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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000540-MR

JOHN D. KING — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 00-CI-04594

DR. JOHN R. ALLEN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO, THOMPSON, AND WINE, JUDGES.

STUMBO, JUDGE: John King appeals several adverse evidentiary rulings by the trial court during the course of a medical malpractice trial. Mr. King claims the trial court erred in its rulings on expert testimony, the admission of medical records, and the application of the collateral source rule. Dr. Allen argues that the trial court made the proper rulings and would have us affirm. We affirm the judgment in favor of Dr. Allen.

Mr. King was diagnosed with peripheral vascular disease of his right foot on March 22, 1999, by Dr. Edwin Rogers. This disease causes blood vessels and arteries to become blocked. In May of 1999, the skin on Mr. King's leg had become inflamed and the blocked blood vessels had not improved. Two days later, Dr. Rogers performed a bypass on Mr. King's leg. The bypass turned the saphenous vein in his leg into an artery, allowing blood flow to return to the foot. The surgery was successful and Mr. King's foot developed a strong pulse. This procedure is only a semi-permanent solution in that the bypass may only last ten years.

Due to a delayed healing of the leg following the procedure, Mr. King was referred to the Wound Care Center under the care of Dr. Allen. Dr. Allen performed a debridement of the wound on an almost weekly basis. A debridement consists of removing dead tissue surrounding the wound. One such debridement occurred on December 29, 1999. During the course of this debridement, the saphenous vein was damaged and began bleeding. Dr. Allen attempted to control the bleeding while a vascular surgeon was summoned. The surgeon was able to stitch the tear in the vein and stop the bleeding.

Mr. King was discharged and returned to the care of Dr. Rogers. Upon examination, Dr. Rogers could no longer feel a pulse in Mr. King's right foot. Dr. Rogers concluded there was an obstruction preventing blood flow. Dr. Rogers believed that he could do nothing more for the foot because there were no more open vessels in the leg that could be used for another bypass.

Soon thereafter, Mr. King's leg began to bleed once again at the site of the debridement. Dr. Rogers was forced to tie off the saphenous vein to stop the bleeding. Dr. Rogers concluded nothing more could be done and believed the leg would ultimately have to be amputated.

In order to get a second opinion, Mr. King began treating with Dr. Eric Endean in January of 2000. On January 17, Dr. Endean performed another bypass surgery on Mr. King's leg. This time, however, Dr. Endean used a vein harvested from Mr. King's arm. This bypass restored some blood flow, but after a month, the vein became obstructed. Dr. Endean determined that nothing more could be done to save Mr. King's leg and foot. The leg was amputated on March 4, 2000.

Mr. King then brought suit against Dr. Allen for medical malpractice. His theory was that Dr. Allen punctured the first bypass during the December 29, 1999 debridement causing the vein to fail and ultimately leading to the amputation of his leg. A jury trial was held from January 28, 2008, to January 30, 2008. The jury returned a verdict in favor of Dr. Allen and this appeal followed.

As stated *infra*, Mr. King appeals the trial court's ruling on evidentiary issues. The proper standard for review of evidentiary rulings is 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." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Mr. King first argues that the trial court erred when it limited the testimony of Dr. Endean. Dr. Endean was disclosed as one of Mr. King's expert witnesses. He was deposed on November 26, 2003. During the deposition, Dr. Endean was asked several questions regarding how he would have treated Mr. King and made some criticisms of Dr. Allen's treatment. Counsel for Dr. Allen objected arguing that Dr. Endean's testimony should be limited to his treatment of Mr. King and that he was not to offer any opinions on Dr. Allen's treatment. Dr. Allen's counsel argued that Dr. Endean's opinion testimony was not disclosed under Civil Rule (CR) 26.02.

Dr. Allen moved in limine to limit Dr. Endean's testimony to his own treatment of Mr. King ten months prior to trial. The trial court granted the motion in part, limiting Dr. Endean's testimony but only if he testified via deposition and not at trial. Additionally, Mr. King was given time to supplement his CR 26.02 disclosure and re-depose Dr. Endean regarding his opinions of Dr. Allen's treatment. Mr. King did neither. Further, Dr. Endean did not testify live at trial and his deposition testimony was therefore limited as the court had previously set forth.

Concerning expert testimony, CR 26.02 states in relevant part:

> Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of paragraph (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (a) (i) A party may through interrogatories require any other party to identify each person whom the other party

> expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) After a party has identified an expert witness in accordance with paragraph (4)(a)(i) of this rule or otherwise, any other party may obtain further discovery of the expert witness by deposition upon oral examination or written questions pursuant to Rules 30 and 31. . . .

CR 26.02(4).

Mr. King's CR 26.02 expert disclosure states that Dr. Endean would testify

> concerning his treatment of John King, during the year 2000 and as the medical records from the University of Kentucky indicate, his subsequent surgery and amputation of Mr. King's leg. Dr. Endean will further testify that the cause of the amputation of Mr. King's leg was the ligation of the saphenous vein in Mr. King's leg, which resulted from the bleeding around the wound caused by Dr. Allen's scalpel. Dr. Endean will further testify that after the saphenous vein was ligated and the leg could not ultimately be saved, because there was not another suitable vein in Mr. King's body to reconstruct the in situ graft, and this ultimately caused the leg to be amputated. Dr. Endean's records are attached, but have been previously obtained by all counsel pursuant to written releases signed by John King.

(R. at 113).

While this disclosure states that Dr. Endean will testify regarding the cause of the amputation, it does not state that he will be discussing the standard of care or any shortcomings in Dr. Allen's treatment of Mr. King. This is in contrast to the disclosure relating to Dr. Mark Gladstein, another expert for Mr. King,

which states that he would testify regarding Dr. Allen's failure to satisfy the standard of care in this situation and what Dr. Allen should have done.

"Pretrial discovery simplifies and clarifies the issues in a case; eliminates or significantly reduces the element of surprise; helps to achieve a balanced search for the truth, which in turn helps to ensure that trials are fair; and it encourages the settlement of cases." *LaFleur v. Shoney's, Inc.*, 83 S.W.3d 474, 478 (Ky. 2002). "The discovery of the substance of an expert witness's expected testimony is essential to trial preparation." *Clephas v. Garlock, Inc.*, 168 S.W.3d 389, 394 (Ky. App. 2004). We cannot say that the decision to limit Dr. Endean's testimony was arbitrary, unreasonable, or unfair. Without proper disclosure, the parties' counsel could not have fully prepared for the deposition. The inability to properly prepare is particularly important in this case since the deposition was the only testimony submitted by Dr. Endean. The trial court gave Mr. King avenues that would have permitted Dr. Endean's full testimony to be heard at trial. The court would not have limited the testimony if Dr. Endean had testified live at trial. Alternatively, the court gave Mr. King time to supplement his disclosure and redepose the physician. This was not an abuse of discretion.

Mr. King next argues that the collateral source rule was erroneously applied when he was prohibited from introducing evidence of $80,000 in medical bills paid by his insurance company. The collateral source rule holds that:

> a tortfeasor is not entitled to any credit against what he owes for payments of medical expenses or disability benefits paid by a *collateral source* to the tort victim

> pursuant to a contractual obligation owed to the victim from the collateral source, whether it be first party insurance coverage, employment benefits, or otherwise. *See Hellmueller Baking Co. v. Risen,* 295 Ky. 273, 174 S.W.2d 134 (1943), and cases cited therein. Nor is the tortfeasor entitled to introduce evidence at trial of such payments, except to corroborate other evidence, if there is any, that establishes malingering. *Hellmueller Baking Co. v. Risen, supra,* 174 S.W.2d at 136.

Burke Enterprises, Inc. v. Mitchell, 700 S.W.2d 789, 796 (Ky. 1985). In essence, no evidence of a victim's collateral source payments (i.e. insurance payments) can be introduced at trial. The issue of applicability of the collateral source rule is reviewed *de novo*. *Schwartz v. Hasty*, 175 S.W.3d 621, 625 (Ky. App. 2005).

Mr. King attempted to introduce the extent of his medical bills and the fact that his own insurance company paid $80,000 in medical bills. Counsel for Dr. Allen objected citing the collateral source rule. The trial court sustained the objection. Mr. King argues that he should have been allowed to introduce this evidence for two reasons. First, Mr. King sought to introduce this testimony as corroboration that he suffered an injury and the extent of the treatment he received. Second, the testimony was to speak to his credibility because he had testified he was on a fixed income of $20,000 a year and that $80,000 in medical bills had been paid. Mr. King contends that without testimony as to the source of the payments, the truthfulness of his testimony about his financial situation could be called into question by the jury.

This case is unusual in that usually it is the plaintiff who objects to the defendant or tortfeasor's attempt to introduce this type of evidence. We find that

the trial court did err in excluding evidence of Mr. King's insurance payments. The collateral source rule is applied to protect the plaintiff from the possibility that a jury may consider the payments when setting the amount of damages to be awarded. Collateral source payments are considered irrelevant and immaterial because they have no place in the calculation of the award. *McCormack Baron & Associates v. Trudeax*, 885 S.W.2d 708 (Ky. App. 1994). However, collateral source payments have been admitted when found to be relevant and admissible for a purpose other than the calculation of an award of damages. In *Burke Enterprises, Inc v. Mitchell*, 700 S.W.2d 789 (Ky. 1985), the tortfeasor was permitted to introduce evidence of collateral source payments for purpose of showing malingering. If Mr. King wished to waive this protection, he should have been allowed to do so.

However, we also find that this error was harmless.

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

CR 61.01. We do not believe that the outcome of the trial would have been different had this information been introduced. The primary issues were the cause

of injury and the medical standard of care. It is very unlikely that the extent and source of insurance payments would affect the jury's decision on those issues.

Mr. King also argues that the medical records of Dr. John Meek should not have been admitted into evidence because they were never subject to cross-examination as Dr. Meek was not deposed and did not testify during trial. Further, he asserts that a record of Dr. Meek's was improperly displayed to the jury during opening statements.

Mr. King alleges that the introduction of Dr. Meek's medical records was improper because they had never been subject to cross-examination. He claims that without supporting testimony, the records might be subject to "distortion, confusion, or misunderstanding." *Young v. J.B. Hunt Transportation, Inc.*, 781 S.W.2d 503 (Ky. 1989). We disagree. The records at issue contain 10 pages of medical facts and observations, two which are a patient history and the others which discuss follow-ups Mr. King had with Dr. Meek from June 9, 1999, to October 4, 1999. They were relevant to show the history of Mr. King's leg issues, they were properly authenticated, they are excluded from the rule against hearsay evidence, *Baylis v. Lourdes Hospital, Inc.*, 805 S.W.2d 122, 123 (Ky. 1991), and thus testimony is not required for these records to be introduced, *Id*.

Even assuming, *arguendo*, that this was in error, it would be harmless error. The records predate the debridement at issue and show that Mr. King's leg was healing properly, albeit slowly. These records could be found to bolster Mr.

King's case in that his leg was on the mend prior to the debridement injury. It was not an abuse of discretion to admit these records into evidence.

During opening statements, counsel for Dr. Allen used an enlarged version of a medical record, showing it to the jury. Counsel for Mr. King objected. During the bench conference, the demonstrative exhibit was not taken down and was in view for the jury. The part of the record at issue is an opinion by Dr. Meek that amputation of the leg at issue was inevitable prior to the performance of the procedure by Dr. Allen. The trial court ruled that Dr. Meek's records could not be discussed during opening statements, but their overall admissibility would be ruled on later. Defense counsel then removed the record from the jury's view.

Mr. Allen now claims that it was prejudicial error to allow the record to stay in view of the jury during the bench conference. We find this issue was not preserved. Mr. King's counsel objected to the use of the record during opening statements and the court ordered the record removed, which it was. No request was made for the record to be removed during the bench conference. Further, there was no request for an admonition or a mistrial. Mr. King received the remedy he requested. *See Lanham v. Commonwealth*, 171 S.W.3d 14, 29 (Ky. 2005).

Mr. King's final argument is that Dr. Allen failed to disclose information concerning a potential bias of his expert witness, Dr. Jacob Robison, and that the admission of his testimony was improper. *Tuttle v. Perry*, 82 S.W.3d 920 (Ky. 2002), explains

> [e]xposure of potential bias based on self-interest is often attempted through cross-examination directed at how much the witness is being paid for his or her services in the case at bar, the frequency with which the witness testifies in similar kinds of cases, whether the witness customarily appears for a particular type of party (usually plaintiff or defendant), whether the witness is frequently employed by a particular party or attorney and, if so, how much income the witness derives from that employment, and . . . the amount or the percentage of the witness's total income that is derived from lawyer referrals or testimony in lawsuits. Some forms of inquiry seek to uncover a specific and enduring relationship between the witness and the party or attorney, from which a direct bias may be inferred. Others are directed at exposing the more subtle problem of the professional "hired gun," who earns a significant portion of his or her livelihood from testifying and, rather than having a tie to a specific party or attorney, may have a general economic interest in producing favorable results for the employer of the moment.

Id. at 923-924 (*quoting Wrobleski v. de Lara*, 727 A.2d 930 (Md. 1999)).

In May, October, and December of 2006, Mr. King requested information and documents regarding Dr. Robison's fees and history. Dr. Allen responded by stating that he was attempting to obtain this information. Then, on January 16, 2007, Mr. King filed a motion to compel Dr. Allen to produce the information requested. No hearing was held or order entered concerning this motion that we can find in the record.

The week before trial, Dr. Allen had not provided the information requested. Mr. King therefore filed a motion to prohibit introduction of Dr. Robison's testimony. At a pretrial conference on January 25, 2008, the trial court denied the motion and directed that the information being sought be furnished to

Mr. King. Also, according to an Agreed Narrative Statement contained in the record, Mr. King declined an offered continuance at this pretrial conference.

Some of the information sought was provided on January 28, 2008, and the rest on January 29, 2008. Additionally, the trial court directed that counsel for Mr. King be allowed to speak with Dr. Robison the night before he was to testify. Dr. Robison was to testify the morning of January 31, 2008. Mr. King argues that by not producing the information in a timely manner, his counsel did not have enough time to prepare for Dr. Robison's testimony. While this is a strong argument, we must still affirm the trial court's decision to allow Dr. Robison to testify.

Mr. King properly filed a motion to compel in order to gain the information concerning Dr. Robison's potential bias. CR 37.01; *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 118 (Ky. App. 1998); *Poe v. Rice*, 706 S.W.2d 5 (Ky. App. 1986). However, nothing came of the motion and it was apparently never pursued by Mr. King.

Mr. King's only argument to support the reversal of this decision of the lower court is that he did not have enough time to prepare for Dr. Robison's testimony. As stated above, Mr. King was offered a continuance during a pretrial conference, but declined it. Also, he was eventually provided with all the information he requested and permitted to interview Dr. Robison the night before he testified. During trial, counsel for Mr. King questioned Dr. Robison about his potential bias. Counsel established through testimony that Dr. Robison had never

testified for a plaintiff and that he had not yet sent a bill for his involvement in this case. Counsel for Mr. King was also able to prepare an exhibit regarding the amount of time Dr. Robison had spent reviewing the materials for this case.

As previously stated, evidentiary issues are reviewed for an abuse of discretion. Further, the "[i]mposition of sanctions for failure to comply with a discovery request is within the trial court's discretion." *M.P.S.*, *supra*, (*citing Greathouse v. American National Bank & Trust Co.*, 796 S.W.2d 868 (Ky. App. 1990)). Mr. King was offered a continuance, but declined it. Also, he was able to acquire the information he requested, albeit only the day before Dr. Robison's testimony. Finally, Mr. King does not indicate what other potential evidence of bias or credibility he was seeking that would have required more time. We find this was not an abuse of discretion.

For the above reasons we agree with the decisions of the trial court and affirm the judgment in favor of Dr. Allen.

ALL CONCUR.

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