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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002634-MR

MARY HERT AND JACK HERT — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 02-CI-005938

STEPHEN BURTON, M.D.;
OLASH MEDICAL ASSOCIATES, PSC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

KELLER, JUDGE: In this medical malpractice case, Mary Hert ("Mary") and Jack Hert ("Jack") (collectively "the Herts") have appealed from the Judgment of the Jefferson Circuit Court dismissing their claims against Stephen Burton, M.D., and Olash Medical Associates, PSC, ("Olash Medical") pursuant to the jury's defense verdict, and from the

order denying their motion for a judgment notwithstanding the verdict or for a new trial. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Mary was born on December 12, 1938. She married her husband, Jack, on September 6, 1958.

Mary's medical records reflect that Dr. Burton became her family doctor while he was working for Olash Medical. In 1997, Mary was treated for atrial fibrillation, as well as depression and anxiety. She was later treated for mitral and tricuspid valve prolapse. Dr. Burton referred Mary to cardiologist Dr. Michael J. Imburgia, who continued to treat her cardiac conditions. On August 10, 2001, Dr. Imburgia saw Mary for a follow-up examination and testing. Dr. Imburgia noted that she had done well since he had last seen her one year earlier. He did not recommend any changes to her medical therapy, as she was stable on her current medications. Dr. Imburgia sent a letter to Dr. Burton detailing these findings and recommendations.

During the morning of August 28, 2001, while at work, Mary began experiencing a funny feeling in her hand and on her face. She called Jack, who picked her up and took her to the emergency room at Baptist Hospital East, where she was treated by Dr. William King. Dr. King took a history from Mary of numbness and tingling to the lips and fingertips that morning, and of the onset of dizziness in the waiting room, but that all of her symptoms were improving. Dr. King noted a past history of Irritable Bowel Syndrome and anxiety. He performed a physical examination and ordered several diagnostic tests, including laboratory tests, an EKG, a chest x-ray, and a CT scan of Mary's head. All of the test results were normal. Based upon his examination and test

results, Dr. King diagnosed dizziness or a possible viral syndrome. After discussing Mary's emergency room visit with Dr. Burton, including her complaints and the results of his examination and testing, Dr. King discharged Mary that afternoon and prescribed Meclizine and Phenergan. Dr. King also instructed Mary to follow up with Dr. Burton "tomorrow" and return to the emergency room if her condition worsened.

Upon their arrival home, Jack contacted Dr. Burton's office to make an appointment for Mary. Jack spoke to Dr. Burton's medical assistant, Jerusha Bunger, who related the telephone call to Dr. Burton. Rather than opting to see Mary in his office immediately, Dr. Burton instructed Jerusha to have Jack increase Mary's dosage of Zoloft from 50 mg to 75 mg and then schedule a follow-up appointment several weeks later. The follow-up appointment was scheduled for September 27, 2001. Mary missed work for the next two days, but after that her symptoms resolved and she completely recovered from the incident.

During the early morning hours of September 13, 2001, Mary tragically suffered an ischemic stroke,[1] causing her left side to be paralyzed. Jack quit working after Mary had her stroke and became her sole caretaker.

On August 8, 2002, the Herts filed a medical malpractice action against Dr. Burton and Olash Medical (as Dr. Burton's employer), seeking damages for Dr. Burton's negligence in his care and treatment of Mary in that he failed to exercise reasonable medical care. Jack's claim was for loss of consortium. In total, the Herts sought more than $13,000,000 in compensatory damages, representing Mary's past and future medical

[1] Dr. Kenneth Gaines, a neurologist who testified as an expert witness at trial, defined a stroke as a disease of the brain or spinal cord. The more frequent type of stroke is an ischemic stroke, which is caused by the loss of blood supply to the brain. The other type of stroke is a hemorrhagic stroke, caused by bleeding into the brain. A stroke results in permanent damage.

expenses, her pain and suffering, the destruction of her ability to earn money, and Jack's loss of consortium.[2]

The Herts' theory of the case was that Mary had experienced a Transient Ischemic Attack (TIA)[3] on August 28, 2001, due to her atrial fibrillation and that she should have been placed on Coumadin, a blood thinner, either in 1997 when her atrial fibrillation was diagnosed or after the August 2001 event in order to prevent the formation of clots. In their theory, Dr. Burton's failure to see her immediately after Mary's August 28, 2001, emergency room visit or to prescribe Coumadin were substantial factors in causing her stroke two weeks later.

The matter was tried before a jury over an eight-day period. At the conclusion of the trial, the jury returned a unanimous verdict in favor of Dr. Burton, finding that Dr. Burton complied with his duty to Mary and that the Herts were not entitled to any damages. The Herts moved the circuit court for a judgment notwithstanding the verdict or for a new trial, alleging that several errors occurred during trial. The circuit court denied the motion, and this appeal followed.

ANALYSIS

1. Jury Selection

The Herts first argue that the circuit court erred by failing to strike a prospective juror for cause, based upon her relationship with Olash Medical. The juror in

[2] Mary and Jack's claim for several million dollars in punitive damages was dismissed during the trial.

[3] Dr. Gaines defined a TIA as a set of temporary symptoms that might or might not be related to a stroke. A TIA is temporary in nature, and resolves once a blood clot dissolves.

question indicated during voir dire that she was a current patient of Dr. Bart Olash of Olash Medical. For this reason, the Herts assert that she should have been stricken for cause. In support of this argument, the Herts rely upon several cases, including *Butts v. Commonwealth*, 953 S.W.2d 943 (Ky. 1997), and *Bowman ex rel. Bowman v. Perkins*, 135 S.W.3d 399 (Ky. 2004), which hold that a juror with a close relationship to a party in the case must be stricken for cause. Those cases address situations where a party specifically moved to strike a particular juror. In the present case, however, Dr. Burton and Olash Medical point out that the Herts never requested that this particular juror be stricken for cause. Our review of the trial record confirms their rendition of the events concerning this stage of *voir dire*. Therefore, we agree that the Herts failed to preserve this issue by moving to strike the juror in question. *Fischer v. Fischer*, 197 S.W.3d 98 (Ky. 2006).

2. Juror Misconduct

Next, the Herts contend that the circuit court should have declared a mistrial or readmonished the jury on the basis of misconduct. This misconduct was based upon an allegation that jurors were sharing notes and discussing the case before deliberations started. However, there is no evidence in the record to support this allegation and the Herts did not submit any type of affidavit detailing the alleged misconduct. Furthermore, we note that the circuit court exhaustively admonished the jury every time a break was called or the court otherwise went into recess. We perceive no merit to this argument.

3. Apportionment Requested Against Unnamed Nonparty

The Herts submit that counsel for Dr. Burton impermissibly argued during closing argument that the jury should apportion damages against an unnamed party to the

suit; namely, Dr. King. In support of their argument, the Herts cite to *Baker v. Webb*, 883 S.W.2d 898 (Ky.App. 1994), which in turn cites KRS 411.182 in relation to instructing the jury on the allocation of fault in tort actions. However, counsel for Dr. Burton asserts that he never asked the jury to apportion fault against any other party, and in fact argued that Dr. King was not negligent in his care of Mary. Furthermore, both Dr. Burton and Olash Medical assert that such an argument is moot, as the jury did not reach the question of damages due to its finding that Dr. Burton was not negligent.

We agree with Dr. Burton and Olash Medical that counsel for Dr. Burton was not seeking an apportionment instruction against Dr. King or any other person. Certainly, the jury instructions did not call for the apportionment of liability against any party but Dr. Burton. Furthermore, counsel for Dr. Burton specifically argued that Dr. King was not negligent. Finally, we note that the jury never reached the question of damages. Therefore, we perceive no error in this line of argument during Dr. Burton's closing.

4. Closing Arguments By Defense Counsel

The Herts' next argument concerns the propriety of a number of statements made by the attorneys representing Dr. Burton and Olash Medical during their respective closing arguments. We agree with Dr. Burton and Olash Medical that the majority of the statements the Herts raise in their brief were not raised below by contemporaneous objection. Those unpreserved issues include comments by defense counsel on objections raised by the Herts' attorney; inferences concerning the payment of the Herts' experts; comments on the job changes of one of the Herts' expert witnesses; comments on the resources of the Herts' counsel; comments concerning the reason Dr. King and Baptist

Hospital East were not sued; and comments described as making light of Mary's condition. Because those issues were not preserved, we shall not consider them any further, except to state that we agree with Dr. Burton and Olash Medical that those issues have no merit.

The two remaining issues, which arose during counsel for Olash Medical's closing argument, are also without merit. At the outset, we note that "[i]t is unquestionably the rule in Kentucky that counsel has wide latitude while making opening or closing statements." *Brewer v. Commonwealth*, 206 S.W.3d 343, 350 (Ky. 2006). We further note that:

> [o]pening and closing statements are not evidence and wide latitude is allowed in both. *Slaughter v. Commonwealth,* Ky., 744 S.W.2d 407 (1987). Counsel may draw reasonable inferences from the evidence and propound their explanations of the evidence and why the evidence supports their particular theory of the case. *Tamme v. Commonwealth,* Ky., 973 S.W.2d 13 (1998), *cert. denied,* 525 U.S. 1153, 119 S.Ct. 1056, 143 L.Ed.2d 61 (1999).

Wheeler v. Commonwealth, 121 S.W.3d 173, 180-81 (Ky. 2003).

The first preserved issue addresses a statement that Dr. Burton had seen Mary and Jack in the past without an appointment. The Herts objected to this statement, arguing that the information was a misstatement of the testimony. Following a bench conference discussion of the objection, the circuit court opted to inform the jury that the objection represented a dispute between counsel concerning the testimony that was elicited during the trial, and that they were to decide for themselves what the testimony truly was. This admonition is in line with the jury instructions, which provided as follows: "In making their final arguments, the attorneys will refer to the testimony as

they recall it. The attorneys will not knowingly misstate the testimony but if their recollection of the testimony differs from yours, you should rely on your own recollection of the testimony." Once she resumed her closing argument, defense counsel told the jury that she could have been incorrect in her recollection. Counsel for the Herts did not object any further. We cannot identify any error in the circuit court's action in regard to this issue.

The second preserved issue concerns a statement by counsel for Olash Medical that Jack and Mary should have contacted their son and daughter-in-law, who both work in the medical field, if they were so concerned about Mary's condition in August. The basis for this objection was an earlier ruling on a motion in limine, which precluded testimony by the daughter-in-law regarding conversations between Jack and his son. Based upon our review of the record, it appears that the circuit court sustained the Hert's objection, as this matter was not referred to again. Therefore, we cannot perceive any potential error to appeal.

5. Sufficiency of the Evidence

The Herts assert that the circuit court should have granted a JNOV, as Dr. Burton and Olash Medical failed to rebut the testimony of their expert witnesses that Dr. Burton had deviated from the standard of care. The Herts refer in their brief to the testimony of Dr. Peter LeWitt, Dr. Joel Heller, and Dr. James Whittle, as well as to a single medical report of Dr. John Gormley, to support this argument. Dr. Burton and Olash Medical both disagree with this statement of the testimony elicited at trial and assert that in a light most favorable to them, the evidence supported the denial of the Herts' motion for a JNOV.

Our standard of review is set forth in *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky.App. 1985):

> In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.

We have extensively reviewed the trial held in this matter, including the Herts' expert witnesses and medical records, and agree that Dr. Burton and Olash Medical submitted evidence and testimony to rebut the Herts' claims that Mary had experienced a TIA in August 2001 and that Dr. Burton deviated from the standard of care by failing to prescribe Coumadin and not immediately scheduling an appointment to see her. We note that the experts' opinions that Dr. Burton did not meet his standard of care are based on Mary having experienced a TIA on August 28 and not being put on Coumadin at that point, or in 1997 when her atrial fibrillation was diagnosed. In fact, Dr. Whittle stated that the linchpin for the whole case was his belief that Mary had a TIA on August 28. There was certainly evidence to support a conclusion that Mary did not suffer a TIA at all. Accordingly, we agree with Dr. Burton and Olash Medical that there was sufficient evidence to support the jury's finding that Dr. Burton's treatment of Mary was within the standard of care.

The circuit court did not commit any error in denying the Herts' motion for a JNOV based upon the sufficiency of the evidence.

6. Motion In Limine Concerning Responsibility of Unnamed Persons

This argument is similar to the one raised in Argument 3 above, in that both relate to the defendants' alleged attempts to shift liability to another person. Here, the Herts argue that the circuit court improperly denied their motion in limine to exclude any testimony regarding the fault, negligence, or liability of a third party. After much discussion, the circuit court denied the motion, based upon counsels' statements that they were not going to place blame on other physicians or argue that those other physicians were in some manner negligent. Rather, counsel for Dr. Burton and Olash Medical stated that they did not think either Dr. King or Dr. Imburgia was negligent and did not intend to argue otherwise to the jury. For the reasons stated above, we perceive no error in the circuit court's ruling or in the statement by defense counsel during closing argument.

7. Exclusion of Evidence of Dr. Burton's Credibility

During their cross-examination of Dr. Burton, the Herts were not permitted to introduce evidence that Dr. Burton was, in their opinion, less than honest in his deposition as to how many lawsuits had been filed against him. While he admitted that two suits had been filed, including the present case, counsel for the Herts uncovered another case. The circuit court opted to exclude this evidence pursuant to KRS 403, which provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury[.]" We agree. In Dr. Burton's avowal testimony, he testified that he had not understood the legal terms used during his deposition and had never been served with the "third" lawsuit. While Dr. Burton is a highly educated person, he is not an attorney, and his misunderstanding of legal terminology and the intricacies of the law is not

unexpected. Thus, the Herts attempt to attack Dr. Burton's credibility in this regard would have been unduly prejudicial and was properly excluded.

8. Defendants With Identical Interests and Theories

For this argument, the Herts dispute the circuit court's decision to allow Dr. Burton and Olash Medical to each undertake *voir dire* and direct and cross-examinations, and to give opening and closing statements, as there was no separate claim of negligence against Olash Medical and as their defenses were duplicative. The Herts specifically argue in their brief that "[t]wo voices telling the jury a unified version of events overcomes the lone voice of one attorney." We agree with Dr. Burton and Olash Medical that there is no merit to the argument. The Herts named both parties as defendants, affording both parties the right to retain counsel and put on a defense. As stated in the brief for Olash Medical, the Herts could have agreed to dismiss Olash Medical from their suit, as that party's liability would have been vicarious based upon its position as Dr. Burton's employer.

9. Personal Statements by Defense Counsel

A pretrial ruling on a defense motion in limine precluded counsel for the Herts from making any statements about his personal life to the jury, specifically that he had atrial fibrillation and was taking Coumadin. In granting the motion in limine, the circuit court made it clear none of the attorneys should do this. However, if a defense attorney were to "open the door" by discussing his or her personal life experience, then counsel for the Herts would be permitted to do so as well.

During her opening statement, counsel for Olash Medical made references to being a teacher, to a joke her former boss had told her, and that she liked when she called her doctor and he would change the dosage of her medication without her having to make an office visit. The Herts did not object to any of these statements. However, at the

conclusion of this opening statement, counsel for the Herts indicated that based upon those personal references, he then wanted to be able to talk about himself, including his atrial fibrillation diagnosis and Coumadin prescription, when he questioned the witnesses. Counsel for the defendants argued that this would be akin to making Mr. Franklin an expert witness. Counsel for the Herts ultimately withdrew the request. The pertinent parts of the trial read as follows:

> Attorney Franklin: Can we mention two other things if its okay with everyone?
>
> Judge: Sure.
>
> F: The only thing, sir, it's back to this, talking about whether I have A-fib or not. The personal comments about "I was a teacher before I was a lawyer" is talking about personal information. The next information was, um, Mr. Harmon, who I know well, telling the story about entering the practice of law; how she has learned about coincidence. And the final thing was when she called her doctor and had a conversation with the doctor and said, "I've got a sore throat send me some medicine." So she talks about personally herself on two occasions. I want to talk about myself personally. Um, three occasions.
>
> J: How do you propose doing this?
>
> F: I just want to say, that when I question people, we have spoken before, I talked to you about fluttering in the heart, because as you know, I told you I have atrial fibrillation. I'm on Coumadin and I talked to you about that. I talked to all their experts about it. They know. The way I propose to do it is just be allowed to have the same conversation with them here that I had in the deposition. No surprises.
>
> Attorney Grohmann: He's putting his own health at issue. I mean that's not a conversation that lay people know about. I mean putting his own health, his atrial fibrillation at issue. Some of this came up when my neurology expert was struck because he's Mr. Franklin's neurologist and we were gonna, you know, that was forbidden to get into anything so sensitive

as counsel's health. And I think that for him then to then be able to address it with the jury in front of the witnesses to talk about his A-fib and his Coumadin, which is what this case is about. I think it is prejudicial and of course, it's not relevant.

J: I guess that's my . . . how would it be relevant to any issue that this jury has to decide?

F: Well, when I was questioning some of their experts and I said, "Well can't there be fluttering or something as a precursor to know you have atrial fib" and this one guy said, "No, I haven't heard of that" or whatever. I said "Well, let me tell you, I've got fluttering, I've got atrial fib. I know what it is." Well, I'm telling these people when they go down this list of symptoms and they exclude the symptoms I have, you're wrong. This does happen to people. I know.

Attorney Phillips: I think that's the very problem, Your Honor. Are we going to put Mr. Franklin on the witness stand and question him about making him an expert on atrial fib, because he has it? I think that's the very problem we are trying to avoid by making the motion in limine to start with. Mr. Franklin has made some comments about his personal life as well. He talked about himself that he was divorced in response to one of the witnesses. Things about being divorced. He talked about never missing a meal. We make little personal comments to try to kind of segue to writing on the board or something like that. I'm not talking about anything that has any kind of an issue in this case at all.

J: (inaudible)

Attorney Barbour: She made the comment about, you know, she has a sore throat, she calls the doctor. She calls the doctor, "I've got a sore throat." The doctor says, "Oh, you've got strep, let me give you some antibiotics" to prove to the jury that it's okay for a doctor to treat you over the phone without ever laying hands on you. She let in her own personal knowledge about an issue that is at stake in this case as to whether or not it is reasonable as Mr. Grohmann and Mrs. Phillips argued in their opening statements. Is it reasonable for Mr. Burton to have never seen Mary, to have never spoken to her before he did this? She used her own personal experience to tell the jury it is okay. "I like it when my doctor does that." Those were her words.

> J: I think if in your closing if you want to argue that to the jury, I think we would all, you know we talked earlier about some things we all agree on. I think we all agree that there is a huge, huge difference between calling a doctor and saying I've got symptoms of a sore throat as opposed to calling the doctor and saying I've got numbness in my arm or something that might indicate a heart problem. Or I've got a growth on my skin that's abnormal or something. There's just a big, big difference. So if you want to argue that to the jury, that's fine, but I agree with defense counsel. If I let Mr. Franklin bring in his own personal health, it's going to open a can of worms that I'm not going to know how to put the lid back on.
>
> F: I withdraw it, sir.

The Herts now contend that they objected to these statements, that the circuit court should have permitted them to "enter the door" opened by counsel for Olash Medical by making these statement, and that the circuit court should have admonished the jury. First, we believe that the circuit court properly refused the Herts' request that their attorney be permitted to talk about his own medical condition when questioning the witnesses. Second, the Herts never actually objected to the statements; they did not make any contemporaneous objections during the opening statement and did not lodge an objection once it was completed. Rather, the Herts merely wanted the circuit court to rule that such statements opened the proverbial door, but ultimately withdrew the request. Finally, the Herts did not request that the circuit court admonish the jury in any fashion concerning defense counsel's statements. Therefore, the Herts failed to preserve this issue for review.

Even if we were to review this issue, we would nevertheless hold that such statements were not violative of the circuit court's order on the motion in limine, although counsel's statements regarding her experience with her own doctor were questionable. As

to defense counsel's discussion with Mary during her cross-examination regarding her own husband, we also perceive no error.

10. Exclusion of Karen Hert's Testimony as Hearsay

Next, the Herts argue that the circuit court erred when it excluded statements made by Mary's treating cardiologist, Dr. Imburgia, to the Hert's daughter-in-law, Karen Hert. According to Karen, when Dr. Imburgia visited Mary in the hospital on September 13 and Karen told him of Mary's symptoms on August 28, Dr. Imburgia then stated, "I wish Dr. Burton had called me. I would have put her on Coumadin." In excluding these statements, the circuit court found that such statements did not fall under the excited utterance exception to the hearsay rule.

An excited utterance is defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." KRE 803(2). The Supreme Court of Kentucky addressed this exception to the rule against hearsay in *Mounce v. Commonwealth*, 795 S.W.2d 375, 379 (Ky. 1990):

> The spontaneous statement exception to the hearsay rule provides that an extrajudicial statement made in response to a startling occurrence or event is admissible if it is spontaneous, relates to the startling occurrence or event, and consists of data that would be competent evidence if presented as testimony by the declarant. Lawson, *supra,* § 8.60(A), at 259. The theory behind the rule is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. *Preston v. Commonwealth,* Ky., 406 S.W.2d 398, 401 (1966), *cert. denied,* 386 U.S. 920, 87 S.Ct. 886, 17 L.Ed.2d 792 (1967), *quoting* 6 *J. Wigmore on Evidence,* § 1747 at 135 (1976).

> The key question in this case is whether the requirement of spontaneity has been met. The true test is "not when the exclamation was made, but whether under all the circumstances of the particular exclamation the speaker may be considered as speaking under the stress of nervous excitement and shock produced by the act in issue, or whether that nervous excitement has died away." *Preston,* 406 S.W.2d at 401. Circumstances that must be examined in each case are 1) lapse of time between the main act and the declaration; 2) the opportunity or likelihood of fabrication; 3) the inducement to fabrication; 4) the actual excitement of the declarant; 5) the place of the declaration; 6) the presence there of visible results of the act or occurrence to which the utterance relates; 7) whether the utterance was made in response to a question; and 8) whether the declaration was against interest or self-serving. *Souder v. Commonwealth,* Ky., 719 S.W.2d 730, 733 (1986), *quoting* Lawson, *supra.* [overruled on other grounds by *B.B. v. Commonwealth*, 226 S.W.3d 47 (Ky. 2007).]

We agree with the circuit court that Dr. Imburgia's statement to Karen does not fall within the excited utterance exception, or within any other exception to the rule against hearsay. Such a statement concerning Mary's medical treatment certainly would not have been made without reflection or deliberation, and it was not made for purposes of medical treatment or diagnosis under KRE 803(4). The circuit court did not abuse its discretion in ruling that Dr. Imburgia's statements to Karen were inadmissible as hearsay.

11. Highlighting of Medical Records

The Herts sought permission to highlight portions of the medical records that were submitted into evidence to aid the jury in its deliberation. Both Dr. Burton and Olash Medical opposed this request, arguing that such highlighting by the Herts would place undue emphasis on certain portions of the records and would be more like attorney work product. The circuit court denied this motion, which the Herts now claim was highly prejudicial to them. Dr. Burton and Olash Medical contend that such a decision is

left to the sound discretion of the circuit court, and that its discretion was not abused in this case. We have reviewed all of the cases cited by the Herts,[4] which generally hold that the trial court did not abuse its discretion in allowing highlighted documents or records to be sent to the jury.

We agree with Dr. Burton and Olash Medical that the circuit court did not abuse its discretion in disallowing the Herts' request. The medical records were not so voluminous so as to prevent the jury from adequately reviewing them and the Herts were permitted to show highlighted copies of the medical records to the jury during closing argument.

[4] All of the cases cited were outside Kentucky, but for one distinguishable case from the 6th Circuit.

12. Testimony Based Upon Never-Produced Medical Records

The Herts assert that they were surprised by Dr. Burton's testimony concerning missing medical records revealing Mary's diagnosis of and treatment for anxiety prior to 1997. During his testimony, Dr. Burton stated that he did not have Mary's medical records prior to 1997 because he changed practices, but that all of her records would be relevant. The Herts now argue that they are now entitled to a new trial because Dr. Burton never mentioned these missing, relevant records earlier.

Based upon our review of the record and trial, we cannot hold that the Herts were prejudiced in any way or that they are entitled to a new trial. The medical records submitted into evidence clearly show that Mary had been treated as far back as 1997 with Zoloft. In fact the record of Mary's April 28, 1997, office visit with Dr. Burton states: "She has had long standing problems with anxiety and depression. . . . She has a family history of major depression." Furthermore, the Baptist East Hospital records from September 13, 2001, when she had her stroke reveal a history of anxiety.

The circuit court did not commit any error in denying the Herts' motion for a new trial on this issue.

13. Plaintiffs Not Permitted to Explain Prior Lawsuit

Finally, the Herts claim that the circuit court erred when it refused to allow them to introduce testimony concerning a later lawsuit the Herts filed. This lawsuit was against a nursing home for injuries Mary suffered due to neglect while she was recuperating from pneumonia and a bacterial infection. The Herts assert that the circuit court should have permitted them to introduce photographs showing Mary's bedsores and that it then compounded the problem with its admonition by leading the jury to think she

received a “hefty award” due to her horrible injuries. The Herts wanted to introduce the photographs to show that they had a legitimate reason for bringing the suit against the nursing home. Dr. Burton and Olash Medical, while expressing some confusion as to what error the Herts were alleging on this issue, nevertheless argued that the circuit court did not commit any error in excluding the evidence or in what it stated to the jury concerning the other lawsuit, which is what the Herts sought to do.

We have reviewed the trial record as well as the excluded photographs, and agree that the circuit court's rulings were proper. The photographs would have been highly prejudicial, especially as they had no relevance to the complained of actions of Dr. Burton. Furthermore, the circuit court emphasized to the jury that the Herts had a legitimate complaint against the nursing home that was ultimately resolved.

CONCLUSION

For the foregoing reasons, we hold that the circuit court did not commit any error or abuse its discretion in relation to the issues raised by the Herts in this appeal, and specifically did not commit any error in denying their motion for a JNOV or for a new trial. Therefore, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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