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AUGUST 19, 2009
(FILE NO. 2008-SC-000396-DG)

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000376-MR
&
NO. 2007-CA-000499-MR

JERRY L. WOOLUM, M.D.,
INDIVIDUALLY; AND WOOLUM
& COMBS-WOOLUM, P.S.C. APPELLANTS/CROSS-APPELLEES

APPEAL AND CROSS-APPEAL FROM BELL CIRCUIT COURT
v. HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 03-CI-00391

LISA ANN HILLMAN, AS
ADMINISTRATIX OF THE ESTATE
OF CAITLYNN HILLMAN, DECEASED;
AND LISA ANN HILLMAN AND AARON
HILLMAN, AS SURVIVING PARENTS OF
CAITLYNN HILLMAN, DECEASED APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: ACREE AND STUMBO, JUDGES; GRAVES,[1] SENIOR JUDGE.

[1] Senior Judge John W. Graves, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes

STUMBO, JUDGE: This appeal and cross-appeal stem from a medical negligence wrongful death action. Lisa Ann Hillman was the patient of Dr. Jerry Woolum during her pregnancy with Caitlynn Hillman. Complications occurred during her pregnancy and Caitlynn was stillborn. A jury found medical negligence on the part of Dr. Woolum and awarded Mr. and Mrs. Hillman a total of $500,600 for their loss of companionship claims and funeral expenses. The jury also returned a verdict of $0 for the permanent impairment of Caitlynn to earn money had she lived. The trial court later ordered a new trial on the issue of the zero verdict for permanent impairment to earn money. Following the court's ruling on motions in limine in regard to certain evidentiary issues, the parties entered into an agreement stipulating that the loss to Caitlynn's estate was $475,000.00 and this appeal followed.

Dr. Woolum argues that the trial court made two evidentiary mistakes, erred in denying his motion for directed verdict, erred in not declaring a mistrial, and erred by granting the Hillmans a new trial on the issue of damages. The Hillmans cross-appeal and raise two additional issues to be considered by this Court. They argue that the trial court erred by not excluding the testimony of two of Dr. Woolum's experts during the first trial and erred by not preventing the jury of the second trial[2] from being informed about the damages awarded to them at the first trial.

After reviewing the records, briefs, and case law, we affirm the trial court on all the issues presented by Dr. Woolum except for the order preventing him from providing evidence at the new trial on damages. We find that he should be allowed to do so and reverse the trial court on this issue. As for the arguments presented by the Hillmans, we affirm the trial court as to the decision to allow expert testimony

(KRS) 21.580.

[2] The second trial referred to is the new trial dealing with damages only, which did not take place after the parties entered into the agreement described above.

concerning an unknown genetic defect. Their second argument is without merit as it is contrary to established Kentucky case law.

As stated above, this case revolves around a claim of medical negligence. Mrs. Hillman first learned she was pregnant when she saw Dr. Woolum on February 12, 2002. She began seeing Dr. Woolum regularly. On August 7, 2002, Dr. Woolum discovered Mrs. Hillman had high blood pressure. He put her on bed rest and told her he wanted to wait a couple more weeks before he delivered the baby.

During the rest of August, Mrs. Hillman began complaining to Dr. Woolum of not feeling well. This led to multiple office visits and at least one hospitalization. During the night of September 2 and early morning of September 3, Mrs. Hillman went into labor. She was taken to the hospital where she delivered a stillborn child. The cause of the child's death was contested. The Hillmans' theory was that the death was the result of uncontrolled preeclampsia, which is a rise in the mother's blood pressure which can cause the placenta to stop functioning. Dr. Woolum claimed the child died from an unknown genetic defect that resulted in a placenta too small to sustain the child.

Dr. Woolum's first argument is in regard to a decision by the trial court to permit evidence of a common medical malpractice insurance carrier between Dr. Woolum and one of his expert witnesses, Dr. Butcher. Before trial, Dr. Woolum made a motion in limine to exclude any testimony regarding the commonality of insurance between Dr. Woolum and his expert. His argument was and is that it is irrelevant because it was merely a coincidence; alternatively, if the court found it relevant, the prejudicial effect would greatly outweigh any probative value. He cites *Wallace v. Leedhanachoke*, 949 S.W.2d 624 (Ky. App. 1996), which states:

> The mere fact that the two physicians shared a common insurance carrier – absent a more compelling degree of

> connection – does not clearly evince bias by the expert, and its arguable relevance or probative value is insufficient to outweigh the well-established rule as to the inadmissibility of evidence as to the existence of insurance.

Id. at 628. Additionally, Kentucky Rules of Evidence (KRE) 411 states that:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

The trial court overruled Dr. Woolum's motion, noting that Dr. Butcher stated during depositions that he thought his malpractice insurance rates might rise if Dr. Woolum, who was insured by the same carrier, lost the case. Further, the court's order denying the motion set forth five additional reasons:

> (1) Dr. Butcher unequivocally stated in his deposition that he is of the belief and opinion that malpractice cases result in, and have a direct link to, rate increases;
>
> (2) Dr. Butcher left one state because he believed there was a collusion between judges and lawyers in malpractice cases;
>
> (3) Dr. Butcher's comments were so severe during his deposition that defense counsel felt the need to rein him in and caution him;
>
> (4) Dr. Butcher has established a general hostility to medical negligence cases;
>
> (5) Dr. Woolum and Dr. Butcher have more than simply the casual connection of having the same insurance company, as they had worked side by side for 20 years in the same community hospital.

Evidentiary rulings are reviewed for abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* at 581.

The trial judge carefully articulated his reasons for overruling this motion and only after having considered it carefully. Taking into consideration KRE 411 and using the KRE 403 balancing test (balancing the probative value against the danger of unfair prejudice), we find that the trial judge's decision to admit the evidence did not constitute abuse of discretion. The evidence was being utilized to show Dr. Butcher's extreme bias toward medical malpractice cases, which was a legitimate consideration for the jury in evaluating his testimony. Ordinarily, the prejudicial effect of such testimony would outweigh the probative value, but Dr. Butcher's hostility to malpractice cases is extreme and combined with his personal relationship to Dr. Woolum, provides a sufficient basis for the trial court to find that the testimony is admissible. Therefore we affirm the trial court's decision to overrule the motion in limine.

Dr. Woolum next argues that the trial court erred by allowing a videotape of an ultrasound done during the course of Mrs. Hillman's pregnancy to be shown to the jury during the testimony of Mrs. Hillman. Dr. Woolum moved in limine to exclude this evidence. During Mrs. Hillman's testimony, an ultrasound of Caitlynn at seven months was shown. Dr. Woolum argues that an ultrasound must be authenticated by a medical professional in order for the jury to understand what it is seeing. Furthermore, he contends that allowing the ultrasound to be shown so that Mrs. Hillman could cry as she testified was extremely prejudicial. Finally, Dr. Woolum claims that an ultrasound report had already been introduced; therefore, the video was unnecessary and cumulative.

The Hillmans claim that the video was necessary to show that at seven months, the child was healthy and moving and it was probative of the love and affection the Hillmans had for their daughter as it was the final image they had of her. They claim that a layperson can understand an ultrasound because a moving baby and heartbeat can be discerned.

According to KRE 1001(2), a video is considered a photograph. In order for a photograph, and therefore a video, to be introduced as evidence, it must be tested for admissibility using three factors.

> First, the [video] shall be properly authenticated. "An authentic [video] is one that constitutes a fair and accurate representation of what it purports to depict." Thus, "the [video] must ... be verified testimonially as a fair and accurate portrayal of [what] it is supposed to represent." Second, the [video] must be relevant by having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the [video]. "[I]f the fact to be evidenced by the [video] is itself not admissible, obviously it cannot be proved by [video] or otherwise." Third, the trial court must determine that the [video's] probative value is not "substantially outweighed by the danger of undue prejudice, confusion of the issues or misleading the jury, . . . or needless presentation of cumulative evidence." (Citations omitted).

Gorman v. Hunt, 19 S.W.3d 662, 669 (Ky. 2000).

We find that the video meets all three factors. The tape was authenticated by Mrs. Hillman as an ultrasound of Caitlynn. This was never refuted by the defense. During the hearing on this issue, the trial court found that the video was also relevant to the loss of companionship claim. Finally, the trial court pointed out that the prejudice must substantially outweigh the probative value and that during criminal trials, pictures of victims are allowed to be shown. We do not believe that the trial judge abused his discretion in admitting this evidence.

We do note that the video could be considered cumulative evidence since the ultrasound report had already been introduced into evidence. We find that even if it is cumulative evidence, it would not result in reversible error.

Dr. Woolum next argues that the trial court erred by denying his motion for a directed verdict after the Hillmans failed to present proof of the viability of their child. He argues that in order for the Hillmans to maintain a wrongful death cause of action,

they would have to prove Caitlynn would have been a viable infant sometime during Mrs. Hillman's pregnancy. *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. 1955). A viable infant is one that "if separated prematurely, and by artificial means, from the mother, it would be so far a mature natural human being as that it would live and grow, mentally and physically, as other children generally . . . ." *Id.* at 905-906.

The standard of review for motions for directed verdict was set forth by the Kentucky Supreme Court in *Lewis v. Bledsoe Surface Min. Co.*, 798 S.W.2d 459, 461-462 (Ky. 1990), when it stated:

> the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'" If the reviewing court concludes that such is the case, it is at liberty to reverse the judgment on the grounds that the trial court erred in failing to sustain the motion for directed verdict. Otherwise, the judgment must be affirmed. (Internal citations omitted).

Dr. Woolum claims the Hillmans put forth no evidence about the viability of Caitlynn and that the alleged genetic abnormality called into question the viability.

We find that the Hillmans did put on ample evidence regarding Caitlynn's viability. One of the Hillmans' expert witnesses, Dr. Richard Fields, stated that on August 7, 2002, he believed the baby was 31 or 32 weeks old. He further testified that if a baby is delivered at 31 weeks, the odds are overwhelmingly in its favor that it will survive. Also, he said that had the baby been delivered on August 19, during a hospitalization of Mrs. Hillman, that there was almost a one hundred percent survival

rate. Since the child was not delivered stillborn until September 3, it is clear that the child could have been viable in August.

Dr. Woolum's fourth argument is that a mistrial should have been granted due to inadvertent jury misconduct. During deliberations, two juror members became ill due to high blood pressure and heart problems. Dr. Woolum made a motion for a mistrial which was denied. He argues that because an issue in the case revolved around high blood pressure - the preeclampsia - a mistrial should have been granted. He argues that the two jurors could have become biased against him due to their high blood pressure and that the jurors who witnessed the illnesses may have become biased themselves due to the tense situation.

In order for a judge to grant a mistrial, the record must reveal "a manifest necessity for such an action or an urgent or real necessity." *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734, 738 (Ky. 1996)(quoting *Skaggs v. Commonwealth*, 694 S.W.2d 672, 678 (Ky. 1985)).

> It is universally agreed that a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice. The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way.

Id. Appellate courts review the denial of a motion for a mistrial using the abuse of discretion standard. *Shabazz v. Commonwealth*, 153 S.W.3d 806 (Ky. 2005).

After the two jurors fell ill, the trial judge gathered everyone into the courtroom and explained the situation. Because the deliberations could not continue that day, he recessed the trial, but admonished the jury multiple times before he did so. Further, the trial judge had properly admonished the jury each day of the trial not to talk to people about the case and to form no opinions about the case outside of the

evidence presented. Juries are presumed to follow the admonitions of the court. *Gould, supra*. "The trial judge is best qualified to weigh the possibilities of his admonitions having been disobeyed, by his knowledge and observation of the community and of the jurors." *Gravett v. Commonwealth*, 449 S.W.2d 416, 418 (Ky. 1969).

As noted above, the trial court admonished the jury on a daily basis. Further, when the jurors returned to finish their deliberations, the court asked if they had anything to report regarding the admonition he had given. None did and the deliberations continued. We also note that one of the jurors who fell ill found in favor of Dr. Woolum. We find that there was no jury misconduct and that without some evidence that the jury disregarded the admonitions given, a mistrial was not warranted.

Next, Dr. Woolum argues that the trial court erred by overruling the jury's verdict and granting the Hillmans a new trial on damages. The jury awarded the Hillmans $600 for funeral expenses and a total of $500,000 for the loss of companionship claims. The jury gave the Hillmans zero dollars for the total and permanent impairment of Caitlynn's power to earn money. The Hillmans moved for a new trial on the issue of damages because under Kentucky law, "[t]he measure of damages in a wrongful death action involving an infant is the destruction of the infant's power to earn money." *Rice v. Rizk*, 453 S.W.2d 732, 735 (Ky. 1970).

Case law in Kentucky is clear that "damages flow naturally from the wrongful death of a person unless there is evidence from which the jury could reasonably believe that the decedent possessed no power to earn money." *Turfway Park Racing Ass'n v. Griffin*, 834 S.W.2d 667, 671 (Ky. 1992). "There is an inference that the child would have had some earning power, and in this lies the basis for recovery." *Rice* at 735. Dr. Woolum contends that the evidence presented in regard to

the child's genetic defect could have permitted the jury to find that the child would have had no ability to earn money.

When reviewing a motion for a new trial, we use the clearly erroneous standard. *Turfway* at 669. The Kentucky Supreme Court in *Turfway* found that only evidence of a "disability so profound as to render [the child] incapable of earning money upon reaching adulthood[,]" *Turfway* at 671, would defeat a claim for permanent impairment. As noted *supra*, Dr. Woolum's defense was premised on there being a genetic defect that prevented the placenta from developing properly and thereby resulting in the stillbirth. On cross-examination, Dr. Woolum's expert was asked whether there was any evidence that, had Caitlynn been delivered before her intrauterine demise, she would have grown up to be anything but a normal woman. He replied that he had no evidence regarding that. The other experts who testified about the alleged genetic defect had no evidence that it would have caused her to grow up to be anything but normal. The Hillmans' expert witnesses testified that had Caitlynn been delivered prior to her intrauterine death, she would have grown up to be normal.

We find that the decision to grant a new trial on the issue of damages was not clearly erroneous. There was no evidence that the genetic defect would cause Caitlynn to have a "disability so profound as to render [her] incapable of earning money upon reaching adulthood." *Turfway* at 671. Rather the evidence indicated that the genetic defect alleged by the experts could have resulted in no negative effect on the child, mental retardation, downs' syndrome or death. None could say with any certainty which result was most likely. This issue was properly placed in the jury's hands to determine. The trial court did not err in granting a new trial on the issue of damages.

This leads us to a second issue regarding the new trial. Dr. Woolum also claims that the trial court erred by precluding him from presenting evidence at the new

trial that Caitlynn possessed no earning capacity. The Hillmans moved in limine to prevent Dr. Woolum from presenting the evidence regarding the unknown genetic defect because it was used solely as evidence of the cause of death and not as evidence regarding Caitlynn's earning capacity. They contended that the "law of the case doctrine" prevented the introduction of evidence not previously presented on the issue. The trial court agreed, finding that "[n]o evidence was introduced nor was it contended at trial that Caitlynn would have been profoundly disabled and unable to earn wages if she had survived." The Hillmans argued that this settled the issue of Caitlynn's earning capacity and as such, the "law of the case doctrine" precludes Dr. Woolum from putting on evidence that Caitlynn would have zero or diminished earning capacity due to the genetic defect.

The law of the case doctrine holds that "a ruling made at one stage of a lawsuit will be adhered to throughout the lawsuit." *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 706 n.4 (Ky. App. 2004). We do not believe this doctrine is applicable in this case. Saying no evidence was introduced regarding Caitlynn's lack of earning capacity is not the same as finding that issue settled. The finder of fact in this case, the jury, was not asked to determine whether a genetic defect existed or even whether or not it caused Caitlynn's death. All the jury was asked to determine was whether or not Dr. Woolum was negligent in his care for Mrs. Hillman and Caitlynn. There has been no ruling by the trial court which can be described as determinative of the issue of Caitlynn's earning capacity. Furthermore, the law of the case applies to rulings of law, not issues of evidentiary admission, and binds the lower court to which an appellate court remands the proceeding. *Hutson v. Commonwealth*, 215 S.W.3d 708, 714-715 (Ky. App. 2006); *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006). We

cannot find any Kentucky law that would prevent Dr. Woolum from presenting additional evidence regarding Caitlynn's diminished or lack of earning capacity on retrial.

As such, we reverse the trial court's order prohibiting Dr. Woolum from presenting evidence at the new trial regarding the genetic abnormality and Caitlynn's earning capacity.

On cross-appeal, the Hillmans first argue that the trial court erred by failing to exclude the proffered testimony regarding the genetic abnormality as the cause of Caitlynn's death. Prior to trial, the Hillmans filed a motion in limine to prevent Dr. Woolum's two experts from testifying as to their theory that Caitlynn died due to a genetic abnormality. They argued that the testimony did not meet the test for expert testimony set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). *Daubert* requires a trial judge to determine if proffered expert testimony is "(1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert* at 592.

Daubert lists a number of factors a trial judge should consider when making decisions regarding admissibility. While not exclusive, four pertinent factors to consider are: (1) whether the theory or technique can be tested; (2) whether the theory or technique has been subject to peer review and publication; (3) whether the theory or technique has a known or potential rate of error; and (4) whether the theory or technique is generally accepted in the scientific community. *Id.* at 593-594.

The Kentucky Supreme Court has held that the standard of review of a trial court's *Daubert* ruling is two-fold. *Miller v. Eldridge*, 146 S.W.3d 909 (Ky. 2004). The *Daubert* standard exists to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Miller* at 914, *citing Daubert* at 589.

> [A]s a result, the distinct aspects of the *Daubert* analysis-the findings of fact, i.e., reliability or non-reliability, and the

> discretionary decisions, i.e., whether the evidence will assist trier of fact and the ultimate decision as to admissibility-must be reviewed under different standards. Because the findings of fact that *Daubert* rulings are based on are preliminary in nature-the ultimate decision as to admissibility depends on these findings-an error that is alleged in the trial court's findings of fact must be reviewed for clear error before the appellate court can reach the discretionary aspects of the trial court's decision.

Miller at 915. If the trial court's decision regarding the witness's reliability was supported by substantial evidence, then it is not clearly erroneous. *Id.* at 918. If the trial court's decision regarding the relevancy of the expert testimony was arbitrary or unreasonable, then it was an abuse of discretion. *Goodyear Tire*, *supra*.

The Hillmans focused on the four *Daubert* factors set forth above when making their argument concerning the expert testimony. They contend that because the genetic defect fell into the "unknown" category, it was unreliable and could not be tested. Additionally, they state that because the genetic disorder was an "unknown" one and did not have a name, it was impossible to determine if it had been subject to peer review. Further, the "unknown" status of the disorder prevented the court from determining if there was a rate of error or if the theory was accepted by the scientific community.

As stated above, these four factors are not exclusive. We must, therefore, examine the evidence using the two part test set forth by *Miller* and not focus solely on the four factors. First, we will look at the reliability of the expert testimony and see if it was supported by substantial evidence. The genetic defect was identified by Dr. Woolum's experts based on trophoblast inclusions found in the placenta. Dr. Woolum provided the Court with evidence in the form of testimony from his experts and articles from medical journals that trophoblast inclusions have been found in placentas and have been linked to genetic defects. One of the experts, Dr. Butcher, is an obstetrician

and gynecologist and the other, Dr. Kliman, is a placental pathologist. Dr. Kliman has also authored and co-authored articles dealing with placentas and genetic anomalies.

We do recognize that the genetic defect discussed in this case fits in the "unknown" category, but that is no reason to exclude the evidence out of hand. Based on the evidence presented, the qualifications of the two experts and the additional scholarly material supplied by Dr. Woolum, dealing with placentas and trophoblast inclusions, there was substantial evidence upon which the trial court could find that the testimony was reliable. The decision to permit the introduction of the evidence was not clearly erroneous.

Next we look to the relevancy of the evidence. This evidence was clearly relevant to the case. It was Dr. Woolum's entire defense. He claimed it was this genetic defect and not his negligence that caused Caitlynn's death. Further, it assisted the trier of fact in understanding the correlation between placentas, unborn babies, and genetic defects. It was not unreasonable for the trial judge to admit this evidence at trial.

"The decisions of trial courts as to the admissibility of expert witness testimony under *Daubert* are generally entitled to deference on appeal because trial courts are in the best position to evaluate first hand the proposed evidence." *Miller* at 914.

> [A]ppellate courts must recognize the unfortunate but necessary corollaries of deference to the trial court: that it is possible for a trial court to rule contrary to what an appellate court would rule without abusing its discretion or being clearly erroneous, and that an appellate court is powerless to disturb such rulings. The abuse of discretion and clear error standards allow an appellate court to walk this fine line-to engage in a meaningful review without resorting to retrying the issue-by requiring a thorough *but deferential* examination of the record and the trial court's findings of fact and rulings.

Id. at 917 (emphasis in original). We find that the evidence of the genetic defect was properly admitted. The areas of genetics is an ever expanding field and this Court, like the trial court, understands that not all genetic abnormalities will have names or be fully understood. Further, any concerns the Hillmans had with the genetic defect evidence could and were brought out during cross-examination of the witnesses.

The final argument of the Hillman's cross-appeal is that the trial court erred by rejecting their proffered jury instructions for the trial on damages only and in denying their motion in limine to exclude the introduction of the prior jury verdict at the trial on damages.

The proposed jury instructions would have omitted the awards the Hillmans received at the first trial. The same issue is the focus of the motion in limine addressed above. The Hillmans did not want the second jury to be informed about their earlier awards for loss of companionship. This issue has already been decided by the Kentucky Supreme Court in the case of *Turfway Park Racing Ass'n v. Griffin*, 834 S.W.2d 667 (Ky. 1992).

In *Turfway*, the Supreme Court recognized that the loss of companionship and the capacity to earn money were two distinct legal claims, but found that the ultimate beneficiaries were the same people, that the litigation arose out of a single event, and that the claims were initially tried in one proceeding. *Id.* at 673. The Supreme Court stated that "it would be inherently unjust to permit the jury on retrial to award what it may mistakenly believe to be the parents' only compensation. To achieve a just and informed verdict, and under the unique facts presented here, the jury on retrial should be told of the damages previously awarded." *Id.* The case at bar is extremely similar to the *Turfway* scenario and the same reasoning applies. Thus we affirm the trial court's decision on this issue.

For the foregoing reasons, the decision of the lower court is affirmed in part, reversed in part and remanded for a new trial on the issue of loss of power to earn money only in accordance with the directions of this court.

ACREE, JUDGE, CONCURS.

GRAVES, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

GRAVES, SENIOR JUDGE, DISSENTING: Respectfully, I dissent.

Dr. Butcher declared under oath that his insurance premiums would not be directly affected by his testimony on behalf of Dr. Woolum. That is, his cost of insurance would neither be increased nor decreased. This evidence is unrebutted.

Consequently, the mere coincidence of being covered by the same insurance company does not indicate sufficient bias or prejudice to affect credibility. Any probative value of admitting evidence of insurance coverage is substantially outweighed by the likely predilection to find liability without fault. With a hired expert witness, prejudice or bias may be demonstrated without mentioning common insurance coverage. Admitting evidence of common insurance coverage was superfluous.

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