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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000100-MR

BILLIE JO RIES, INDIVIDUALLY
AND AS FRIEND OF INFANT CHILD,
LAUREN ELIZABETH RIES; AND
KEVIN RIES, INDIVIDUALLY
AND AS FRIEND OF INFANT CHILD,
LAUREN ELIZABETH RIES — APPELLANTS

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2013-SC-000059-DG

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 05-CI-002925

RICHARD C. OLIPHANT, M.D.;
AND LOUISVILLE PHYSICIANS
FOR WOMEN, PLLC — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, STUMBO, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: This matter is before the Court of Appeals on remand from the Kentucky Supreme Court by Opinion entered February 19, 2015, in *Oliphant v. Ries*, 460 S.W.3d 889 (Ky. 2015). The Supreme Court reversed and remanded to the Court of Appeals directing this Court to address the remaining issue raised by Billie Jo Ries and Kevin Ries, each, individually and as next friend of Lauren Elizabeth Ries, an infant child, (collectively referred to as the Rieses).[1] This issue is whether the trial court committed reversible error by limiting the testimony of the Rieses' expert Dr. Jeffrey Phelan, who would have rebutted Dr. Jay Goldsmith's testimony concerning his mathematical formula timing Lauren's in utero bleed. For the reasons hereinafter elucidated, we conclude that the trial court abused its discretion by so limiting Dr. Phelan's trial testimony and committed reversible error.

FACTS

We will not set forth the underlying facts of this appeal in great detail as the Supreme Court's recitation of those facts are both exhaustive and constitute binding precedent. Rather, we shall only recite those facts necessary to resolution of this appeal.

In the early morning hour of 5:00 a.m. on January 20, 1997, Billie Jo, who was thirty-six weeks pregnant, awoke and noticed she was bleeding vaginally. She and her husband immediately went to Baptist Hospital East in accordance with

[1] In our previous disposition of the appeal, we held that Dr. Jay Goldsmith's expert testimony was erroneously introduced into evidence at trial and that such constituted reversible error, thus rendering Billie Jo Ries and Kevin Ries, each, individually and as next friend of Lauren Elizabeth Ries, an infant child, (collectively referred to as the Rieses) remaining issue moot.

the instructions of Richard C. Oliphant, an obstetrician on call at the office of Billie Jo's regular obstetrician. Billie Jo arrived at Baptist East around 5:30 a.m., and Dr. Oliphant eventually performed a cesarean section delivering Lauren at 6:59 a.m. Upon the delivery of Lauren, Dr. Tonya Robinson, a neonatologist, assumed the primary care of Lauren.[2] At birth, Lauren had no spontaneous respirations and was in need of emergent resuscitation. She also suffered multiple organ failure and brain damage. It was later determined that three velamentous vessels tore causing Lauren to lose approximately one-third of her total blood volume sometime prior to her delivery.

The exact timing of Lauren's loss of blood in utero was a matter of great dispute and of primary importance at trial. The Rieses believed that Lauren suffered the blood loss only after arriving at Baptist East; conversely, Dr. Oliphant maintained that Lauren suffered the blood loss while at home when Billie Jo first noticed the vaginal bleeding.

EXPERT DISCLOSURES

In this complex medical malpractice case, the parties obtained medical experts to testify at trial and were involved in extensive discovery. Relevant to this appeal, by agreed order entered May 7, 2009, the trial court mandated that expert

[2] Although originally parties to the appeal, Tonya Robinson, M.D., and her practice group, Neonatal Associates, PSC, were dismissed as parties by the Kentucky Supreme Court because they and the Rieses entered into a settlement agreement.

disclosures must literally comply with the mandates of Kentucky Rules of Civil Procedure (CR) 26.02:

> **Expert Disclosure:** With reference to expert witnesses, if proper request has been made therefore, **there must be a literal compliance with the requirements of CR 26.02(4)(a)(i).**
>
> Plaintiffs shall serve their liability and causation expert witness disclosures with complete Rule 26 information on or before 180 days prior to trial.
>
> Defendants shall serve their liability and causation expert witness disclosure with complete Rule 26 information on or before 120 days prior to trial.
>
> Plaintiffs shall identify their damages experts with complete Rule 26 information on or before 120 days prior to trial.
>
> Defendants shall identify their damages experts with complete Rule 26 information on or before 90 days prior to trial.
>
> If not previously provided, the expert witness disclosures shall state the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion and shall include the expert's curriculum vitae. Failure to comply with the letter and spirit of the aforesaid civil rule may result in the suppression of the expert's testimony.

May 7, 2009, agreed order at 3 (emphasis added).

In compliance with the May 7, 2009, order, the Rieses filed an Initial Expert Witness Disclosures on November 12, 2009, and specifically named, *inter alios*, Dr. Zane Brown as an expert witness. According to the November 12, 2009, disclosure, Dr. Brown was "Board Certified in obstetrics and gynecology, and in

maternal fetal medicine." Rieses' Initial Expert Witness Disclosures at 6. Essentially, Dr. Brown opined that Lauren presented with symptoms indicative of an "obstetrical emergency" and that Dr. Richard C. Oliphant and Baptist Hospital East breached their applicable standard of care by failing to treat Lauren as an emergent case:

> On January 20, 1997, Dr. Oliphant did not appreciate the gravity of the situation even though he was informed Mrs. Ries had bleeding at home. In light of bleeding, which certainly can indicate an obstetrical emergency, Dr. Oliphant should have told Mrs. Ries to come to whichever hospital he was available at and/or had another physician available for back up. He should have also informed whichever hospital he had her go to that there could be a potential obstetric emergency with his patient.
>
> Once Mrs. Ries was admitted to Baptist Hospital East, she presented with an obvious obstetrical emergency which was not acted upon appropriately by the nurses. She had continued bleeding while at the hospital, and her blood pressure and vital signs were further indications of an obstetrical emergency. The nurses failed to appropriately monitor the situation and failed to facilitate a timely delivery in face of the obstetric emergency. Nurse [Sherry Grant] McGrath should have realized that this was an emergency, since she wrote that she believed it was an abruption, and told the physician the same thing. When the obstetrician did not come in immediately, the nurse should have initiated chain of command to get an obstetrician there, and prepared for a C-Section delivery. The nurse failed to do that. The baby had bradycardia, yet the nurses failed to appreciate the gravity of the situation or act in an appropriate manner. Dr. Oliphant should have arrived at the hospital immediately but he failed to do so. If Dr. Oliphant was unable to arrive immediately, he had an obligation to insure that another obstetrician covered this emergent situation. The nurses also had that obligation. The fact

> that this baby was not delivered until 6:59 am is a severe departure from the reasonable standard of care.
>
> Baptist Hospital East should have, but apparently failed to have, an obstetrician and neonatologist immediately available in this type of emergent situation. Baptist Hospital East should be able to provide 24/7 care for obstetrical patients.

Rieses' Initial Expert Witness Disclosures at 7.

Thereafter, on December 28, 2009, and also in conformity with the May 7, 2009, order, Robinson filed a Rule 26.02 Expert Witness Disclosures. Of import to our appeal, Robinson identified, *inter alios*, Dr. Goldsmith, a neonatologist as an expert witness. According to the December 28, 2009, witness disclosure, Dr. Goldsmith would testify that Robinson fulfilled that standard of care in her treatment of Lauren:

> It is anticipated that Dr. Goldsmith will testify that the care given by Dr. Robinson and the nursing staff at Baptist Hospital East met reasonable standards of care under the circumstances.
>
> Specifically, Dr. Goldsmith will testify that based upon the deposition testimony, and the medical records, there was no significant delay in the delivery of the child or the arrival of Dr. Robinson. Dr. Goldsmith will testify that Dr. Robinson's management of this critical situation was done in compliance with protocols and standards in existence in 1997. Dr. Goldsmith will testify that the resuscitative medications and volume expanders utilized by Dr. Robinson to stabilize the infant were appropriate and done in a timely manner. According to the medical records, the child had a normal heart rate and reasonable blood pressure within a very short time of delivery. A peripheral IV line was established and was an appropriate vehicle to utilize in the resuscitation of this infant. The standard of care in this clinical situation did not mandate

> a placement of an umbilical venous catheter in the delivery room. The utilization of a partial exchange was appropriate and within the standard of care.
>
> It is anticipated that Dr. Goldsmith will testify that the timing and utilization of blood products were appropriate under the circumstances and that there was no significant injury related to the quantity of timing or resuscitative drugs, blood, and fluids.
>
> Dr. Goldsmith is anticipated to testify that the temperature of the baby as reflected in the medical records was actually a protective mechanism, which would have diminished any known injury during the time the child was at Baptist Hospital East.

Robinsons' Initial Expert Witness Disclosures at 3.

The Rieses deposed Robinson's expert, Dr. Goldsmith, on April 23, 2010, and on May 26, 2010. Subsequently, on July 12, 2010, the Rieses filed a motion *in limine* to exclude portions of Dr. Thomas Strong's testimony as to nucleated red blood cells[3] and of Dr. Goldsmith's testimony. During Dr. Goldsmith's depositions, the Rieses pointed out that Dr. Goldsmith testified at great length concerning a mathematical formula he developed to provide the jury with a precise time (between 5:00 a.m. and 5:15 a.m.) that Lauren suffered the blood loss on the day she was delivered. In the mathematical formula, the Rieses noted that Dr. Goldsmith utilized various factors, including the rate of equilibration of a human fetus. However, the Rieses maintained that Robinson's CR 26.02 expert witness disclosures utterly failed to divulge Dr. Goldsmith's opinions concerning his

[3] Dr. Thomas Strong was an expert witness retained by Baptist Hospital East, and he used the laboratory values of Lauren's nucleated red blood cells to opine that the in utero bleed took place before she arrived at the hospital.

timing of Lauren's injury due to blood loss, his mathematical formula, or his theory on the rate of equilibration of a fetus. As a result thereof, the Rieses argued that Dr. Goldsmith should only be allowed to testify as to opinions properly disclosed per CR 26.02.

The Rieses concomitantly filed, on July 12, a Supplemental Expert Witness Disclosures. Therein, the Rieses disclosed that Dr. Brown would also testify concerning the equilibration rate of a fetus and would specifically state that a fetus equilibrated for blood loss "substantially different from neonates, children and adults." Rieses' Supplemental Expert Witness Disclosures at 2.

The trial court heard arguments on the Rieses' July 12, 2010, motions at a pretrial conference held on August 11, 2010. The trial court made oral rulings from the bench and denied the Rieses' motions to exclude portions of Dr. Strong's testimony and Dr. Goldsmith's testimony. The court stated that the Rieses could obtain an expert to refute Dr. Strong's opinion concerning nucleated red blood cells; however, as to Dr. Goldsmith, the trial court was silent. The trial court later rendered a final pretrial conference order entered on August 23, 2010. In the final pretrial order, the trial court denied the Rieses' motion to exclude portions of Dr. Goldsmith's testimony and of Dr. Strong's testimony. The final pretrial order was silent as to whether the Rieses were permitted to obtain supplemental expert testimony to refute the opinions of Dr. Strong and Dr. Goldsmith.

Three days after entry of the final pretrial order, on August 26, the Rieses filed an amended expert witness disclosure.[4] In this amended expert witness disclosure, the Rieses stated: "[p]ursuant to this Court's Order made orally at the Final Pretrial Conference on August 11, 2010, [the Rieses] submit the following expert to refute opinions given by Dr. Jay Goldsmith and Dr. Thomas Strong in their depositions in this case." Rieses Amended Expert Witness Disclosure at 1. The Rieses identified Dr. Phelan, who was "one of the pre-eminent researchers in the field of maternal fetal medicine, and specifically regarding causation and timing of fetal brain injuries." Rieses' Expert Witness Amended Disclosures at 1. According to the amended disclosures, Dr. Phelan would directly rebut Dr. Goldsmith's testimony concerning his mathematical formula that provided a precise time of Lauren's bleed; Dr. Phelan would also rebut Dr. Strong's testimony as to nucleated red blood cells.

The trial commenced on August 31, 2010. At a hearing held on September 10, 2010, outside the presence of the jury, the parties presented arguments upon whether Dr. Phelan should be allowed to testify at trial. Eventually, the trial court orally decided that Dr. Phelan's testimony would be strictly limited to rebutting Dr. Strong's opinion upon nucleated red blood cells and nothing more. The court made clear that Dr. Phelan would not be allowed to rebut Dr. Goldsmith's testimony as to his mathematical formula timing Lauren's in utero bleed.

THE LAW

[4] The Rieses filed another amended expert witness disclosure on September 9, 2010, which was nearly identical to the August 26, 2010, amended expert witness disclosure.

In this Commonwealth, CR 26.02 requires a party to disclose, upon request, an expert witness's opinions before trial:

> **(4) Trial preparation: experts.**
>
> Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of paragraph (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (a) (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.

Generally, CR 26.02(4) permits a party "to serve interrogatories to the opposing party asking for the identity of an expert witness to be called at trial, the subject matter on which he will testify, the substance of the facts and the expert's opinions, and a summary of the grounds for his opinions." *Hashmi v. Kelly*, 379 S.W.3d 108, 111 (Ky. 2012). Our Court has emphasized that a "generalized statement outlining a broad subject matter . . . does not sufficiently apprise the other party of the information needed for trial as contemplated" by CR 26.02(4)(a). *Clephus v. Garlock, Inc.*, 168 S.W.3d 389, 393 (Ky. App. 2004). The underlying "purpose of

[CR 26.02(4)(a)] is to allow the opposing party to adequately prepare for the substance of the expert's trial testimony." *Pauly v. Chang*, 498 S.W.3d 394, 412 (Ky. App. 2015). And, a party is duty-bound to "seasonably" supplement his CR 26.02 disclosure per CR 26.05(a), which provides:

> (a) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (i) the identity and location of persons having knowledge of discoverable matters, and (ii) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

Upon appellate review, our Supreme Court has held that "[a] trial court's ruling on the application of the Rules of Civil Procedure and admissibility of evidence are reviewed for an abuse of discretion." *Hashmi*, 379 S.W.3d at 111. An abuse of discretion occurs when "the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

CR 26.02 AND CR 26.05 VIOLATIONS

Robinson properly disclosed that she expected to call Dr. Goldsmith as an expert witness during trial. In her CR 26.02 expert witness disclosure filed on December 28, 2009, Robinson also disclosed the substance, facts, and opinions of Dr. Goldsmith. In particular, it was disclosed that Dr. Goldsmith would testify that Robinson fulfilled the standard of care in her treatment of Lauren. However, during Dr. Goldsmith's depositions on April 23, 2010, and May 26, 2010, it is clear that Dr. Goldsmith offered previously undisclosed and new opinions

concerning the precise timing of Lauren's in utero bleed by using a mathematical formula. In these depositions, Dr. Goldsmith opined that Lauren in utero suffered a massive bleed in utero sometime between 5:00 a.m. and 5:15 a.m. Dr. Goldsmith explained that he arrived at the time period of 5:00 a.m. – 5:15 a.m. by utilizing his mathematical formula, which was based upon total blood volume, hematocrit level, hemoglobin level, and the rate of equilibration of a human fetus. We have searched the trial court record and can find no supplemental disclosure per CR 26.05 of Dr. Goldsmith's opinions as to his mathematical formula timing Lauren's in utero bleed. Thus, it is patently clear that Robinson violated both the letter and spirit of CR 26.02 and CR 26.05 by failing to seasonably supplement Dr. Goldsmith's opinions concerning his mathematical formula timing Lauren's in utero bleed. *See Kemper v. Gordon*, 272 S.W.3d 146 (Ky. 2008).

FUNDAMENTAL FAIRNESS AND PREJUDICE

In this Commonwealth, the "[c]ase law has repeatedly reinforced the policy underlying pretrial discovery, holding that it:

> [S]implifies and clarifies the issues in a case; eliminates or significantly reduces the element of surprise; helps to achieve a balanced search for the truth, which in turn helps to ensure that trials are fair; and encourages the settlement of cases.

Clephas, 168 S.W.3d at 393 (quoting *LaFleur v. Shoney's, Inc.*, 83 S.W.3d 474, 478 (Ky. 2002)). Additionally, it has been recognized that "[t]he discovery of the substance of an expert witness's expected testimony is essential to trial preparation." *Clephas*, 168 S.W.3d at 394. The failure of a party to disclose the

substance of an expert witness's testimony can result in a fundamentally unfair proceeding and clear prejudice requiring a new trial. *Clephas*, 168 S.W.3d 389.

It is axiomatic that Robinson's failure to seasonably disclose the new mathematical formula and timing opinions of Dr. Goldsmith "seriously undermined" the Rieses' ability to prepare their case for trial. *Id.* at 395. After learning of Dr. Goldsmith's mathematical formula precisely timing Lauren's in utero bleed, the Rieses filed a motion to limit Dr. Goldsmith's opinions to those opinions properly disclosed per CR 26.02. The trial court denied that motion by final pretrial order entered August 23, 2010. A mere three days later, on August 26, the Rieses then filed an Amended Expert Witness Disclosure and identified Dr. Phelan as offering opinions refuting Dr. Goldsmith's mathematical formula. The trial court, however, ruled that Dr. Phelan could not testify concerning Dr. Goldsmith's mathematical formula as he was identified untimely as an expert witness for that purpose. By denying both the Rieses' motion to limit Dr. Goldsmith's testimony and the Rieses' motion to rebut such testimony with Dr. Phelan's testimony, the trial court seriously and adversely impacted the Rieses' trial preparation and, however, unintentionally rewarded a party's "blatant violation of the 'rules of the game.'"[5] *Clephas*, 168 S.W.3d at 394 (citations

[5] It was argued that no prejudice resulted from Dr. Tonya Robinson's Kentucky Rules of Civil Procedure (CR) 26.02 and CR 26.05 violations because the Rieses could have called Dr. Zane Brown to rebut Dr. Goldsmith's newly disclosed opinions. However, a close examination of the Rieses' expert witness disclosures reveal that Dr. Brown would only testify concerning a fetus's equilibration rate and that a fetus equilibrated for blood loss "substantially different from neonates, children, and adults." Rieses' Supplemental Disclosures at 2. Dr. Brown was not disclosed as offering an opinion contradicting Dr. Goldsmith's mathematical formula; rather, Dr. Phelan was disclosed as offering an opinion directly refuting Dr. Goldsmith's mathematical formula timing Lauren's bleed. As hereinbefore pointed out, Dr. Goldsmith's mathematical

omitted). By so doing, the trial court abused its discretion resulting in a fundamentally unfair proceeding that was unduly prejudicial to the Rieses. Thus, we hold that the Rieses are entitled to a new trial. *See Clephas*, 168 S.W.3d 389.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is reversed and this case is remanded for proceedings consistent with this Opinion.

STUMBO, JUDGE, CONCURS.

CLAYTON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

CLAYTON, JUDGE, DISSENTING: Respectfully, I dissent. The majority opinion holds that the trial court abused its discretion in denying Dr. Phalen the opportunity to testify in rebuttal to Dr. Goldsmith's testimony regarding his mathematical calculations. The majority's opinion concludes that Dr. Robinson violated both the letter and spirit of CR 26.02 and CR 26.05 by failing to seasonably supplement Dr. Goldsmith's opinion concerning his mathematical formula timing Lauren's in utero bleed. However, even given those violations, the purpose and spirit of the rules were followed because Dr. Goldsmith's depositions revealed his calculations months before trial, thus giving the Rieses ample time to rebut the anticipated trial testimony. Moreover, after reviewing the series of events leading up to trial, the ample trial evidence regarding the in utero bleed's timing, and the Rieses untimely *Daubert* motion, I do not believe the trial court abused its

formula utilized various factors, only one of which was the equilibration rate of a fetus.

discretion by denying Dr. Phalen the opportunity to rebut Dr. Goldsmith's calculations.

I begin with the applicable civil rule. CR 26.02 (4) states in pertinent part:

> Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of paragraph (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (a) (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.

CR 26.05(a)(ii) also requires a party "seasonably to supplement" his CR 26.02 expert disclosures.

In *Hicks v. Cole*, 566 S.W.2d 169 (Ky. App. 1977) (disc. rev. denied June 6, 1978), a panel of this Court found no error when a party neither complied

with CR 26.02 by identifying his expert in his answers to interrogatories nor complied with CR 26.05 by seasonably supplementing his expert witness list. Instead, prior to trial, the party noticed a deposition of his expert witness, at which the plaintiff attended and participated. By deposing his expert, there was no surprise to the plaintiff at trial – the full substance of the expert's opinion was known to the opposing party because of the expert's examination during discovery. The Court reasoned that CR 26.02 is designed to assist in trial preparation, and when a pre-trial deposition is taken, the "purpose and spirit" of the rule is served because the opposing party is aware of the expert's testimony. *Id*. at 171.

Aligning with the "purpose and spirit" interpretation of CR 26.02 and 26.05 expert disclosures, our state Supreme Court has since held that when the rules are violated and a party moves to exclude the expert witness, "the person requesting exclusion of testimony must show prejudice." *Equitania Ins. Co. v. Stone & Garrett, P.S.C.*, 191 S.W.3d 552, 556 (Ky. 2006) (citing *Ward v. Housman*, 809 S.W.2d 717 (Ky. App. 1991)). There may be no prejudice when there is complete pre-trial disclosure, even if the party fails to fully comply with CR 26.02 and 26.05.

In the instant case, the Rieses cannot demonstrate prejudice because there was complete pre-trial disclosure. Dr. Goldsmith was first identified in the December 30, 2009, CR 26.02 disclosure by Dr. Robinson. That disclosure stated that Dr. Goldsmith reserved the right to develop additional opinions based on the deposition testimony of Dr. Crawford, one of the plaintiffs' experts. In March of

2010, Dr. Crawford then testified in his deposition to mathematical calculations. A month later, Dr. Goldsmith's opinion became fully known when he testified about the calculations he made in response to Dr. Crawford's deposition. He also testified about Dr. Crawford's opinion of mathematical calculations made by Dr. Robinson. Dr. Goldsmith was deposed again in May.

The trial court set a deadline of July 12, 2010, for all motions regarding experts including *Daubert* challenges. The Rieses made a motion to strike portions of Dr. Goldsmith and Dr. Strong's testimony for improper disclosure (failure to disclose the mathematical calculations), but no *Daubert* motion was filed. On July 14, 2010, the Rieses' supplemental disclosure stated that the "Plaintiffs reserve the right to present rebuttal opinions and/or testimony from Dr. Brown about any and all opinions Defendants' experts gave in deposition." As pointed out by the majority, it is true that the disclosure in the preceding paragraph references the equilibration and compensation opinions, but Dr. Brown's rebuttal testimony was not limited to those opinions.

At the Pre-Trial Conference on August 11, 2010, the trial court ruled that because both Dr. Crawford and Dr. Brown had undisclosed testimony, Dr. Goldsmith would be allowed to testify also. Later, in its August 23, 2010 order, the trial court determined that all expert testimony was reliable. The trial began on August 31, 2010. On September 13, 2010 the Rieses filed a *Daubert* motion regarding the mathematical calculations. The trial court ruled that the motion was

untimely and that the testimony went to the weight of the evidence and not its admissibility.

Based on this history, it is apparent that the spirit and purpose of the disclosure rules were followed and no prejudice occurred. CR 26.02 is designed to clarify the issues and disclose the expert's opinions to the fullest extent. Subsequent deposition testimony is a method to disclose those opinions. That is exactly the situation in this case.

Here, the disclosures and the depositions combined to permit the Rieses sufficient time to both procedurally and substantively address Dr. Goldsmith's testimony. They even filed a motion *in limine* in July. It is noteworthy how the Kentucky Supreme Court ultimately resolved this motion *in limine*. The Court held that it was not an abuse of discretion for the trial court to, under *Daubert*, admit Dr. Goldsmith's testimony regarding the mathematical calculations. More relevant to the instant prejudice inquiry, though, is that the Court also held that even if there were error in admitting Dr. Goldsmith's testimony, any error was harmless.

The net result is that at trial there was ample evidence about the mathematical calculations from both sides, and the Rieses were neither surprised by, nor left unprepared to rebut, Dr. Goldsmith's testimony. Dr. Goldsmith's testimony was known, and the Rieses contacted experts who disagreed with both the equilibration testimony and the mathematical calculations of the defense's

experts. Indeed, one of the Rieses' experts, Dr. Brown, could testify as to the calculations. The trial court even commented on September 10, 2010, that the Rieses had other expert testimony (Dr. Brown) regarding the mathematical calculations. Both Dr. Brown and Dr. Phelan are maternal fetal medicine specialists. Dr. Phelan was to testify regarding nucleated red blood cells. When Dr. Phelan was deposed on September 12, 2010, he was asked by defense counsel, "Is it your understanding as well that your testimony is limited in this matter, only to discussing nucleated red blood cells?" Dr. Phelan response was "That's my understanding; yes ma'am." He was also asked when he was first contacted in this case. He responded that it was, "Probably back in July, first of August".

As stated by the majority, we review the trial court's ruling on application of the Rules of Civil Procedure and admissibility of evidence for an abuse of discretion. *Hashmi, supra.* Was the trial judge's decision arbitrary, unreasonable, unfair, or supported by sound legal principles? *Goodyear Tire & Rubber Co., supra.* The trial court determined that the *Daubert* motion was untimely, which it was. The trial court stated that the mathematical calculations went to the weight of the evidence and not to its admissibility. The calculations were a method to determine the timing of the fetal bleed. The Appellants had several experts who directly contradicted the Appellees' experts on the timing of the fetal bleed. This was the crucial issue in the case. The Appellants were not surprised by the use of a mathematical formula. I do not believe that it was

fundamentally unfair to not allow Dr. Phelan to testify. It is certainly possible that another court, utilizing its discretion, would have allowed this testimony. *Cf. Kemper v. Gordon*, 272 S.W.3d 146, 154-55 (Ky. 2008) (finding circuit court "acted within its discretion in excluding the evidence."). However, it was not an abuse of discretion for the trial court to exclude this testimony when the Rieses were aware of it for approximately four months preceding the trial, had another witness who was expected to, and who would have been allowed to, testify about the mathematical calculations, and the *Daubert* motion was made two months after the deadline the trial court had set for *Daubert* motions to be filed. I would affirm the trial court.

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