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Commonwealth of Kentucky

Court of Appeals

NO. 2025-CA-1182-MR

RHONDA HAVENS, AS
ADMINISTRATRIX OF THE ESTATE
OF BARBARA HAVENS — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. TRAVIS, JUDGE
ACTION NO. 22-CI-01820

KENTUCKY ORTHOPAEDICS &
SPINE, LLC AND GREGORY GRAU,
M.D. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CALDWELL, L. JONES, AND KAREM, JUDGES.

CALDWELL, JUDGE: Rhonda Havens ("Havens"), as Administratrix for the Estate of her daughter Barbara, appeals the judgment of the Fayette Circuit Court entered in favor of the Appellees in accordance with a jury verdict. Havens argues that the trial court improperly allowed undisclosed expert testimony over her

objection. After reviewing the record, the parties' arguments, and the applicable law, we find no abuse of discretion and affirm.

BACKGROUND

This appeal arises from a malpractice action brought on behalf of the estate of Barbara, who died from a pulmonary embolism thirteen days after undergoing surgery in June 2021. Dr. Gregory Grau performed the procedure, a right knee arthroscopy with lateral release, at Baptist Surgery Center in Lexington, Kentucky.

Barbara had first presented to Kentucky Orthopedics and Spine ("KOS"), in October 2020, with a complaint of right knee pain. From this initial visit until February 2021, Barbara was treated by a physical therapist at KOS on several occasions. Medical records indicated that Barbara continued to experience pain in her knee. In April 2021, Barbara first saw Dr. Grau at KOS and the doctor recommended surgery.

Barbara's surgery occurred as scheduled on June 25, 2021. On July 1, 2021, Barbara saw Dr. Grau at his office for a post-operative assessment. On July 8, 2021, Barbara became unresponsive at work. Despite attempts at resuscitation and transport for emergency care, Barbara did not survive. An autopsy would determine she had succumbed to a pulmonary embolism, which was most likely caused by a deep-vein thrombosis ("DVT").

In June 2022, Havens filed a complaint in Fayette Circuit Court asserting medical negligence claims against Dr. Grau and agency claims against KOS.[1] She alleged that Dr. Grau failed to prescribe appropriate DVT prophylaxis before Barbara's surgery and that this failure caused Barbara's DVT and ultimately her death. Havens alleged that obesity, contraceptive use, a recent surgery, and immobility following the arthroscopic knee surgery placed Barbara at an elevated risk of DVT, particularly when considered cumulatively.

In December 2023, counsel for Havens took the deposition of Dr. Grau, who testified that he complied with the standard of care. During his testimony Dr. Grau referenced the American College of Chest Physicians ("ACCP") Guidelines for VTE[2] Prophylaxis. Specifically, he cited to Recommendation 4.0. which states that "[f]or patients undergoing knee arthroscopy without a history of prior VTE, we suggest no thromboprophylaxis rather than prophylaxis (Grade 2B)."

> A. So my planned procedure was a knee arthroscopy, lateral release, which has some risk of bleeding with it. It's a short procedure and she was going to be mobilized afterwards. So the guidelines, essentially, do not recommend DVT prophylaxis in that situation.

[1] Dr. Grau and KOS were represented by the same counsel during proceedings with no dispute as to agency or contrary legal positions. Aside from references to Dr. Grau's specific testimony or actions, references to "Dr. Grau" hereinafter collectively refer to co-Defendants Dr. Grau and KOS.

[2] Venous thromboembolism.

> Q. Okay. The guidelines do not recommend DVT prophylaxis in a situation where a surgery is short and the person is going to be mobile afterwards?
>
> A. According to the American College of Chest Physicians and the American Association of Orthopedic Surgery Guidelines.
>
> Q. It doesn't matter what other kind of risk factors or what risk factors are there?
>
> A. The risk factors that are talked about include a previous history of DVT or a personal hypercoagulable state.

During pretrial discovery, the parties exchanged interrogatories concerning the identities of expert witnesses and their opinions. In accordance with a scheduling order of the court, in October 2024, Havens filed CR[3] 26.02 witness disclosures identifying three retained experts. The disclosures identified orthopedic surgeon Dr. Brett Cascio as the only one of the expert witnesses expected to render expert testimony regarding the standard of care.

The disclosure for Dr. Cascio indicated his opinion that the standard of care required Dr. Grau to provide Barbara with prophylactic measures for DVT, beginning prior to her surgery:

> Specifically, it is anticipated that Dr. Cascio will testify that prior to Dr. Grau's surgery on June 25, 2021, Barbara Havens had a medical history that included, among other things, obesity (BMI 43), birth control and recent history of sinus surgery. This history was known,

[3] Kentucky Rules of Civil Procedure.

> or should have been known, by Dr. Grau. . . . With Barbara's known history, she should have been placed on aspirin therapy or other prophylactic measures for clotting or DVT prior to surgery. Had she been on prophylaxis, it is more likely than not that clot Barbara ultimately had would not have formed, preventing her fatal [pulmonary embolism].

(Record on Appeal ("R."), p. 244-45).

CR 26 disclosures were filed by Dr. Grau in January 2025. The expert witnesses identified included hematologist Dr. Ronald Sacher; orthopedic surgeon Dr. William Andrews; forensic pathologist/medical examiner Dr. Darius Arabadjief; as well as two pulmonologists, Dr. Thomas Parker and Dr. Matthew Exline.

Pretrial discovery continued following the disclosures and a number of depositions of the retained expert witnesses occurred. Counsel for Dr. Grau took discovery depositions of both of Havens' medical experts. Counsel for Havens took discovery depositions including those of Dr. Sacher and Dr. Andrews. No deposition of Dr. Exline occurred.

The deposition of Dr. Cascio occurred in March 2025. Dr. Cascio detailed his opinion that, with Barbara's medical history, the standard of care required Dr. Grau to use prophylaxis. Dr. Cascio testified critically about the ACCP Guidelines (hereinafter "the Guidelines") and Dr. Grau's reliance upon

them during his deposition and disputed their applicability to a patient such as Barbara.

The case proceeded to a jury trial beginning on August 18, 2025. During opening statements, counsel for Havens warned the jury that Dr. Grau would attempt to rely upon the Guidelines to contend he had met the standard of care. Counsel was critical of the Guidelines at this time; his opening statement included assertions that the Guidelines were inapplicable to orthopedic surgeons, that they carried a weak rating because they relied on flawed data, and that they were archaic and outdated. Counsel preemptively attacked the testimony of Dr. Andrews in the opening statement.

Dr. Cascio testified in person regarding the standard of care and causation during Havens' case-in-chief. Dr. Cascio testified at trial in greater length and detail about the Guidelines than he had at his deposition. Dr. Cascio contended the Guidelines had been written by pulmonologists, a non-surgical specialty, because of their desire to be "relevant" to surgical processes. He contended the 2012 publication date, along with a lack of additional recommendation, demonstrated that the Guidelines had been abandoned by the ACCP themselves. Dr. Cascio testified that the publication date and lack of republication were significant because the Guidelines preceded the availability of alternatives to heparin; his testimony also asserted that the authors of the

Guidelines had been paid by pharmaceutical companies marketing heparin. Dr. Cascio argued that, when Recommendation 4.0 is read in context with the entirety of the Guidelines article, a patient such as Barbara should have received prophylaxis under the Guidelines despite Recommendation 4.0. Additionally, Dr. Cascio testified extensively regarding the grading of "2B" for Recommendation 4.0 in the Guidelines; he contended this demonstrated the ACCP lacked confidence in the recommendation or the data supporting it.

On August 21, 2025, prior to the jury's arrival on the morning of the fourth day of the trial, the trial court held a hearing on a motion *in limine* Havens filed the preceding evening. In the motion, Havens sought to exclude any reference to the ACCP Guidelines during the testimony of Dr. Exline, alleging that any such reference would be outside of the scope of the subject matter noticed in Dr. Exline's disclosure. As support for her motion, along with the CR 26 disclosure filed for Dr. Exline, which contained no mention of the Guidelines, Havens cited the scheduling order of the trial court. Additionally, Havens cited to an interrogatory she had served on Dr. Grau inquiring as to the retained experts he anticipated calling at trial, which included a request for all titles, authors and publication dates of texts that any expert had relied upon in formulation or as support of any opinion. Finally, Havens attached and discussed email correspondence between her counsel and counsel for Dr. Grau. An email from

counsel for Havens proposed that "if anyone plans to use any medical literature not previously disclosed on direct examination, I would suggest a Tuesday deadline for that as well[.]" A reply from counsel for Dr. Grau asserted that the defense would object to any late identification of medical literature that had not been previously identified.

Havens argued that Dr. Grau had failed to include any reference to or summary of the ACCP Guidelines in the disclosure for Dr. Exline. Furthermore, Havens argued, despite her providing Dr. Grau an opportunity to supplement the disclosure by email, Dr. Grau's reply amounted to a representation that Dr. Exline did not intend to reference any medical literature during his testimony.

Havens emphasized that disclosures for some of Dr. Grau's experts included specific mention of the Guidelines, but the disclosure for Dr. Exline had not. Havens acknowledged that her own disclosure for Dr. Cascio included no specific mention of the Guidelines and that she had nonetheless elicited testimony about the Guidelines during his trial testimony. However, Havens pointed out that Dr. Cascio had referenced and discussed the Guidelines during his pretrial deposition. She argued this had relieved her of any duty to supplement the initial disclosure. In contrast, Havens argued, she had elected not to take a pretrial deposition of Dr. Exline, so that Dr. Grau had remained duty-bound to supplement

the initial disclosure if he intended to elicit any testimony from Dr. Exline beyond its scope.

Counsel for Dr. Grau argued that the ACCP Guidelines had been a prominent topic of conversation by both parties throughout pretrial litigation and had been a focus of Havens' opening statement and proof during trial. As a result, defense counsel maintained, Havens could not be legitimately surprised that Dr. Exline wished to testify regarding the Guidelines. Defense counsel pointed out that counsel for Havens made statements critical of Dr. Exline's specialty during opening statements, asserting the Guidelines represented "lung doctors telling bone doctors what to do." Additionally, defense counsel argued that during her proof, Havens elicited testimony from Dr. Cascio concerning the Guidelines that had not been previously disclosed in either his disclosure or deposition.

Defense counsel contended that several criticisms of the Guidelines which occurred during Dr. Cascio's direct examination amounted to factual allegations that had gone beyond anything previously disclosed during his pretrial deposition. Counsel argued that most questions he intended to ask of Dr. Exline regarding the Guidelines sought statements of fact rather than opinion, to rebut those undisclosed factual assertions elicited during the prior testimony of Dr. Cascio. Defense counsel argued that literature upon which Dr. Cascio based some criticisms had not been identified in his disclosure or deposition testimony,

including previously unexamined sections of the Guidelines. Defense counsel asserted that, based on Havens' argument, Havens had herself been in violation of CR 26 when she elicited this testimony from Dr. Cascio. Nonetheless, defense counsel contended, he had refrained from objection to the direct examination testimony as it did concern the Guidelines, which had been at issue from early in litigation.

Counsel for Havens argued that the Guidelines had previously been discussed at trial only by orthopedists after the subject matter of their testimony was properly disclosed. She asserted that discussion of the Guidelines from the perspective of physicians of a different specialty would prejudice her.

The trial court denied the motion. The trial judge found no significant element of surprise in the anticipated testimony and concluded that there had been substantial compliance with the disclosure requirements. Based on the way the case had been litigated and the pretrial and trial testimony, the judge found it reasonably inferable that Dr. Exline would discuss the Guidelines and characterized the omission from his disclosure as a technical error.

On direct examination, Dr. Exline testified about the ACCP Guidelines and stated that Dr. Grau's care was appropriate because it complied with those Guidelines. He also testified to his familiarity with the ACCP's procedures regarding publishing and asserted that the Guidelines remained current

per the ACCP. He asserted that, while the Guidelines had been written by chest physicians, the data upon which they relied had been studies concerning prophylaxis that had been undertaken by orthopedic surgeons. Dr. Exline also discussed his familiarity with the grading system applied to the ACCP Guidelines to the jury; he asserted the grade of "2B" was a reference to how the studies were constructed, rather than to the quality of the recommendation. Dr. Exline asserted that the "weaker" designation of 2, rather than 1, in the grade still indicated the Recommendation should most likely be followed. He contended that the designation of B, rather than A, indicated only that no randomized controlled trial looking into the topic had occurred, which Dr. Exline maintained was typical of most medical evidence.

Following the testimony of Dr. Exline, the defense rested. Havens did not put on any rebuttal proof.

Following closing arguments and deliberations, the jury returned a verdict in Dr. Grau's favor at the close of the four-day trial. The trial court entered judgment consistent with the verdict of the jury. Havens filed a timely appeal.

ANALYSIS

On appeal, Havens brings a single claim, alleging the trial court erred by allowing Dr. Exline to utilize and discuss the ACCP Guidelines during his

testimony and by denying her motion *in limine* that requested the exclusion of this testimony.

Where an appellant raises issues concerning a trial court's evidentiary rulings, including the admission of expert testimony, our review is limited to a determination of whether the trial court abused its discretion. *Clephas v. Garlock, Inc.*, 168 S.W.3d 389, 393 (Ky. App. 2004) (citing *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000)) ("abuse of discretion is the proper standard of review of a trial court's evidentiary rulings"). It is well established that "[t]he test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Clephas*, 168 S.W.3d at 393 (quoting *Goodyear Tire & Rubber Co.*, 11 S.W.3d at 581).

Havens Has Not Established An Abuse of Discretion By the Trial Court

As she argued to the trial court, Havens contends on appeal that the disclosure for Dr. Exline lacked any mention of his intent to rely upon or utilize the ACCP Guidelines or any other medical literature. Consequently, Havens argues, she was unable to ascertain that Dr. Exline would rely upon the Guidelines during his trial testimony and therefore was denied information she needed to adequately prepare for trial. Havens alleges she was denied reasonable notice of the

information Dr. Exline relied upon to formulate his opinions so that she was unable to adequately prepare for trial.

Havens argues that this appeal presents an identical issue to *Clephas*, 168 S.W.3d 389, and asserts that this Court's decision in that case "prohibits admission of expert testimony that is based on material not disclosed pursuant to CR 26.02(4)(1)(i)." Appellant brief, p. 8. Havens contends it is an abuse of a trial court's discretion to allow an expert to reference in testimony a text which was not previously identified in the expert witness disclosure. We disagree that *Clephas* imposes such a restriction on a trial court's discretion to admit disputed expert testimony.

Despite her contention that Dr. Exline did not sufficiently disclose any opinion as to the Guidelines, Havens does not allege that Dr. Exline acted in a manner so contrary to the spirit of the discovery rules that he would be comparable to the defendant in *Clephas*. In *Clephas*, despite extensive pretrial efforts by the plaintiff, which included securing an order from the trial court specifically compelling defendant to produce its expert for deposition, the defendant evaded producing its expert. 168 S.W.3d at 393. Here, Havens admittedly chose to forgo a pretrial deposition of Dr. Exline. And she did not allege any other efforts to thwart any of her pretrial discovery efforts by opposing counsel to the trial court.

The disclosure in *Clephas* began with a statement that the expert "*may* testify, in general, concerning asbestos-related disease and the effects of exposureto asbestos upon persons in occupational settings[.]" 168 S.W.3d at 391 (emphasis added). The remainder of the disclosure likewise contained only tentative assertions as to the expert's anticipated testimony. *Id*. It failed to disclose any opinion that was particular to the plaintiff in the case, offering only that "[w]ith respect to particular plaintiffs, he may testify as to review and interpretation of x-ray films, review and interpretation of pulmonary function testing, the nature and extent of any impairment or disability, whether the condition is progressive and whether other disease or conditions are present in plaintiffs." *Id*. at 391.

In addition to the disclosure at issue in *Clephas* being insufficient to provide notice of any particular opinion of the expert, it was followed by "[s]hoddy trial tactics" which effectively eliminated any meaningful opportunity for plaintiff to discover the expert opinions that would be offered at trial. 168 S.W.3d at 394. The expert acknowledged he had formed no opinions about the plaintiff's medical condition at the time defense counsel filed the CR 26.02(4) disclosure identifying him in this case. *Id*. at 393. Counsel then waited until the trial commenced before providing the materials that were necessary for the expert to form any opinion. *Id*. at 394. Havens made no allegation to the trial court that Dr. Grau included

anything improper in the CR 26.02(4) disclosure for Dr. Exline, or that it did not reflect opinions the expert had formed at the time it was filed. She merely alleged that counsel had failed to supplement the disclosure with a specific reference to a particular text.

During the hearing, counsel for Havens told the trial court he was undecided whether the omission of the Guidelines from Dr. Exline's disclosure was inadvertent or strategic. Even assuming, *arguendo*, the more egregious of Havens' scenarios – that Dr. Grau had strategically omitted the reference – we cannot say that such a strategic omission would rise to the level of the "blatant violation" of discovery rules described in *Clephas*. 168 S.W.3d at 394. Other authority Havens relies on is no more availing. For example, Havens cites to *Meade v. Dvorak*, another case where a CR 26 disclosure had been filed for an expert prior to the expert having any opportunity to form an opinion. 571 S.W.3d 585, 588 (Ky. App. 2018). We locate no support in that case for Havens' contention that the trial court here abused its discretion in admitting expert testimony.

While the parties vigorously dispute whether Dr. Grau's disclosure was in strict technical compliance with CR 26, our review is limited to a determination of whether the trial court abused its considerable discretion in admitting the challenged testimony during trial. *Clephas*, 168 S.W.3d at 393.

Furthermore, the trial judge found that Dr. Grau had "substantially complied" with the notice requirements of CR 26. To the extent Havens argues that *Clephas* requires strict compliance with CR 26 before a trial court may exercise its discretion to admit expert testimony, we reject her argument. Here, even if the discovery violation alleged by Havens occurred, it was not of the nature which would divest the trial court of its discretion to admit the expert testimony regarding the Guidelines.

No pretrial deposition of the challenged expert occurred here or in *Clephas*. Unlike the circumstances described in *Clephas*, however, Havens had an opportunity to conduct a deposition and chose not to do so. Havens argues that, because of her decision not to depose Dr. Exline, he was without "any latitude to expand upon the opinions, or bases of the opinions, that are contained within the CR 26 Disclosure." Appellant brief, p. 9 (emphasis added). In support of her argument, Havens cites *Mullins v. Appalachian Regional Healthcare, Inc*., where this Court noted:

> Mullins insists it was Appellees' duty to take her experts' depositions prior to the granting of any summary judgment. There is no such rule. It is not the duty of defendants to undergo considerable expense and inconvenience to flesh out obviously inadequate expert disclosures by taking depositions.

707 S.W.3d 1, 8 (Ky. App. 2025).

Mullins concerned expert disclosures that lacked the specificity needed for most of the plaintiff's malpractice claims to survive summary judgment under CR 26.02(4). 707 S.W.3d at 7. The disclosures failed to attribute specific conduct to most defendants or connect the summarized opinions to a timeframe or act of negligence. *Id*. at 8. The plaintiff alleged malpractice during approximately two weeks in which the decedent was on a ventilator and developed stage three pressure wounds that led to his death. *Id*. at 7. The complaint named forty-two defendants, including "unknown defendants," and repeated boilerplate allegations with different defendants' names but no case-specific facts. *Id*. at 4-5. During a year of discovery, the plaintiff repeatedly sought and missed new expert-disclosure deadlines while the defendants repeatedly moved to compel. *Id*. at 6. When the plaintiff finally identified experts, the disclosures still did not supply most defendants with any notice of specific conduct on their part which the plaintiff alleged made them liable. *Id*. at 8. The trial court granted summary judgment, which this Court affirmed for all defendants who did not receive notice of an allegation of specific conduct.

The opinion in *Mullins* discerned that the rules of discovery require that each opposing party receive fair notice of the specific allegations against him/her based on his or her particular conduct. *Mullins* also restated the principle from *Clephas* that "[a] generalized statement outlining a broad subject matter about

which an expert may testify does not sufficiently apprise the other party of the information needed to prepare for trial as contemplated and mandated by the notice requirements of CR 26.02(4)(a)." 707 S.W.3d at 7 (quoting *Clephas*, 168 S.W.3d at 393-94).

The rules of discovery imposed no duty upon Havens to take a discovery deposition for each and all of Dr. Grau's numerous disclosed experts. Nevertheless, her election not to depose Dr. Exline did not create a situation where the trial court was divested of its discretion to grant any latitude to allow Dr. Grau's expert to respond to testimony Havens herself elicited. The broad discretion to admit or exclude evidence given to trial courts includes the testimony of expert witnesses. *Boland-Maloney Lumber Co., Inc. v. Burnett*, 302 S.W.3d 680 (Ky. App. 2009). Havens made no allegation to the trial court that the disclosure for Dr. Exline was so vague and generalized that she could not discern what his specific opinion was. *Compare Mullins*, 707 S.W.3d at 7, *Clephas*, 168 S.W.3d at 393-94. She alleged, instead, that she did not receive a proper disclosure of his anticipated reference to a particular text. In short, Havens failed to allege, let alone establish, any violation of the discovery process so egregious that it would be an abuse of the trial court's discretion to admit the evidence.

Even if Dr. Grau Failed to Strictly Comply With CR 26, Havens Did Not Adequately Demonstrate Prejudice to the Trial Court

"[T]here is no valid basis to exclude or limit testimony" where there has been no demonstration of prejudice that would result by the party seeking exclusion. *Equitania Ins. Co. v. Slone & Garrett, P.S.C.*, 191 S.W.3d 552, 556 (Ky. 2006).

Havens argues that her ability to adequately prepare for trial was thwarted by admission of the testimony, as she had no way to anticipate Dr. Exline would testify about the ACCP Guidelines. While her Appellant brief does not explicitly address the subject of prejudice, Havens alleges there that the objectionable testimony of Dr. Exline presented him, as a pulmonologist, as the witness most qualified to interpret the ACCP Guidelines.

At the hearing on Havens' motion *in limine*, Havens argued similarly. For instance, the trial judge asked counsel for Havens how Dr. Exline's testimony would prejudice her, given the extensive testimony about the Guidelines from other witnesses. Havens' counsel responded that the prior discussion had come from orthopedists who had properly disclosed their testimony and that she had no reason to anticipate an interpretation from a physician of a different specialty.

In his Appellee brief, Dr. Grau argues that Havens suffered no prejudice from the admission of Dr. Exline's testimony. Dr. Grau contends that

Havens' claim that Dr. Exline's specialty as pulmonologist served to bolster the credibility of the Guidelines is, in fact, a concession that Dr. Exline was amply qualified to render testimony on the matter.

In her Reply brief, Havens argues that prejudice resulted because Dr. Exline, as the only expert witness who testified who was a pulmonologist, "made it clear in his trial testimony that he is the most appropriate person to address and interpret the ACCP Guidelines." Reply brief, p. 1. Havens emphasizes there, as she did to the trial court, that Dr. Grau expressly identified the Guidelines in some of his other experts' disclosures but included no such reference in the disclosure for Dr. Exline.

Dr. Grau argues that the disclosure for Dr. Exline provided substantive notice that he had relied upon the Guidelines by the inclusion of the statement that:

> [Barbara's] history did not include prior VTE or DVT. Her history did not require or indicate the need for DVT prophylaxis.

R. at p. 398-99.

Dr. Grau argues that this part of Dr. Exline's disclosure was, essentially, a quotation and obvious application of the Guidelines consistent with the defense's position from the beginning of litigation. Dr. Grau argues the above lines summarizing Dr. Exline's opinion were an obvious reference to and

restatement of Recommendation 4.0: "For patients undergoing knee arthroscopy without a history of prior VTE, we suggest no thromboprophylaxis rather than prophylaxis."

The parties' arguments concern two different forms of notice. Havens focuses on notice of the testimony Dr. Exline would offer, arguing specific reference to the materials he would use was critical to her trial preparation. Dr. Grau relies on the Guidelines' prominence throughout the litigation, including at trial, and on the disclosure's statement that Dr. Exline would respond to Havens' experts.

Furthermore, Dr. Grau argues in his Appellee brief, as he did before the trial court, that Dr. Exline's testimony about the Guidelines was properly disclosed through statements throughout in the disclosure indicating that Dr. Exline intended to respond to and rebut the forthcoming opinions of Dr. Grau's experts. The disclosure for Dr. Exline concluded:

> This is merely a summary of Dr. Exline's opinions, and he expects to elaborate [on] them more fully at his deposition. Dr. Exline reserves the right to supplement or clarify his opinions as discovery progresses. This disclosure will be supplemented in accordance with the Civil Rules. Finally, Dr. Exline reserves the right to rebut additional opinions of Plaintiff's experts.

R. at 399.

In her Reply brief, Havens argues that Dr. Exline had ample opportunity to review Dr. Cascio's discovery deposition and supplement his disclosure. She argues there was no need here for Dr. Grau to "rebut[] some sort of surprise testimony" but that it "was simply a case where Dr. Exline's disclosure omitted that he intended to testify about the ACCP Guidelines[;] [m]aybe this was inadvertent or maybe it was a strategy of Appellees." Reply brief, p. 2.

However, Havens does not meaningfully counter Dr. Grau's detailed allegations that Dr. Cascio went well beyond the scope of any deposition testimony *at trial* when he "offer[ed] an impromptu and undisclosed criticism concerning the ACCP Guidelines for VTE Prophylaxis" Appellee brief, p. 9. More importantly to our determination, Havens failed to meaningfully counter the same argument Dr. Grau presented to the trial court during the motion *in limine*.

To the trial court, Dr. Grau argued the anticipated testimony from Dr. Exline regarding the Guidelines would be offered simply to counter factual assertions which had been elicited by Havens: that the Guidelines were not intended for or relied upon by orthopedic surgeons; that their 2B grading meant they were unreliable; and that they were archaic or had not been subject to subsequent review. Dr. Grau argued that Havens had elicited undisclosed testimony from Dr. Cascio that was critical of the practices and procedures of the ACCP, and Dr. Exline was uniquely positioned to address these assertions. Dr.

Exline's *curriculum vitae* ("CV") listed, among his professional memberships and activities, a fellowship with the ACCP from 2003 to that time; it also noted an occasion when he served as a moderator for the ACCP. The CV was attached to the disclosure for Dr. Exline. R. at 412.

In his Appellee brief, Dr. Grau contends that Dr. Exline simply addressed Dr. Cascio's criticisms without expanding the scope of his disclosed opinions, or that the discussion of the Guidelines that had already occurred before the jury. Review of the record demonstrates that Dr. Cascio did include some criticisms during his discovery deposition, as conceded by Dr. Grau. And while Dr. Cascio did describe some of his general criticisms of the Guidelines during his deposition, counsel for Havens did not meaningfully dispute that several of Dr. Cascio's specific criticisms and allegations regarding the Guidelines during his trial testimony had not been previously detailed in discovery.

Havens argues that, since Dr. Exline had to have been aware of discussions of the Guidelines in the case and he had an opportunity to supplement his disclosure, his testimony cannot be said to be rebuttal. However, we discern no error in the trial court's finding that Havens could have reasonably inferred that Dr. Grau had inadvertently omitted a reference to the Guidelines in the disclosure for Dr. Exline. Certainly, under best practice for such an event, defense counsel might have detected the omission and supplemented the disclosure. However,

establishing opposing counsel failed to supplement discovery responses with information previously known to the party seeking reversal is not a demonstration of prejudice, or grounds for reversal, even with an obligation to supplement under the discovery rules. *Welsh v. Galen of Virginia, Inc.*, 128 S.W.3d 41, 49 (Ky. App. 2001).

The disclosure for pulmonologist Dr. Parker contained a passage describing a substantially similar opinion to Dr. Exline's. The most notable distinction is the addition of a specific mention of the ACCP Guidelines:

> Dr. Parker will testify that, based upon his review of the medical records and experience, DVT prophylaxis was not indicated or required in connection with Dr. Grau's performance of Ms. Havens' arthroscopic knee surgery. The guidelines promulgated by the American College of Chest Physicians, do not recommend prophylaxis for arthroscopic knee surgery. The surgery is brief and patients are not immobilized. These types of surgeries have an exceedingly low risk for DVT.
>
> Ms. Havens' history included Depo-Provera, obesity, and prior surgery. She had no prior history of DVT. This history does not require VTE prophylaxis in a patient undergoing arthroscopic knee surgery.

R. at p. 396-97.

Like Dr. Exline, Dr. Parker's CV listed a current and long-standing fellowship with the ACCP among his professional memberships.

Dr. Grau did not call Dr. Parker to testify at trial. However, it is noteworthy that Havens received specific notice that Dr. Parker, a pulmonologist

and potential expert witness at trial, intended to cite the Guidelines as support for his opinion. The disclosure of pulmonologist Dr. Parker as a potential expert witness undercuts Havens' argument that she had no reason to prepare for discussion of the Guidelines by an expert witness from the perspective of a pulmonologist.

Our review of the record confirms the trial court carefully considered Havens' arguments concerning prejudice during the hearing on the motion in limine, as well as during objections made by counsel for Havens during the testimony by Dr. Exline which followed. Dr. Exline's direct testimony regarding the Guidelines, as well as the practices of the ACCP, was relatively brief and the court certainly did not grant counsel for Dr. Grau free rein. The trial judge sustained some of Havens' objections that Dr. Exline was straying from the confines of his disclosure and refrained from overruling others until the defense volunteered to revise its line of questioning. Dr. Exline's testimony regarding the Guidelines was directly responsive to criticisms voiced by Havens' expert witness and her counsel. We cannot say the trial court's decision to allow limited testimony by Dr. Exline regarding the Guidelines was arbitrary, unreasonable, or unfair.

Furthermore, even if it were an evidentiary error to allow Dr. Exline's testimony, Havens cannot establish that it was an error that affected her

"substantial rights" as would be required by CR 61.01, in order for this court to overturn the verdict of the jury. *See Rehm v. Ford Motor Co.*, 365 S.W.3d 570, 577 (Ky. App. 2011). Havens made the jury aware of her criticisms of the Guidelines and Dr. Grau's reliance on them during the opening and closing arguments of her counsel. Counsel for Havens subjected Dr. Exline to vigorous cross-examination regarding the Guidelines. Furthermore, the jury was given the opportunity to weigh Dr. Exline's testimony alongside the prior testimony of Dr. Cascio voicing numerous criticisms of the Guidelines during Havens' case-in-chief. "As our court [has] remarked . . . , '[w]e are confident that Kentucky juries can hear ... expert testimony and weigh it accordingly.'" *Rehm*, 365 S.W.3d at 576 (quoting *Commonwealth v. Martin*, 290 S.W.3d 59, 69 (Ky. App. 2008)).

In sum, we discern no reversible error in the trial court's admission of Dr. Exline's testimony about the Guidelines.

CONCLUSION

For these reasons, we affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

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