RENDERED: OCTOBER 5, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002292-MR
AND
NO. 2011-CA-000028-MR

IRA BRANHAM, INDIVIDUALLY AND
AS ADMINISTRATOR OF THE ESTATE
OF PEGGY BRANHAM, DECEASED APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 08-CI-01856

TROY C. ROCK, M.D.; LARRY L. BRITT,
M.D.; ANDREW C. BERNARD, M.D.;
SHANE D. O'KEEFE, M.D.; CALIXTO M.
PULMANO, M.D.; JASON L. KESZLER,
D.O.; MURRAY B. CLARK, ASSOCIATE
VICE PRESIDENT FOR MEDICAL
CENTER OPERATIONS; UNIVERSITY
OF KENTUCKY MEDICAL CENTER;
UNIVERSITY HOSPITAL OF THE
ALBERT B. CHANDLER MEDICAL
CENTER, INC.; AND KENTUCKY
MEDICAL SERVICES FOUNDATION,
INC. APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; MOORE AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: Ira Branham appeals the Fayette Circuit Court's November 29, 2010 judgment in favor of Appellees Troy C. Rock, M.D., Larry L. Britt, M.D., Calixto M. Pulmano, M.D., and Jason L. Keszler, D.O. (collectively the "Physician Appellees"); the judgment followed a six-day jury trial. Prior to trial, the circuit court dismissed Appellees University of Kentucky Medical Center (UKMC) and University Hospital at the Albert B. Chandler Medical Center (University Hospital) on sovereign immunity grounds. On appeal, Branham contends the circuit court committed numerous evidentiary errors, published improper jury instructions, and erroneously dismissed UKMC and University Hospital. Finding no error, we affirm.

The Physician Appellees cross-appeal the Fayette Circuit Court's August 3, 2010 order prohibiting them from pursuing comparative fault defenses at trial. Because we have found no grounds warranting reversal of the judgment in favor of the Physician Appellees, the cross-appeal is denied as moot.

I. Facts and Procedure

On April 24, 2007, Branham and his wife, Peggy Branham (Peggy), were involved in a single vehicle car accident. The Branhams' vehicle left the roadway, striking a tree. The airbags deployed and Peggy hit her head on the windshield, briefly losing consciousness. Peggy was not wearing a seat belt. The Montgomery County EMS transported Peggy to Mary Chiles Hospital in Mount Sterling, Kentucky. Upon arrival, emergency room physician, Dr. Regina Forster,

treated Peggy. Dr. Forster ordered several laboratory tests as well as CT scans of Peggy's head and neck; the CT scans did not reveal any injuries or fractures related to the car accident.[1] Dr. Forster also treated several small lacerations on Peggy's hand and forehead. While under Dr. Forster's care, Peggy was stable, alert and oriented, and not in distress. Peggy did not display any visible signs of trauma to her chest area. Dr. Forster was concerned about internal bleeding and/or damage so, "out of an abundance of caution," Dr. Forster transferred Peggy to UKMC. At the time of the transfer, Peggy was fully alert, talking normally, moving all limbs, and neurologically intact.

Peggy was flown by a Lifenet helicopter from Mary Chiles to UKMC. Upon admission to UKMC, Peggy was seen and treated by Dr. Rock, an attending emergency room physician, and Dr. Britt, a resident. In addition to repeating certain laboratory tests, Dr. Rock and Dr. Britt ordered a chest x-ray.

The radiology resident on duty, Dr. Jason Keszler, interpreted the x-ray. Dr. Keszler did not perceive any signs of a traumatic aortic injury. He did, however, discover "blunting to the left costophrenic angle which may be secondary to pleural effusion or scarring." Dr. Keszler also discovered "an approximate 3.5 cm mass-like density in the lower left lobe which is worrisome for neoplasm" and recommended a CT of Peggy's chest for further evaluation. Attending radiologist Dr. Calixto Pulmano concurred with Dr. Keszler's report, adding that he perceived a "left lower lobe atelectasis with left lower lobe collapse."

[1] The neck x-ray computed tomography (CT) scan revealed a moderate to large left pleural effusion at the lung apex; there is no known cause of this.

Peggy remained in the emergency room for approximately two hours. During her stay, Dr. Rock and Dr. Britt examined and interacted with her on several occasions. Except for moderate leg and hip tenderness, Peggy did not complain of any pain; she remained in stable condition. Dr. Rock and Dr. Britt did not perceive any signs or symptoms of active internal bleeding related to an aortic injury. As a result, they concluded an immediate chest CT was not medically or reasonably indicated. Peggy was discharged at 10:30 p.m. with instructions to follow up with her family physician within a week for further evaluation concerning medical concerns unrelated to the car accident.[2]

On April 26, 2007, approximately thirty-six hours following her discharge from UKMC, Peggy passed away at home. Kentucky Medical Examiner, John C. Hunsaker, III, M.D., conducted an autopsy. Dr. Hunsaker concluded Peggy died as a result of blunt force trauma of the chest, an aortic injury. Specifically, Dr. Hunsaker discovered Peggy's "descending aorta was transected, a process which developed over less than 2 days after the collision and eventuated into frank rupture of the mural tear of the aorta."

On April 26, 2008, Branham, as the Administrator of Peggy Branham's Estate, and individually, filed suit in Fayette Circuit Court claiming

[2] Peggy's laboratory tests revealed a low but stable blood count and elevated blood sugar. Dr. Rock and Dr. Britt attributed the former to chronic anemia and the latter to undiagnosed diabetes and recommended Peggy consult with her primary care physician regarding these concerns.

medical negligence and wrongful death against the Physician Appellees, UKMC, and University Hospital.[3]

Pursuant to a prior court order, on October 16, 2009, the Physician Appellees identified five non-party medical experts to testify on their behalf at trial: Dr. O. John Ma, Chair of Emergency Medicine at Oregon Health & Sciences University; Dr. Bruce Janiak, the Vice-Chair of Emergency Medicine at Medical College of Georgia; Dr. Michal Foley, a radiologist in private practice in Tampa, Florida; Dr. Dennis Whaley, a radiologist in private practice in Lexington, Kentucky; and Dr. Addison May, a trauma surgeon at Vanderbilt University.

Prior to trial, Branham and the Physician Appellees filed competing motions *in limine*. Branham sought, *inter alia*, to limit the defense to one expert in each field of radiology and emergency medicine. The circuit court denied Branham's request. The Physician Appellees sought to exclude, *inter alia*: (1) discussion concerning a May 13, 2005 Agreed Order between Dr. Rock and the Kentucky Board of Medical Licensure (KBML) in which Dr. Rock stipulated that he had written prescriptions for three people (unrelated to this case) without first establishing a doctor/patient relationship, and (2) evidence that Dr. Britt twice

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[3] The complaint also named as defendants: Andrew C. Bernard, M.D., Shane D. O'Keefe, M.D., Murray B. Clark (Associate Vice President for Medical Center Operations), and Kentucky Medical Services Foundation, Inc. (KMSF). However, pursuant to an order dated April 26, 2010, the circuit court dismissed Dr. Bernard, Dr. O'Keefe, and Mr. Clark. Similarly, on August 13, 2010, the circuit court dismissed KMSF. Branham did not appeal the April 26, 2010 order, or the portion of the August 13, 2010 order relating to KMSF. Accordingly, the dismissed defendants are not before us.

failed his medical licensing exam. The circuit court granted the Physician Appellees' request.

The circuit court conducted a jury trial beginning on November 9, 2010, and lasting six days. The jury returned a unanimous verdict for the defendants. Consistent with the jury's verdict, a trial order and judgment was entered on November 29, 2010. This appeal and cross-appeal followed.

As additional facts become relevant, they will be discussed.

II. Analysis

Branham presents five arguments on appeal. First, the circuit court improperly excluded evidence of Dr. Rock's prior disciplinary action. Second, the circuit court improperly excluded evidence that Dr. Britt twice failed his medical licensing examination. Third, the circuit court erred in failing to limit the number of expert witnesses testifying at trial on the Physician Appellees' behalf. Fourth, the jury instructions submitted by the trial court failed to comport to applicable law based upon the facts of the case. And fifth, the circuit court erred in dismissing UKMC and University Hospital on sovereign immunity grounds. We are not persuaded by these arguments.

A. Evidence of Dr. Rock's Prior Disciplinary Action

Branham contends the circuit court improperly excluded evidence of prior disciplinary action taken against Dr. Rock by KBML. Branham's argument contains several facets: (1) because Dr. Rock testified as an expert witness, evidence of the disciplinary proceeding impacts his credibility and knowledge as

an expert witness; (2) the prior disciplinary action goes to Dr. Rock's medical knowledge and knowledge regarding the applicable standard of care; and (3) the exclusion of Dr. Rock's prior disciplinary action deprived Branham of his right to challenge Dr. Rock's credibility through cross-examination.

"The presentation of evidence as well as the scope and duration of cross-examination rests in the sound discretion of the trial judge." *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997) (quoting *Moore v. Commonwealth*, 771 S.W.2d 34, 38 (Ky. 1988)). "An abuse of discretion occurs when a 'trial judge's decision [is] arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Baptist Healthcare Sys., Inc. v. Miller*, 177 S.W.3d 676, 684 (Ky. 2005) (quoting *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)).

Branham first asserts that, because Dr. Rock was a named expert witness and testified as such, the disciplinary action taken against his medical license was relevant to his qualifications as an expert witness and was crucial in assessing the weight that the jury should afford Dr. Rock's opinions. The Physician Appellees counter by claiming the circuit court properly limited the cross-examination of Dr. Rock on a collateral matter.

"A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." Kentucky Rules of Evidence (KRE) 611(b); *see also* KRE 703. Conversely, "a witness cannot be cross-examined on a collateral matter which is irrelevant to the issue at hand." *Morrow v. Stivers*, 836

S.W.2d 424, 429 (Ky. App. 1992); *see also Commonwealth v. Jackson*, 281 S.W.2d 891, 894 (Ky. 1955) (holding that generally a witness may not be impeached with a matter which is irrelevant and collateral to the crime of which he is charged) *overruled on other grounds by Jett v. Commonwealth*, 436 S.W.2d 788 (Ky. 1969). "[A] collateral matter is a fact which is irrelevant to the substantive issues of the case[.]" Underwood and Weissenberger, *Kentucky Evidence Courtroom Manual* 339 (2008-2009 ed.); *see also Black's Law Dictionary* (9th ed. 2009) (defining a collateral matter as one that is "supplementary" or "secondary and subordinate to" the primary issue).

We find instructive the cornerstone case of *Morrow v. Stivers, supra* – discussing the cross-examination of an expert regarding prior disciplinary action on his medical license. In *Morrow*, this Court recognized that the prior suspension of the plaintiff's expert's medical license was a collateral matter, irrelevant to the issue of negligence, and unduly inflammatory. In finding that the trial court properly excluded the evidence, the Court explained:

> The crucial question then is whether the evidence excluded in this case is collateral. We think it is. The matter of having hepatitis and thus not practicing for a time does not reflect on his knowledge or ability to testify on the matters at hand, *i.e.*, the causation of Stivers's condition and any deviation by Dr. Morrow from the standard of care. Further, the inflammatory effect, if the jury heard testimony such as that Dr. Harris may have had sex with his patients, although unproven, would outweigh any probative value it might have. There was no abuse of discretion in excluding this evidence.

Morrow, 836 S.W.2d at 429.

Several years later, Kentucky's appellate courts were again confronted with this issue in *Reece v. Nationwide Mut. Ins. Co.*, 217 S.W.3d 226 (Ky. 2007). In *Reece*, the plaintiff presented expert testimony from Dr. David Thurman concerning the extent and duration of the plaintiff's injuries following a prior motor vehicle accident. *Id.* at 227. Prior to trial, the plaintiff moved to suppress evidence that the KBML had suspended Dr. Thurman's medical license for improperly prescribing Oxycontin to another patient. *Id.* at 288. The circuit court denied the plaintiff's motion. *Id.* In concluding the denial of the plaintiff's motion was error, the Kentucky Supreme Court explained:

> We agree with the Court of Appeals that the evidence of Dr. Thurman's medical license suspension was a collateral matter irrelevant to his treatment of Reece and to her claims for personal injury in this case. The salient facts are virtually the same as those in *Morrow*, 836 S.W.2d 424, and we see no reason why the holding in *Morrow* that the medical license suspension was a collateral matter would not apply here. In both cases the reason for license suspension had no relation to the case in which they were testifying and was likely to be highly inflammatory. In Dr. Thurman's case, his license was suspended long after he treated Reece, and was not suspended at the time he gave his deposition.

Id. at 232. Critical in both *Morrow* and *Reece* was the lack of a nexus between the expert's prior disciplinary issues and the expert's proffered testimony in the case at hand. *Morrow*, 836 S.W.3d at 429; *Reece*, 217 S.W.3d at 232.

Similarly, in the case before us, Dr. Rock's prior improper practice of writing prescriptions without first establishing a doctor/patient relationship "has no

bearing on his knowledge or ability to testify on the matters at hand," *i.e.,* whether he deviated from the applicable standard of care by failing to diagnose Peggy's aortic injury, thereby causing Peggy's death. *Morrow*, 836 S.W.2d at 429. As in *Morrow* and *Reece*, Dr. Rock's past disciplinary action is a collateral matter irrelevant to his treatment of Peggy and to Branham's claim of medical negligence. *Morrow*, 836 S.W.3d at 429; *Reece*, 217 S.W.3d at 232.[4]

Next, Branham argues Dr. Rock's prior disciplinary action is relevant concerning Dr. Rock's knowledge, or lack of knowledge, of the appropriate standard of care. In support, Branham points to the portion of the Agreed Order in which a consultant for the Board of Medical Licensure concluded that, "for these three individuals, [Dr. Rock's] diagnosis, treatment, records and overall care were below the minimum standards of care" and Dr. Rock's "prescribing patterns . . .

[4] In his Reply Brief, Branham relies extensively on this Court's currently non-final opinion in *Estate of Judith Burton v. The Trover Clinic Found., Inc.*, No. 2009-CA-001595-MR, 2011 WL 8318231 17-20 (Ky. App. June 10, 2011), *disc. rev. granted* Aug. 15, 2012 (2011-SC-000565-DG and 2011-SC-000580-DG). Incidentally, *Trover Clinic* hinders, not supports, Branham's position. In *Trover Clinic*, the plaintiff brought a medical negligence and credentialing suit against defendant Dr. Trover (among others) claiming Dr. Trover misread the decedent's CT scan in late 2003 and 2004 resulting in the decedent's death. Subsequent to the decedent's death, the KBML suspended Dr. Trover's medical license as a result of a complaint that Dr. Trover misread another CT scan in 2004. *Id.* at 19. In distinguishing the facts of *Trover Clinic* from *Morrow* and *Reece*, this Court noted that the 2004 complaint giving rise to the defendant's license suspension was "both close in time to [plaintiff's] misread CT scans of late 2003 and 2004 and relevant thereto." *Id.* at 20. Of particular importance was that Dr. Trover's subsequent disciplinary case rested on the same type of alleged negligence – improperly reading CT scans – for which he was being sued in *Trover Clinic*. *Id.* at 19-20. Because of the relevant and temporal proximity between the conduct giving rise to Dr. Trover's license suspension and the underlying facts of that case, this Court concluded the trial court exceeded its discretion in limiting the cross-examination of the defendant concerning the recent suspension of his medical license. *Id.* As explained, in the case *sub judice*, there is a complete absence of a temporal or relevant proximity between Dr. Rock's prior disciplinary case for improperly writing prescriptions, and the alleged negligence for which he was being sued, *i.e.,* failing to properly diagnose an aortic injury. If *Trover Clinic* were citeable, it would nevertheless be clearly distinguishable.

indicate Gross Ignorance of the precautions and prohibitions necessary to insure the safety of patients and the community."

Subject to certain delineated exceptions, "[a]ll relevant evidence is admissible." KRE 402. Evidence is relevant if it has "any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401.

We perceive no relevant connection between Dr. Rock's past improper practice of writing prescriptions without a prior doctor/patient relationship and his knowledge concerning the relevant standard of care in the case at hand. The Agreed Order with the KMLB does not tend to establish that Dr. Rock did not know the applicable standard of care pertinent to writing prescriptions, but simply that he violated that standard of care. Moreover, it is something of a stretch to suggest the standard of care relevant to writing prescriptions is the same as the standard of care relevant to a patient's emergency medical treatment. The subject of Dr. Rock's prior disciplinary action simply has no bearing on the case at hand.

Finally, in the last facet of this argument, Branham contends "Rock's testimony in his discovery deposition is inconsistent with the medical board finding" and "[a]s such, evidence that demonstrates Rock's character for untruthfulness is highly probative and Branham should have been permitted to call attention to this trait through cross-examination." (Appellant's Brief at 15, 17). Branham fails to cite any authority to support his position. Accordingly, we

decline to address this argument. *Hadley v. Citizens Deposit Bank*, 186 S.W.3d 754, 759 (Ky. App. 2005) (citation omitted).

B. Evidence that Dr. Britt Twice Failed his Medical Licensing Examination

Branham asserts the circuit court improperly excluded evidence of Dr. Britt's failure to pass his medical licensing examination on two occasions. In support, Branham contends such evidence is relevant to Dr. Britt's credibility and knowledge of the standard of care. We disagree.

As previously discussed, "a witness cannot be cross-examined on a collateral matter which is irrelevant to the issue at hand." *Morrow*, 836 S.W.2d at 429. As in *Morrow*, "the crucial question then is whether the evidence excluded . . . is collateral." *Id.* To reiterate, "a collateral matter is a fact which is irrelevant to the substantive issues of the case[.]" Underwood and Weissenberger, *Kentucky Evidence Courtroom Manual* 339 (2008-2009 ed.).

Contrary to Branham's position, we think evidence that Dr. Britt twice failed his medical licensing examination is collateral and irrelevant because it is too far removed in time and substance from the matter at hand. The mere fact that Dr. Britt did not initially pass his medical licensing examination in or about 2000 or 2001 is not indicative of or relevant to Dr. Britt's knowledge of the standard of care when he treated Peggy in April of 2007. We perceive no abuse of discretion in excluding this evidence.

C. Multiple Expert Witnesses

Branham complains the circuit court abused its discretion in failing to limit the number of defense expert witnesses to one per specialty.[5] We disagree.

As explained, a circuit court's evidentiary rulings are reviewed under the abuse of discretion standard. *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 725 (Ky. 2009) (citing *Turney v. Richardson*, 437 S.W.2d 201, 205 (Ky. 1969)). "An abuse of discretion occurs when a 'trial judge's decision [is] arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Miller*, 177 S.W.3d at 684 (quoting *Thompson*, 11 S.W.3d at 581).

As previously referenced in their expert witness disclosure pursuant to CR 26.02(4)(a),[6] the four Physician Appellees identified five non-party medical experts to testify at trial on their behalf: two experts specializing in emergency medicine, two experts specializing in radiology; and one expert specializing in trauma surgery. Pursuant to a motion *in limine*, Branham sought to limit the

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[5] Branham also summarily contends the circuit court abused its discretion in "failing to permit [Branham] to call rebuttal expert witnesses." (Appellant's Brief at 20). Branham fails, however, to flesh out his argument beyond this sole conclusory statement, or cite any law in support of his position. "It is not our function as an appellate court to research and construct a party's legal arguments, and we decline to do so here." *Hadley*, 186 S.W.3d at 759 (citation omitted).

[6] CR 26.02(4)(a) provides, in its entirety:

> (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) After a party has identified an expert witness in accordance with paragraph (4)(a)(i) of this rule or otherwise, any other party may obtain further discovery of the expert witness by deposition upon oral examination or written questions pursuant to Rules 30 and 31. The court may order that the deposition be taken, subject to such restrictions as to scope and such provisions, pursuant to paragraph (4)(c) of this rule, concerning fees and expenses as the court may deem appropriate.

defense to one expert in each field of radiology and emergency medicine, ostensibly pursuant to KRE 403. Branham's position was two-fold: (1) the presentation of two expert witnesses in each of the areas of radiology and emergency medicine resulted in a needless presentation of cumulative evidence, a waste of the Court's time, and an affront to the notion of judicial economy; and (2) the presentation of two experts, offering the same testimony in each area, was prejudicial to Branham in that it improperly implied to the jury that more physicians shared the opinions of the experts retained by the Appellees than agreed with Branham's position. The circuit court denied Branham's motion.

Branham raises these same arguments on appeal. In support of his position, Branham points to *F.B. Ins. Co. v. Jones*, 864 S.W.2d 926 (Ky. App. 1993). In *Jones*, the sole defendant, Farm Bureau, raised an arson defense in response to an insurance coverage claim brought by two homeowners. *Id.* at 927. Following "lengthy and repetitive testimony from three different arson investigators and at least one of their assistants" concerning the cause of the fire at issue, the trial court prohibited Farm Bureau from calling a fifth arson investigator, claiming the investigator's testimony would be "cumulative and useless." *Id.* at 929. On appeal, this Court upheld the trial court's decision, finding "it cannot be said the trial court abused its discretion in excluding the [fifth investigator's] testimony. *Id.* at 929-30. In support, the Court noted "Farm Bureau put on testimony from several experts; all testified on the same issue" and "[i]t is not

suggested that the substance of the [fifth expert's] testimony would have differed in any detail from the testimony of the other experts." *Id.* at 930.

Unlike *Jones*, the case at hand involved four defendants and included a host of complex medical issues covering at least three specialties: emergency medicine, radiology, and surgery. Further, unlike the "repetitive" expert testimony in *Jones*, the five experts here did not testify concerning the exact same issue. Dr. Ma and Dr. Janiak testified concerning proper emergency medical practice, the signs and symptoms of aortic transaction and injury, and when a chest CT is medically indicated; Dr. Whaley and Dr. Foley discussed the chest x-ray interpretation; and Dr. May testified to liability and causation issues. It is not unreasonable to allow two experts in each specialty – here, emergency medicine and radiology – when the plaintiff has sued two defendants in each of those specialties. As highlighted by the circuit court, each defendant is entitled to at least one expert to testify on his or her behalf. The circuit court was certainly within its discretion in so permitting under the circumstances of this case. Moreover, unlike *Jones*, we can hardly classify the experts' testimony as lengthy, considering each expert's direct testimony lasted approximately one hour or less.

It bears repeating that a "trial court has the power to control the course of litigation, including control of the amount of evidence produced on a particular point." *Washington v. Goodman*, 830 S.W.2d 398, 400 (Ky. App. 1992) (citing *Woods v. Commonwealth*, 305 S.W.2d 935 (Ky. 1957), and *Johnson v. May*, 307 Ky. 399, 211 S.W.2d 135 (1948)). In exercising that power, the circuit court may

exclude relevant testimony if its probative value is substantially outweighed by considerations of judicial economy, such as undue delay or needless presentation of cumulative evidence. KRE 403; *Jones*, 864 S.W.2d at 930. However, as pointed out by Professor Robert Lawson:

> Not all evidence that is duplicative is . . . cumulative. . . . At times it is reasonable for a party to insist that "one witness is good, but two or three will make my case much stronger, even though all will testify in a similar vein." In short, the discretion to exclude cumulative evidence must be exercised in a discriminating fashion, and with wisdom, particularly where the evidence goes to issues of central importance.

Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 2.10[5], at 93 (4th ed. 2003) (footnote omitted) (quoting 1 Mueller & Kirkpatrick, Federal Evidence, § 96 (2d ed. 1994)); *see also Adams v. Cooper Industries, Inc.*, No. 03-476-JBC, 2006 WL 2983054, at *33 (E.D. Ky. Oct. 17, 2006)[7] ("[E]xpert testimony is not rendered cumulative simply based on the number of witnesses who offer evidence at a trial.").

Here, the circuit court was in the superior position to determine whether the testimony offered by the Physician Appellees' expert medical witnesses was needlessly cumulative causing undue delay and, if so, to limit the

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[7] *Adams v. Cooper Industries, Inc.* was rendered October 17, 2006, and designated as "unpublished." However, in accordance with Federal Rules of Appellate Procedure (FRAP) 32.1, "[a] court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as 'unpublished' . . . and (ii) issued after January 1, 1997." While Kentucky courts are not bound by FRAP 32.1, the federal judiciary has determined that all of its opinions rendered after January 1, 1997, have equally persuasive import without regard to their designation as unpublished. We should take no less a view of those opinions.

number of medical expert witnesses; the circuit court perceived no such basis. On this issue, we defer to the circuit court's sound judgment and affirm.

D. Jury Instructions in a Medical Malpractice Case

Branham next contends the instructions presented to the jury were incorrect and improper, resulting in reversible error. The sole basis of Branham's improper-jury-instructions argument is that the instructions failed to comply with *Deutsch v. Schein*, 597 S.W.2d 141 (Ky. 1980). We find no merit in this argument.

Claimed errors regarding jury instructions are questions of law that we examine under a *de novo* standard of review. *Harstad v. Whiteman*, 338 S.W.3d 804, 817 (Ky. App. 2011).

Kentucky permits "bare bones" jury instructions. *Cox v. Cooper*, 510 S.W.2d 530, 535 (Ky. 1974). "The purpose of an instruction is to furnish guidance to the jury in their deliberations and to aid them in arriving at a correct verdict." *Ballback's Adm'r v. Boland–Maloney Lumber Co.*, 306 Ky. 647, 208 S.W.2d 940, 943 (1948). To that end, proper instructions need only "be based upon the evidence and they must properly and intelligibly state the law." *Howard v. Commonwealth*, 618 S.W.2d 177, 178 (Ky. 1981).

With respect to Dr. Rock, the trial court instructed the jury as follows:

INSTRUCTION NO. 1

> It was the duty of the defendant, Troy Rock, M.D., in treating Peggy Branham and diagnosing her condition to exercise the degree of care and skill expected of a reasonably competent physician specializing in emergency medicine acting under similar circumstances.

INTERROGATORY NO. 1

> Do you believe from the evidence that Troy Rock, M.D. failed to comply with this duty and that such failure was a substantial factor *in causing Peggy Branham's death*? [Emphasis added].

The circuit court provided an identical instruction concerning Dr. Britt (Instruction 2). Instructions 3 and 4 – pertaining to Dr. Pulmano and Dr. Keszler respectively – differed slightly in that the instructions explained "[i]t was the duty of the defendant, [physician's name], in interpreting Peggy Branham's chest x-ray to exercise the degree of care and skill expected of a reasonably competent physician specializing in radiology acting under similar circumstances." The interrogatories pertaining to all the Physician Appellees, as set forth above, were identical, except for the physician named in the interrogatory. The jury answered "No" to all four interrogatories, amounting to a verdict in favor of the Physician Appellees.

Branham claims the jury instructions, particularly the interrogatories, should have been patterned after those given in *Deutsch* so as to focus on the *event* leading to the injury (*i.e.,* the Physician Appellees' failure to properly diagnose Peggy's aortic injury), rather than on the injury itself (*i.e.,* Peggy's death). Thus, according to Branham, each interrogatory should read as follows:

INTERROGATORY

> Do you believe from the evidence that [the defendant] failed to observe this duty and that such failure was a substantial factor *in the failure to diagnose Peggy Branham's aortic injury*? [Emphasis added].

In *Miller ex rel. Monticelllo Baking Co. v. Marymount Med. Ctr.*, 125 S.W.3d 274 (Ky. 2004), our Supreme Court discussed when a *Deutsch* instruction is required. Notably, the Court explained that *Deutsch* holds that when a defendant claims an event subsequent to the defendant's negligence was a superseding legal cause, and the circuit court "having decided as a matter of law that the intervening event was not a superseding cause,[8] the judge should instruct the jury to determine whether the tortfeasor's negligence was a substantial factor in causing the event that, as a matter of law, caused the injury." *Id.* at 287. To that end, a *Deutsch* "'event' instruction [is] *only [required] when there is a claim of a superseding intervening cause* and the trial court has held that the intervening cause was not a superseding cause." *Id.* (emphasis added); *see also* 2 Palmore & Cetrulo, *Kentucky Instructions to Juries,* Civil § 23.07, comment (5th ed. 2009 & release no. 6, 2011) (explaining *Deutsch* represents "a narrow exception to the general rule that the question to be put to the jury is whether the defendant's negligence is a substantial factor in causing the plaintiff's injuries").

Here, the Physician Appellees did not claim at trial, nor do they assert on appeal, that an intervening event caused Peggy's death. Concomitantly, the circuit court was not asked to determine whether any such intervening event amounted to

[8] To clarify, an "intervening cause" is "[a]n event that comes between the initial event in a sequence and the end result, thereby altering the natural course of events that might have connected the wrongful act to an injury. If the intervening cause is strong enough to relieve the wrongdoer of any liability, it becomes a superseding cause." *Black's Law Dictionary* (9th ed. 2009).

a superseding cause. *Deutsch* is simply inapplicable. Accordingly, the circuit court did not err in refusing to give a *Deutch* instruction.

Moreover, the jury instructions provided by the circuit court "properly and intelligibly state[d] the law." *Howard*, 618 S.W.2d at 178. It is well-settled that the elements of a medical malpractice action are no different than any other negligence action: duty, breach, causation, and injury. *Grubbs ex rel. Grubbs v. Barbourville Family Health Ctr., P.S.C.,* 120 S.W.3d 682, 687 (Ky. 2003). Accordingly, in medical malpractice cases, the "the plaintiff must prove that the treatment given was below the degree of care and skill expected of a reasonably competent practitioner [of the same specialty or class, and under similar circumstances,] and that the negligence proximately caused *injury or death*." *Hyman & Armstrong, P.S.C. v. Gunderson*, 279 S.W.3d 93, 113 (Ky. 2008) (emphasis added); *see also Reams v. Stutler*, 642 S.W.2d 586, 588 (Ky. 1982).

Our review of the jury instructions convinces us that the instructions presented to the jury were proper. The instructions certainly conform to *Gunderson* and *Reams* in that the instructions properly combined all of the elements of a medical negligence action by accurately setting forth the standard of care, and requiring the jury to find both that the Physician Appellees failed to comply with that standard of care and the Physician Appellees' actions were a substantial factor in causing Peggy's death. Accordingly, we find the circuit court did not err in instructing the jury.

E. Sovereign Immunity

Finally, Branham asserts the circuit court erroneously dismissed UKMC and University Hospital on sovereign immunity grounds. Branham contends, under the two-part test enunciated in *Kentucky Ctr. for the Arts Corp. v. Berns*, 801 S.W.2d 327 (Ky. 1991), UKMC and University Hospital do not meet the requirements necessary to be afforded the protection of sovereign immunity.

Branham only pursued vicarious liability claims against UKMC and University Hospital as the employers of the Physician Appellees. Because we have found no grounds warranting reversal of the verdict in favor of the Physician Appellees, the issue of vicarious liability is moot.

III. Conclusion

For the foregoing reasons, the Fayette Circuit Court's November 29, 2010 judgment in favor of the Appellees is affirmed.

The Physician Appellees' cross-appeal is dismissed as moot.

ALL CONCUR.

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