

RENDERED: September 18, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 1996-CA-001122-MR

GREG JOHNSON, Executor of the
Estate of ROBERT EARL JOHNSON

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 95-CI-000592

BOBBY LEWIS BUNCH, Individually
and as Warren County Jailer; BASIL
GRIFFIN, Individually and as Warren
County Judge Executive; SAM C. POTTER,
Individually and as Magistrate of
Warren County Fiscal Court; TONY PAYNE,
Individually and as Magistrate of Warren
County Fiscal Court; DAREL CARRIER,
Individually and as Magistrate of Warren
County Fiscal Court; EPHRIM WHITE,
Individually and as Magistrate of Warren
County Fiscal Court; G. W. DETHRIDGE,
Individually and as Magistrate of Warren
County Fiscal Court; WARREN COUNTY FISCAL
COURT; JESSE MILLER, Individually and as
Chief Deputy Jailer of Warren County
Regional Jail; WILLIAM H. LASLEY,
Individually and as Warden of Roederer
Correctional Complex; DONALD SAMS,
Individually and as Correction Officer of
Roederer Correctional Complex; ANDREW YUNT,
Individually and as Correction Officer of
Roederer Correctional Complex; JEFF PERRY,
Individually and as Correction Officer of
Roederer Correctional Complex; STEVE TAYLOR,
Individually and as Correction Officer of
Roederer Correctional Complex; DONNIE JONES,

Individually and as Correction Officer of
Roederer Correctional Complex; JOHN DAVID
CALDWELL, Individually and as Correction
Officer of Roederer Correctional Complex;
RALPH BROWN, Individually and as Correction
Officer of Roederer Correctional Complex;
CLARENCE ROBINSON, Individually and as
Lieutenant of Roederer Correctional Complex;
MARY BETH SCHMIDT, Individually and as
Coordinator of Community Center Program;
JOHN LANIER, Individually and as Probation
and Parole Officer; JEROME MELTON, Individually
and as Probation and Parole Officer; JAMES
SWEATT, Individually and as Supervisor of
Assessment and Classification Unit, Kentucky
State Reformatory; DR. RICHARD LARSON,
Individually and as Warren County Jail
Physician; UNKNOWN DEFENDANTS

APPELLEES

AND

NO. 1996-CA-001216-MR

BOBBY LEWIS BUNCH, Former
Jailer; BASIL GRIFFIN, Former
County Judge Executive; and
JESSE MILLER, Former Deputy
Jailer

APPELLANTS

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 95-CI-000592

GREG JOHNSON, Executor of the
Estate of ROBERT EARL JOHNSON

APPELLEE

OPINION AFFIRMING IN PART;
and REVERSING AND REMANDING IN PART

* * * * *

BEFORE: EMBERTON, HUDDLESTON and JOHNSON, Judges.

EMBERTON, JUDGE. The appellant, Greg Johnson, is the son and executor of the estate of Robert Earl Johnson, who died of a massive pulmonary embolism while incarcerated in a Kentucky state prison facility. The trial court dismissed the claims against Basil Griffin, Warren County Judge Executive; Bobby Bunch, Warren County Jailer; and Jesse Miller, Warren County Deputy Jailer, in their individual capacities. The case was submitted to a jury on the remaining counts and a verdict was returned in favor of the appellees.

Mr. Johnson was incarcerated at the Warren County jail where he was a participant in a work program. He was an obese man suffering from high blood pressure. On February 8, 1991, Mr. Johnson was involved in an automobile accident and taken to the emergency room where he was diagnosed with a cervical strain. Upon his release from the hospital, Mr. Johnson was allowed furlough from the jail, during which time he complained to his son about chest pain and shortness of breath.

Following his return to jail on February 11, 1991, Mr. Johnson saw a jail nurse regarding his complaints. He was again seen by a jail nurse on February 12th and 13th.

Mr. Johnson continued to experience physical symptoms, and on February 18th was examined by the appellee, Dr. Richard Larson, a private physician under contract with the county to treat jail inmates. At that time he also saw Dr. Connelly, a private orthopedic surgeon. The physicians diagnosed a cervical

strain caused by the accident and Mr. Johnson was returned to jail.

After his physical symptoms did not subside, he saw Dr. Larson and Dr. Connelly, as well as three outside physicians on February 20th. On that date, Dr. Larson ordered an EKG and x-ray; the tests were never performed, however, and Mr. Johnson was transferred to the Roederer Correctional Complex, a state prison facility.

The decision to transfer Mr. Johnson was made by Mary Ruth Schmidt, Community Center Program Administrator. Mr. Johnson arrived at Roederer on Friday, February 22nd, and although he was screened by a non-medical correctional officer and saw a nurse on Sunday, he was not scheduled for a medical examination until Monday. In the early hours of Monday, February 25, 1991, Mr. Johnson suffered a massive stroke caused by a pulmonary embolism and died.

The appellant's expert, Dr. Hauser, a board certified pulmonologist, was questioned on direct examination regarding the symptoms and causes of pulmonary embolisms. On cross-examination, he was asked if, based on the records and information available, he had any criticism of Dr. Larson's care and treatment. Appellant claims that such questioning was error since Dr. Hauser is not a qualified "prison" physician. We are reluctant to refer to Dr. Larson as a "prison" physician. He is a physician retained on contract to provide care to the inmates at the Warren County jail. In short, we know of no special

qualifications required to administer medical treatment to inmates. There was no error in permitting the cross-examination of Dr. Hauser. Morrow v. Stivers, Ky. App., 836 S.W.2d 424 (1992).

There are three classes of defendants in this case: Dr. Larson, the Warren County defendants, and the state defendants. The trial court permitted each class to have four peremptory strikes to be used without collaboration with the others. Appellant argues that the defendants' interests were not antagonistic and therefore should not have been permitted separate peremptories. Ky. R. Civ. P. (CR) 47.03 provides that each opposing side shall have three peremptory challenges, but provides that co-parties with antagonistic interests shall have three each. Pursuant to CR 47.03, the trial court increased the number of strikes for each class to four. We find no error in the classification of the defendants for the purpose of exercising peremptory strikes. Although the interests were not antagonistic within each of the three classes, the classes clearly were antagonistic to one another. Negligence was asserted against Dr. Larson in rendering treatment to Mr. Johnson, and against the Warren County defendants and correction department defendants for their independent acts of negligence. Mackey v. Greenview Hospital, Inc., Ky. App., 587 S.W.2d 249 (1979). Each group of defendants could have escaped or reduced liability by proving that the other was responsible for Mr. Johnson's death. Roberts v. Taylor, Ky., 339 S.W.2d 653 (1960).

Appellant alleges that the attorney for the Warren County defendants failed to respond to certain discovery requests. Specifically, he alleges that counsel was required to reveal the names of experts consulted about the case but not expected to be called as witnesses. The opinions of consultants hired for the purpose of evaluating claims are privileged.

Newsome v. Lowe, Ky. App., 699 S.W.2d 748 (1985). Appellant has failed to demonstrate any exceptional circumstances justifying the production of such information or that he could not obtain facts or opinions on the same matter. Ky. R. Civ. P. (CR) 26.

Dr. Zachek testified at trial regarding the level of care rendered by Dr. Larson. Dr. Zachek was identified in Dr. Larson's supplemental discovery response as an expert witness, but the facts and opinions to which he was expected to testify were not revealed. On that basis, appellant objected to his testimony at trial. Appellant claims that the failure to disclose the material relied upon by Dr. Zachek, periodicals, nurses notes, medical logs and records of Mr. Johnson, prevented him from effectively cross-examining the witness. Failure to amend or supplement discovery responses will not warrant reversal unless a party can show significant prejudice. Washington v. Goodman, Ky. App., 830 S.W.2d 398 (1992). Appellant was aware that Dr. Zachek would be called as a witness. Additionally, he did not depose Dr. Zachek prior to trial, nor did he move to continue the trial. We find no error.

Over appellant's objection, counsel for the Warren County defendants was permitted to ask appellant's expert, Dr. Spencer, about correspondence received from appellant's counsel. The correspondence, with a list of exhibits used to form his opinion, was removed from the file by appellant's counsel. Although the correspondence may be work product as claimed by appellant, Dr. Spencer relied upon it and the attached documents in forming his opinion. The basis of a witness's opinion is generally discoverable. L & N Railroad v. Gregory, 248 Ky. 297, 144 S.W.2d 519 (1940). We find no error in permitting counsel to solicit testimony that the witness relied on information not available due to opposing counsel's actions.

Throughout the trial, various references were made to Mr. Johnson's confinement as a result of a conviction for possession of cocaine. The fact that Mr. Johnson possessed narcotics is relevant to his physical condition and the exacerbation of his physical symptoms. Additionally, in this wrongful death action, it is relevant to his earning capacity. We find no error.

Mr. Hudson, an inmate at the Warren County jail, testified that Mr. Johnson had voiced physical complaints during his stay. On cross-examination, Mr. Hudson was asked if he had been a "cocaine salesman." Counsel's cross-examination of Mr. Hudson may have been a strategic way to deal with Ky. R. Evid. (KRE) 609, which states that the witness may be asked only if he was convicted of a felony. We do not find, however, that this

brief reference to Mr. Hudson's criminal occupation is so prejudicial to require reversal. Obviously, because he was identified as an inmate, his credibility was already tainted.

Appellant complains about the conduct of opposing counsel during the trial and argues that a mistrial should have been granted. We have reviewed the record and find no conduct by opposing trial counsel that was so prejudicial as to require reversal.

Appellant also objects to the award of costs. We find no error in the award of CR 54.04 costs to the prevailing parties. However, appellees' itemized bill includes the costs of postage and long-distance telephone calls which ordinarily are not recoverable. We reverse and remand to the trial court to exclude extraordinary expenses, including postage and long distance phone calls from the total costs awarded. If any of the costs awarded duplicate amounts previously paid as a result of the federal court's award of costs, appellees are entitled to off-set that amount.

Appellant also claims that he was entitled to a directed verdict on liability, and that the trial court erred in dismissing from the action the appellees in their individual capacities. The record in this case is lengthy and confusing. Although all parties refer to the Warren County appellees as being litigants at trial only in their official capacities, the order dismissing them in their individual capacities was not entered until after entry of the trial judgment in favor of all

appellees. The instructions are ambiguous as to the capacity in which each party might be liable and over-broad as to the duties of each. In fact, the instructions make no reference to the Warren County Fiscal Court members in any capacity. There is, however, no issue raised on appeal regarding the instructions. Only the Warren County appellees have filed a cross-appeal relating to the trial court's refusal to dismiss them in their official capacities. The corrections department has, for some inexplicable reason, not raised the issue. It is important to note, however, that sovereign immunity is a defense which cannot be waived by the litigants. Knott County Board of Education v. Mullins, Ky. App., 553 S.W.2d 852 (1977).

With the exception of Dr. Larson, all the appellees named in their official capacities were either employees of the county or of the state. Such actions against the parties are actions against the county or state and are barred by sovereign immunity. Ky. Const. § 231; Littlejohn v. Rose, 768 F.2d 765, cert. denied 475 U.S. 1045, 106 S.Ct. 1260 (6th Cir. 1985); Fryman v. Harrison, Ky., 896 S.W.2d 908 (1995). The Commonwealth is immune from suit except as provided by Ky. Rev. Stat. (KRS) Chapter 44 with jurisdiction vested in the Board of Claims. The state and county officials and employees in their official capacities should not have remained defendants in this action. We hold, therefore, as a matter of law, that appellant was not entitled to a directed verdict.

Summary judgment was proper as to the Warren County appellees and the state appellees in their individual capacities. Under the facts, there was no evidence that Bobby Bunch breached his duty to provide reasonable care for Mr. Johnson. Board of Trustees of the University of Kentucky v. Hayse, Ky., 782 S.W.2d 609, cert. denied, 497 U.S. 1025, 110 S.Ct. 3273 (1989). He can be held responsible only for his own misfeasance and negligence and not for the negligence of those employed by him. Moore v. Fayette County, Ky., 418 S.W.2d 412 (1967). There is no proof of personal wrongdoing by Mr. Bunch. He had no medical expertise nor knowledge which suggested that Mr. Johnson should not have been transferred, and based on the medical history, there was no known medical reason precluding his transfer. The evidence is clear that Mr. Bunch and his assistants, including Jesse Miller, gave Mr. Johnson access to medical care. Unfortunately, Mr. Johnson's condition went undiagnosed. Although the competency of that care may be questionable, there can be no liability on the part of the jail employees, including Mr. Bunch.

The jury instructions are unclear as to whether the correction department defendants remained in this case in their individual capacities or in their official capacities. Any action against them in their official capacities is barred by sovereign immunity. Fryman, supra.

In their individual capacities, these defendants are entitled to absolute immunity only if they were acting within their official capacities and performing a discretionary act.

Thompson v. Huecker, Ky. App., 559 S.W.2d 488 (1977). We do not find, however, that the resolution of this appeal is dependent on the characterization of their actions. The evidence indicates that the decision to transfer Mr. Johnson, and his course of treatment, were based on the medical diagnosis that he had a back injury. The jury reasonably concluded that the defendants acted reasonably under the circumstances. Because there is substantial evidence to support the jury's finding that none of the correction department defendants breached any duty owed to Mr. Johnson, we affirm.

Dr. Larson is not entitled to the same immunity as the remaining appellees. He was not a state or county employee, but operated under a contract to provide medical services. Sovereign immunity is not extended to physicians rendering medical services on behalf of the state or county. University of Louisville v. O'Bannon, Ky., 770 S.W.2d 215 (1989). There was a question of fact raised as to whether Dr. Larson breached the standard of care by failing to diagnose Mr. Johnson's condition and failing to pursue the EKG and chest x-rays.¹ There was, however, expert testimony that Dr. Larson did not breach the standard of care and the trial court properly denied the appellant's motion for a directed verdict. Meyers v. Chapman Printing Company, Inc., Ky., 840 S.W.2d 814 (1992).

¹ The instructions refer to the standard of care of a prison physician. Such language would seem to be surplusage and arguably could have led the jury to conclude that the standard of care is different than that of a private physician. There is, however, no challenge to the instructions.

It is our conclusion, that with the exception of the malpractice claim against Dr. Larson, this case should not have been tried before a jury. The verdict in favor of the appellees, however, renders the issue moot.

This case is reversed and remanded to the trial court for reconsideration of the amount of costs awarded. In all other aspects the judgment is affirmed.

HUDDLESTON, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT ONLY AND WRITES SEPARATE OPINION.

JOHNSON, JUDGE, CONCURRING. I concur with the result reached by the Majority Opinion, but feel it is necessary to write separately concerning the issues of the awarding of costs and the claims which should have been tried before the jury. As to the award of costs, I want to emphasize that the costs that may be allowed are set forth in CR 54.04(2). While the Majority Opinion recognizes that postage and long distance telephone expenses are not recoverable, I believe we should go further and make it clear to the trial court that it may have incorrectly included as allowable costs other expenses, such as copies of depositions and expert witness fees, that are not properly recoverable as costs. I also disagree with the statement by the Majority on page twelve "that with the exception of the malpractice claim against Dr. Larson, this case should not have been tried before a jury." This statement implies that all of the other defendants were protected by some type of immunity

defense. Since none of the parties on appeal has raised the issues of discretionary function and absolute immunity, and since the state of the law in this Commonwealth in the areas of sovereign immunity and governmental immunity is tenuous at best, I believe this Court is well advised to avoid these issues unless they are fully presented for our consideration.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

J. Dale Golden
Lexington, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE WARREN COUNTY
DEFENDANTS:

C. Thomas Hectus
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE DR. LARSON:

John David Cole
Bowling Green, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEES CORRECTIONS
DEFENDANTS:

Mark A. Sipek
Frankfort, Kentucky