(b), Ala. R. Evid., which states that, "[i]n any civil or criminal proceeding, a person has a privilege to refuse to testify, or to prevent any person from testifying, as to any confidential communication

B. Exclusion of Repair-Cost Evidence

Leftwich contends that the trial court erred in excluding from evidence the testimony and written estimates of the costs to repair defects in the home. He argues that such evidence was vital to the jury's determination of damages because, without that evidence, the only basis for damages was Leftwich's own opinion that the home was worthless.

> "'The proper measure of compensatory damages in a tort action based on damage to real property is the difference between the fair market value of the property immediately before the damage and the fair market value immediately after the damage. Nelson Brothers, Inc. v. Busby, 513 So. 2d 1015, 1017 (Ala. 1987); Dooley v. Ard Oil Co., 444 So. 2d 847, 848 (Ala. 1984). Although mathematical certainty is not required, a jury cannot be left to speculate as to the amount of damages, but "'[t]his does not mean that the plaintiff must prove damages to a mathematical certainty or measure them by a money standard. Rather, he must produce evidence tending to show the extent of damages as a

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made by one spouse to the other during the marriage." Leftwich asserts that this privilege would prevent a spouse from reporting juror misconduct by the other spouse. However, Leftwich never presented this argument to the trial court, and, therefore, we will not consider it. See, e.g., State Farm Mut. Auto. Ins. Co. v. Motley, 909 So. 2d 806, 821 (Ala. 2005) ("This Court cannot consider arguments advanced for the purpose of reversing the judgment of a trial court when those arguments were never presented to the trial court for consideration or were raised for the first time on appeal.").

> matter of just and reasonable inference.' C. Gamble, Alabama Law of Damages § 7-1 (2d ed. 1988)."'"

Birmingham Coal & Coke Co. v. Johnson, 10 So. 3d 993, 998 (Ala. 2008) (quoting IMAC Energy, Inc. v. Tittle, 590 So. 2d 163, 168 (Ala. 1991), quoting in turn Industrial Chem. & Fiberglass Corp. v. Chandler, 547 So. 2d 812, 820 (Ala. 1988)).

Both parties appear to agree that before-and-after fair-market value is the standard for establishing damages for real property. Indeed, as our rendition of the facts reveals, Leftwich's counsel insisted several times in arguments before the trial court that the only relevant measure of damages was the fair-market value of the home around the time Brewster performed his inspection of the home. Leftwich's counsel asserted those arguments in a successful effort to exclude evidence that two years after Brewster's inspection Leftwich stripped the home of several of its fixtures before he permanently moved out of the home.

However, Leftwich appears to be contending that evidence as to costs of repair to real property can be relevant to determining after-damage fair-market value. See Leftwich's

brief, p. 25 (explaining that "Leftwich tried to make it clear that he was not arguing with the trial court about the measure of damages, but that the cost of repairs was relevant"). Leftwich cites several cases in support of that argument, including Kerns v. Pro-Foam of S. Alabama, Inc., 572 F. Supp. 2d 1303, 1306 (S.D. Ala. 2007), which surveyed several Alabama cases and concluded that "[n]umerous Alabama authorities" have confirmed that "a jury can consider out-of-pocket repair costs as evidence of that difference in fair market value." See also IMAC Energy, Inc. v. Tittle, 590 So. 2d at 168-69 (allowing the introduction of repair costs when the plaintiffs were unable to obtain a post-damage appraisal of their residential property); Bella Invs., Inc. v. Multi Family Servs., Inc., 148 So. 3d 716, 724 (Ala. Civ. App. 2013) (observing that "repair costs is a factor to consider in determining the after-damage fair market value of real property").

Leftwich is correct that our courts have held that in some circumstances repair costs can be relevant to determining damages for real property. We note, however, that in Poffenbarger v. Merit Energy Co., 972 So. 2d 792, 801 (Ala.

2007), this Court held that "the appropriate measure of direct, compensatory damages to real property generally is the diminution in the value of that property, even when the cost to remediate the property exceeds the diminution in the value thereof." Thus, Leftwich's estimates of repairs that exceeded the value of the home could not have been considered by the jury. Even so, the trial court did not state that costs of repair to real property are never relevant; rather, it stated that it did not deem such cost estimates to be relevant in this case. The trial court reached this conclusion after several back-and-forth arguments between the parties' counsel in which Brewster's counsel sought to question Leftwich about stripping the home of fixtures. In short, the trial court's conclusion was the product of weighing what evidence was the most relevant and the least confusing to the jury. Given the deference we afford to a trial court's judgments on the admission and exclusion of evidence, we cannot conclude that the trial court exceeded its discretion in not allowing the evidence.

Furthermore, as Brewster observes, the jury returned a general verdict in favor of Brewster. In addition to damages,

it was incumbent upon Leftwich to demonstrate that Brewster breached a duty he owed Leftwich and that such a breach caused damage to Leftwich. See, e.g., Lowe's Home Ctrs., Inc. v. Laxson, 655 So. 2d 943, 945-46 (Ala. 1994) (restating the elements of a negligence claim). Brewster contested each element of Leftwich's claim, including presenting expert testimony that insisted that Brewster followed the standards applicable to his inspection of the home. Leftwich does not argue that the jury's verdict was against the great weight of the evidence.[3] Therefore, even if the trial court had erred in excluding Leftwich's evidence of repair costs, we could not conclude that the ruling probably injuriously affected Leftwich's substantial rights because the jury could have determined that Brewster did not breach a duty to Leftwich. See, e.g., Clements v. Lanley Heat Processing Equip., 548 So. 2d 1345, 1347 (Ala. 1989) (observing that "there are four

[3]Leftwich attempts to argue that presenting the evidence on costs of repair "would have greatly strengthened the case and claims of Leftwich as to proving that the duty of Brewster to him had been substantially breached." Leftwich's brief, p. 28. But the issues of duty and its breach are fundamentally separate from the issues of causation and damages. Leftwich cannot use his argument as to what constitutes reasonable damages to bootstrap his contention that Brewster breached a duty to Leftwich.

essential elements that must be proven to the jury's reasonable satisfaction: duty, breach (initial legal liability), causation, and damages" and that, "for the jury to find for the plaintiff, all four elements must have been resolved in plaintiff's favor, for the absence of any one element would require a verdict for the defendants").

IV. Conclusion

The trial court did not err in declining to strike for cause two jurors who were married to each other. The trial court also did not exceed its discretion in excluding from evidence Leftwich's testimony and written estimates of costs to repair the home. Therefore, the trial court's judgment is affirmed.

AFFIRMED.

Parker, C.J., and Bolin, Wise, Bryan, Sellers, Stewart, and Mitchell, JJ., concur.

Shaw, J., concurs in the result.