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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001354-MR

JAMES DORNBUSCH — APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ANTHONY W. FROHLICH, JUDGE
ACTION NO. 08-CI-01333

BRIAN MILLER, M.D.; THE ST. LUKE HOSPITALS, INC.; THE EMERGENCY CARE PHYSICIANS OF NORTHERN KENTUCKY, P.S.C.; AND THE HEALTH ALLIANCE OF GREATER CINCINNATI, INC. — APPELLEES

NO. 2011-CA-001358-MR

THE ST. LUKE HOSPITALS, INC.; AND THE HEALTH ALLIANCE OF GREATER CINCINNATI, INC. — CROSS-APPELLANTS

v. CROSS-APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ANTHONY W. FROHLICH, JUDGE
ACTION NO. 08-CI-01333

JAMES DORNBUSCH; BRIAN MILLER, M.D.; THE EMERGENCY

CARE PHYSICIANS OF NORTHERN
KENTUCKY, P.S.C. CROSS-APPELLEES

NO. 2011-CA-001380-MR

BRIAN MILLER, M.D.; AND
EMERGENCY CARE PHYSICIANS OF
NORTHERN KENTUCKY, P.S.C. CROSS-APPELLANTS

CROSS-APPEAL FROM BOONE CIRCUIT COURT
v. HONORABLE ANTHONY W. FROHLICH, JUDGE
ACTION NO. 08-CI-01333

JAMES DORNBUSCH; THE ST.
LUKE HOSPITALS, INC.;
AND THE HEALTH ALLIANCE
OF GREATER CINCINNATI, INC. CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; MOORE AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: This matter involves a combined appeal and two protective cross-appeals from the Boone Circuit Court's May 12, 2011 Trial Order and Judgment entered after a jury's verdict finding no medical malpractice in a suit by a patient against an emergency medicine physician, the physician's employer, and the hospital where the incident occurred.

Appellant/Cross-Appellee James Dornbusch contends the circuit court committed numerous evidentiary errors, published improper jury instructions, and

erroneously afforded the physician and the hospital three peremptory challenges each. We do not find his arguments for setting aside the judgment persuasive; therefore, we affirm.

Appellees/Cross-Appellants Dr. Brian Miller, and his employer, The Emergency Care Physicians of Northern Kentucky, P.S.C. (Emergency Care), protectively cross-appeal claiming the circuit court erred by denying their motion for a directed verdict as to Dornbusch's damages.

Appellees/Cross-Appellants The St. Luke Hospitals, Inc. (St. Luke), and its managing corporation, the Health Alliance of Greater Cincinnati, Inc. (Health Alliance), also protectively cross-appeal asserting: (1) St. Luke was entitled to a directed verdict on the issue of apparent agency relative to Dr. Miller; (2) the circuit court erred by denying their motion for a directed verdict as to a portion of Dornbusch's damages; and (3) the circuit court erred by refusing to issue a comparative fault jury instruction.

As we have found no grounds warranting reversal of the judgment in favor of the Appellees/Cross-Appellants, the arguments set forth in the cross-appeals are moot and, therefore, will not be addressed.

I. Facts and Procedure

Because the issues raised on appeal relate solely to alleged procedural error, the underlying facts are of little consequence. Suffice it to say on June 12, 2007, Dornbusch went to St. Luke's emergency room complaining of severe

abdominal pain, vomiting, and diarrhea. St. Luke's nursing staff treated Dornbusch. Approximately two hours later, Dr. Miller treated Dornbusch. Shortly thereafter, he was discharged. However, Dornbusch continued to experience pain and diarrhea. The next day, Dornbusch visited another hospital where hospital staff discovered a non-functioning bowel and performed emergency surgery to remove a portion of his bowel.

In June 2008, Dornbusch filed suit, alleging that St. Luke, by and through its nursing staff, and Dr. Miller breached their respective standards of care when treating Dornbusch, which resulted in substantial damages. He also sought to hold St. Luke vicariously liable for Dr. Miller's acts.[1] As additional facts become relevant, they will be discussed.

Procedurally, the circuit court conducted a jury trial beginning on April 25, 2011 and lasting six days. The jury returned a verdict for the Appellees. On May 12, 2011, consistent with the jury's verdict, a trial order and judgment was entered in the Appellees' favor. The circuit court denied Dornbusch's post-judgment motions. This appeal and two cross-appeals followed.

II. Issues on Appeal

Dornbusch presents five arguments on appeal. He claims first that the circuit court erroneously granted Dr. Miller and St. Luke three peremptory challenges each for a total of six rather than three challenges to be exercised between them. Second, he claims the circuit court erred by permitting an

[1] Dornbusch further attempted to hold Emergency Care vicariously liable for the acts of Dr. Miller, and Health Alliance vicariously liable for the acts of St. Luke.

undisclosed expert witness to testify at trial. Third, he asserts the circuit court improperly limited Dornbusch's cross-examination of defense expert Dr. Greg Henry. Fourth is his claim that the circuit court committed prejudicial error when it allowed defense expert Dr. George Thomas to testify at trial. Fifth and finally, Dornbusch argues that the jury instructions published to the jury unacceptably emphasized certain portions of those instructions. We do not find Dornbusch's arguments convincing and, therefore, affirm.

III. Standard of Review

Dornbusch's claims of error relate primarily to the circuit court's evidentiary rulings. We review those rulings for an abuse of discretion. *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 725 (Ky. 2009). "An abuse of discretion occurs when a trial judge's decision [is] arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Baptist Healthcare Sys., Inc. v. Miller*, 177 S.W.3d 676, 684 (Ky. 2005) (citation and internal quotation marks omitted). However, claimed errors regarding jury instructions are questions of law which we review *de novo*. *Harstad v. Whiteman*, 338 S.W.3d 804, 817 (Ky. App. 2011).

IV. Analysis

A. Peremptory Challenges

Dornbusch first argues that allotting St. Luke and Dr. Miller three peremptory challenges apiece (rather than a total of three peremptory challenges to share between them) was error because they did not have antagonistic interests and presented a united front prior to and during trial. St. Luke and Dr. Miller disagree.

All agree, however, that *Sommerkamp v. Linton*, 114 S.W.3d 811 (Ky. 2003) is the controlling authority on this issue.

In *Sommerkamp*, the Kentucky Supreme Court pointed out that the relevant procedural rule, Kentucky Rules of Civil Procedure (CR) 47.03, states:

> (1) In civil cases each opposing side shall have three peremptory challenges, but co-parties having antagonistic interests shall have three peremptory challenges each.
>
> (2) If one or two additional jurors are called, the number of peremptory challenges for each side and antagonistic co-party shall be increased by one.

114 S.W.3d at 815 (citing CR 47.03). In ascertaining whether co-parties have antagonistic interests within the meaning of CR 47.03(1), *Sommerkamp* first identifies three general factors: "1) whether the coparties are charged with separate acts of negligence; 2) whether they share a common theory of the case; and 3) whether they have filed cross-claims." *Id.* *Sommerkamp* then tempers those factors with several additional considerations, namely: "whether the defendants are represented by separate counsel; whether the alleged acts of negligence occurred at different times; whether the defendants have individual theories of defense; and whether fault will be subject to apportionment." *Id.*

Sommerkamp further demands that this Court, in reviewing the circuit court's decision, refrain from substituting "its judgment for that of the trial judge in . . . the absence of an abuse of discretion[;]" whether we would have decided the issue differently does not affect our review. *Id.* at 814-15. As referenced, 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).

In this case, the circuit court, prior to trial, concluded St. Luke and Dr. Miller had sufficiently antagonistic interests to justify allotting them their own peremptory challenges. A careful review of the record reveals the respective interests of St. Luke and Dr. Miller were indeed antagonistic.

In his complaint, Dornbusch charged St. Luke and Dr. Miller with independent acts of negligence. Dornbusch averred each Appellee owed him a separate and distinct duty of care. While Dornbusch also pleaded vicarious liability, Dornbusch clearly sought to hold St. Luke and Dr. Miller liable upon their own negligence. Each Appellee played a different role in treating Dornbusch, and each Appellee's alleged negligence occurred at different points during that treatment: St. Luke's through its nursing staff when Dornbusch first arrived at the hospital, and Dr. Miller's a few hours later.

St. Luke and Dr. Miller were represented by separate counsel, filed separate answers, and identified separate expert witnesses to testify at trial. While the Appellees' defense theories and expert witnesses, at times, intertwined and overlapped, their interests were not wholly aligned and the two did not share a wholly common defense theory. In fact, Dr. Miller claimed prior to trial that the nursing staff's failure to transmit certain information to him affected his treatment of Dornbusch.

Apportionment was also at issue and, as represented by the Appellees prior to trial, was to be included in the jury instructions. "Inherent in the Kentucky law of apportionment, KRS 411.182, is that the interests of codefendants may be considered antagonistic." *Sommerkamp*, 114 S.W.3d at 816. Under the apportionment doctrine, St. Luke and Dr. Miller each sought to escape or minimize liability by convincing the jury that the other was responsible for Dornbusch's injuries. In a case such as this "where two [medical actors] were alleged to have committed entirely separate acts of negligence," the inherently antagonistic framework of apportionment "alone provides sufficient justification for the trial court's decision[]" to award separate peremptory challenges. *Bayless v. Boyer*, 180 S.W.3d 439, 448 (Ky. 2005).

Dornbusch counters by asserting that no cross-claims were filed, and St. Luke and Dr. Miller ostensibly participated in united defense efforts. While true, "those factors cannot be viewed in isolation from the other elements regarding antagonistic interests." *Davis v. Fischer Single Family Homes, Ltd.*, 231 S.W.3d 767, 774 (Ky. App. 2007). "[T]he clear language" of CR 47.03(1) "does not require the defendants to demonstrate a certain degree of antagonism, but only the existence of antagonism . . . at the time of jury selection, in order to permit separate preemptory challenges." *Sommerkamp*, 114 S.W.3d at 816. We cannot say the circuit court abused its discretion in finding Dr. Miller and St. Luke satisfied this burden.

We pause here to emphasize Dornbusch's argument that Dr. Miller and St. Luke's interest could not be antagonistic because, *at trial*, they presented a united front, and at no point *at trial* attempted to shift the blame to the other. Dornbusch asserts, *at trial*, "Dr. Miller was highly complementary of St. Luke's nursing staff[,]" who returned the favorable compliments to Dr. Miller, and the Appellees' attorneys declined to even reference the apportionment instruction during closing arguments. (Appellant's Brief at 13-14). We need not fully address this argument because we do not review the trial court's decision through the special lens of hindsight, but based on the evidence before the trial court when that determination was made, before presentation of the case to the jury; "subsequent trial strategy is" simply irrelevant. *Davis*, 231 S.W.3d at 774; *Bayless*, 180 S.W.3d at 448 ("[A] trial court's ruling under CR 47.03 is necessarily made prior to trial and a review of that decision need not focus on what actually occurred during the proceedings."). Here, the circuit court made its antagonistic-interest decision preceding the Appellees' presentation of proof. At that time, as explained, Dr. Miller and St. Luke's interests were sufficiently antagonistic. *Sommerkamp*, 114 S.W.3d at 816 ("[I]nterests that are antagonistic . . . when the trial judge makes a determination regarding entitlement to separate preemptory challenges[] do not necessarily have to remain antagonistic through the trial[.] There can be no certainty as to what the evidence will demonstrate or precisely what claims or defenses will be during trial."). Dornbusch's argument is unavailing.

Dornbusch further suggests that the first three factors outlined in *Sommerkamp* are entitled to more weight and, in turn, take precedence over the latter four factors. We reject this characterization for two reasons. First, *Sommerkamp* reiterates that the trial court must weigh "*all*" factors when making its antagonistic-interests determination. *Id.* (emphasis added). The Supreme Court opted not to impose labels such as "primary," "main," or "lesser" when describing the factors to be weighed. Second, the Supreme Court faulted this Court in *Sommerkamp* for affording "disqualifying weight to a single factor," thereby again indicating the cumulative effect once *all* factors are weighed, not the mere existence or non-existence of one or two factors, is what ultimately influences the trial court's decision. *Id.* at 816; *Davis*, 231 S.W.3d at 773 ("Due weight shall be given to each of these factors as the existence or absence of a single factor is insufficient to make a determination as to the reasonableness of the trial court's ruling.").

In sum, the circuit court perceived antagonism between Dr. Miller and St. Luke's interests, and properly allotted peremptory strikes accordingly. We find no abuse of discretion and affirm on this issue.

B. Undisclosed Expert Witness

Dornbusch asserts the circuit court erroneously permitted defense expert Dr. Charles Eckerline to testify at trial regarding whether St. Luke, through its nursing staff, breached its standard of care when treating Dornbusch. Dornbusch asserts Dr. Eckerline's opinions on that topic were not disclosed prior

to trial in a CR 26.02(4)(a) expert witness disclosure or in any supplementation to discovery answers. Following a careful review, we discern no error.

On June 10, 2010, the circuit court ordered all parties, "if proper request has been made" to disclose its expert witnesses in compliance with CR 26.02(4)(a)(i). (Record at 57). Pursuant to this order and CR 26.02(4)(a)(i), Dr. Miller, but not St. Luke, identified Dr. Eckerline as an expert witness; Dr. Eckerline was slated to testify, on Dr. Miller's behalf, concerning an emergency medicine physician's standard of care, and Dr. Miller's compliance with that standard. Soon thereafter, St. Luke filed its expert witness disclosure; St. Luke did not identify Dr. Eckerline as one of its expert witnesses.

Dornbusch deposed Dr. Eckerline on February 17, 2011. During the discovery deposition, Dornbusch, through counsel, asked Dr. Eckerline if he was familiar with Dornbusch's experts' depositions, including that of Nurse Cynthia Bratcher. Nurse Bratcher was the nursing expert retained by Dornbusch to opine on the negligence of St. Luke. Dornbusch then asked Dr. Eckerline to go through each of those depositions, and identify the expert opinions with which he disagreed.[2] Dr. Eckerline responded:

> Well, I clearly disagree with Nurse Bratcher. I don't think there was any indication for the nurse to get labs. That's a physician decision, and the physician's decision was correct in my view. And of course, even with the event of hindsight, we know that labs wouldn't have changed anything. I disagreed that the patient wasn't triaged properly. I disagreed that the patient needed to be

[2] Dr. Eckerline also gave other responses prior to directly responding to Dornbusch's original question outlined.

> brought back directly. I disagreed with some of her opinions that seem to me to be appointed to the physician, not just the nurses. . . .

Dornbusch's counsel further explored Dr. Eckerline's opinions concerning the quality of nursing care rendered by St. Luke by asking several follow up questions; this persisted for several minutes. After moving on to other subjects for awhile, Dornbusch's counsel returned to this issue:

> [Counsel]: Do you have an opinion, Doctor, as to whether the nurses breached [the] standard of care at St. Luke Hospital during the time that they cared for James Dornbusch?
>
> [Doctor]: Yes, I do.
>
> [Counsel]: And what is that opinion?
>
> [Doctor]: My opinion is that they did not breach the standard of care.
>
> [Counsel]: Okay. And what do you base that opinion on.
>
> [Doctor]: My review of the records, their depositions, and my knowledge and experience in emergency medicine and working with nurses for 31 years at this point.

Subsequent to this exchange, St. Luke orally notified the parties it intended to extract this same testimony from Dr. Eckerline at trial. Dornbusch requested St. Luke submit a revised CR 26 disclosure identifying Dr. Eckerline; St. Luke refused. The parties feverishly disputed whether St. Luke could elicit from Dr. Eckerline any opinion regarding the quality of nursing care rendered absent a proper CR 26 disclosure. All agreed to "take it up with the Court."

At trial, prior to Dr. Eckerline taking the stand, Dornbusch verbally moved to prohibit Dr. Eckerline from expressing any opinions regarding the nursing standard of care, arguing those opinions had not been previously identified in St. Luke's CR 26.02 expert witness disclosure. The circuit court denied Dornbusch's motion, but limited Dr. Eckerline's testimony on that issue to the questions asked and corresponding answers given during his deposition.

Dornbusch maintains the circuit court abused its discretion in so ruling because St. Luke adopted Dr. Eckerline as an expert witness and filed an expert witness disclosure, but failed therein to identify Dr. Eckerline or reference any opinions by Dr. Eckerline on the topic of nursing case. Having received no CR 26 expert witness disclosure or supplemental discovery answers, Dornbusch claims he was surprised and substantially prejudiced by Dr. Eckerline's nursing-related testimony, and is therefore entitled to a new trial.

CR 26.02(4)(a) provides, in pertinent part:

> (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.

A "trial court is vested with wide discretion in determining to admit or exclude expert testimony." *Jones v. Stern*, 168 S.W.3d 419, 424 (Ky. App. 2005); *Hashmi v. Kelly*, 379 S.W.3d 108, 111 (Ky. 2012). Discovery matters such as this that "come within the discretion of the trial court . . . do not amount to reversible error unless there is an abuse of discretion and substantial prejudice." *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450, 1466 (6th Cir. 1993); *Equitania Ins. Co. v. Slone & Garrett, P.S.C.*, 191 S.W.3d 552, 556 (Ky. 2006) ("[T]he person requesting exclusion of testimony must show prejudice. Otherwise, there is no valid basis to exclude or limit testimony."). In the case before us, the circuit court did not exceed its discretion when it permitted Dr. Eckerline to testify as to the nursing standard of care. Our reasoning is three-fold.

First, as referenced above, Dr. Miller and St. Luke are co-defendants with interests determined by the trial court to be antagonistic. Each identified and disclosed separate, independent witnesses, including expert witnesses, who would testify. Dr. Miller identified Dr. Eckerline as an expert witness in his CR 26.02(4)(a)(i) disclosure, Dr. Miller called Dr. Eckerline at trial during his case-in-chief, and Dr. Miller conducted the direct examination of Dr. Eckerline. *See* BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "direct examination" as the "first questioning of a witness in a trial or other proceeding, conducted by the party who called the witness to testify"). There is only one direct examination of a witness; all others are cross-examinations. St. Luke cross-examined Dr. Eckerline. St. Luke's reference to Dr. Eckerline's opinions concerning the nursing standard of

care did not exceed the acceptable bounds of cross-examination.[3] Kentucky Rules of Evidence (KRE) 611(b) ("A witness may be cross-examined on ***any matter relevant to any issue*** in the case, including credibility." (emphasis added)).

Second, to the extent St. Luke failed to comply with the letter of CR 26.02, Dornbusch was not placed at a disadvantage; St. Luke adhered to the spirit of the rule at least. *See Hicks*, 566 S.W.2d at 171. After Dornbusch elicited Dr. Eckerline's opinion on the nursing standard of care, St. Luke repeatedly notified Dornbusch it intended to extract these same opinions at trial. Dornbusch fully knew of the substance of Dr. Eckerline's nursing-related opinions, having extracted those opinions himself. Of course, supplementing its prior CR 26.02(4)(a)(i) expert witness disclosure would undoubtedly have been the better practice.[4] Nevertheless, in light of the above and under the specific facts of this case, we cannot say St. Luke's failure to do so surprised and prejudiced Dornbusch. Without such prejudice, as more fully explained below, St. Luke's failure to fully comply with CR 26.02(4)(a)(i) did not make the circuit court's pre-trial order erroneous. *See Hicks*, 566 S.W.2d at 171 (holding the defendant's failure to abide by the civil rule requiring him to supplement its answers to interrogatories to inform the plaintiff of the identity of the defendant's expert

[3] Perhaps the better course of action would have been for Dornbusch to move the circuit court to limit St. Luke's cross-examination of Dr. Eckerline to matters testified to on direct examination. KRE 611(b) ("In the interests of justice, the trial court may limit cross-examination with respect to matters not testified to on direct examination.").

[4] We are puzzled by St. Luke's reluctance to provide a revised CR 26 disclosure. This could have been accomplished easily. We do not intend by this opinion to give sanction to the method it employed in this case. To avoid the risk of error which may be found under other facts, practitioners should reject this method in favor of actual compliance with the rule.

witness did not result in reversible error; the defendant put the plaintiff on notice that expert would be called at trial thereby complying with the "purpose and spirit of the Civil Rules").

Third, as a corollary to the above, we reject Dornbusch's argument that Dr. Eckerline's nursing-care testimony at trial surprised and severely prejudiced him. As aptly noted by Dornbusch, CR 26.02(4)(a) is designed to simplify and clarify the issues, disclose the expert's identity and the substance of his opinions to the fullest practicable extent, and to reduce the element of surprise at trial. *See* CR 26.02(4)(a); *Hicks*, 566 S.W.2d at 171 (CR 26.02(4)(a)(i) "is designed to give the opposing party a chance to prepare for the trial itself"); *Clephas v. Garlock, Inc.*, 168 S.W.3d 389 (Ky. App. 2004). Here, Dornbusch first claims surprise on the basis that St. Luke failed to name Dr. Eckerline in its initial CR 26.02(4)(a) expert witness disclosure. We need only point out that St. Luke filed its expert disclosure *prior* to Dr. Eckerline's deposition. St. Luke represents, and we have been given no reason to doubt, that it lacked any knowledge that Dr. Eckerline would render any expert opinion regarding the nursing care standard until Dr. Eckerline voiced those opinions during his deposition.

Dornbusch next claims surprise on the basis that, without an amended CR 26.02 expert witness disclosure, it had no knowledge Dr. Eckerline would render any opinions regarding nursing care. As previously stated, it was Dornbusch's own deposing of Dr. Eckerline that elicited his opinion as to the nursing standard of care; without Dornbusch's own questions, this expert opinion may never have

been expressed. Further, immediately thereafter, St. Luke put Dornbusch on notice that Dr. Eckerline's nursing-care testimony may be elicited at trial. We cannot discern how and in what manner Dornbusch was "surprised" when St. Luke, in fact, did what it said it would do and questioned Dr. Eckerline on the issue at trial.

Dornbusch also claims he was severely prejudiced because he could not evaluate Dr. Eckerline's nursing-care opinions before trial. We disagree. Dornbusch had ample opportunity to depose Dr. Eckerline prior to trial, address Dr. Eckerline's nursing-related opinions offered, and explore the basis of those opinions. Significantly, the circuit court prevented any prejudice from permeating the trial by limiting Dr. Eckerline's testimony on the issue of nursing care to the exact questions asked and exact answers given during his deposition. Dornbusch has failed to identify how this claimed error resulted in prejudice. *See Equitania Ins. Co.*, 191 S.W.3d at 556; *Clark v. Johnston*, 492 S.W.2d 447, 450 (Ky. 1973) (explaining there must be a *prejudicial* error to warrant reversing a circuit court's decision to exclude a witness).

In further support of his position, Dornbusch directs our attention to this Court's opinion in *Clephas*, *supra*. In that decision, this Court ordered a new trial because the defendant's failure to disclose the opinion of its medical expert witness "seriously undermined" the plaintiff's ability to adequately practice its case. *Clephas*, 168 S.W.3d at 394-95. Of particular importance to the reasoning in *Clephas* was the defendant's failure to produce his expert witness for deposition, despite being ordered to do so, and the defendant's decision to provide the plaintiff

with the expert witness's competing standard of care opinion for the first time at trial. *Id.* at 394. *Clephas* is factually distinguishable from the case now before us. In *Clephas*, the plaintiff was wholly uninformed as to the defendant's medical expert's opinion, and was deprived of the opportunity to depose the expert to obtain those opinions. Here, by contrast, Dornbusch did depose Dr. Eckerline prior to trial, was made fully aware of his opinion regarding the quality of nursing care rendered, and was made fully aware that St. Luke intended to rely on Dr. Eckerline's opinion on this issue at trial. Dornbusch's reliance on *Clephas* is misplaced.

For the foregoing reasons, we cannot say the circuit court abused its broad discretion by permitting Dr. Eckerline to testify whether St. Luke's nursing staff breached its standard of care. On this issue, we affirm.

C. Cross-Examination of Dr. Greg Henry

Dornbusch next argues it was clear error for the circuit court to prohibit the cross-examination of defense expert Dr. Greg Henry regarding his opinions on tort reform and the judicial system. Dornbusch asserts these areas were probative of Dr. Henry's bias and credibility and, consequently, admissible. The Appellees counter that Dr. Henry's views on tort reform and medical malpractice adjudication are collateral matters irrelevant to the issues at trial.

"The presentation of evidence as well as the scope and duration of cross-examination rests in the sound discretion of the trial judge." *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997) (quoting *Moore v. Commonwealth*,

771 S.W.2d 34, 38 (Ky. 1988)). Similarly, the circuit court is vested "with broad discretion to evaluate the proof of bias on a case-by-case basis." *Woolum v. Hillman*, 329 S.W.3d 283, 289 (Ky. 2010). We will only reverse the circuit court's decision to limit bias evidence on cross-examination if the circuit court abused its discretion. *See id.*

Evidence is relevant if it has any tendency to make a fact more or less likely than it would be without the evidence. KRE 401. Characteristically, "[e]vidence to show bias of an expert witness is relevant" and, therefore, admissible. *Underhill v. Stephenson*, 756 S.W.2d 459, 461 (Ky. 1988). Nevertheless, the circuit court, as the gate-keeper of evidence, must carefully define the breadth of admissible bias evidence to avoid undue prejudice, confusing, enflaming, or misleading the jury, undue delay, and the needless presentation of cumulative evidence; where to draw the line is not always clear. *See Woolum*, 329 S.W.3d at 290 ("Absent unusual circumstances wherein the evidence would be [extremely prejudicial or] minimally probative, the principal question is the scope of the evidence of bias to be allowed," not its "initial admissibility" (citation omitted)); *Baker v. Kammerer*, 187 S.W.3d 292, 296 (Ky. 2006); KRE 403.

While "the law favors admissibility of evidence of bias[,]" the Kentucky Supreme Court continues to recognize "the trial court's inherent discretion over evidentiary questions such as this one." *Baker*, 187 S.W.3d at 296. "Because a multitude of factors may be considered by a trial judge addressing

[whether to admit bias evidence], judges are free to consider a spectrum of potential remedies." *Id.* The circuit judge here did just that.

Despite Dornbusch's arguments to the contrary, the record reveals the circuit court did not "completely shield[] the jury from evidence of [Dr. Henry's] possible bias." *Id.* at 295. The circuit court permitted Dornbusch to question Dr. Henry on a host of topics potentially exposing Dr. Henry's biases, including: Dr. Henry's involvement with two medical malpractice insurance companies; his lectures and written commentaries discussing a "malpractice crisis"; the fact that Dr. Henry frequently testifies as an expert witness in legal/medical cases, and the majority of those times for a defendant physician; Dr. Henry's opinion that he is one of the best medical/legal experts in the business; his experience teaching doctors to handle themselves when giving medical/legal depositions; his compensation for testifying for the Appellees; his compensation for working as a consultant for a medical malpractice insurance company; and his own prior malpractice claims. Without question, these topics are relevant to issue of bias, as they paint Dr. Henry as defense oriented with an eye toward disfavoring medical malpractice lawsuits and the manner in which they are adjudicated. However, there is "a point beyond which inquiry [into a witness's bias] is to be considered too prejudicial and intrusive." *Primm v. Isaac*, 127 S.W.3d 630, 636 (Ky. 2004); KRE 403. The circuit court, through the proper exercise of its discretion, found Dr. Henry's opinions concerning tort reform to be beyond that point and limited Dr. Henry's cross-examination accordingly.

If the trial court had prohibited all inquiry into Dr. Henry's bias, Dornbusch's argument would carry more weight. As it is, the quantum of bias evidence Dornbusch sought to admit was quite large, and the circuit court allowed much of it. Under these circumstances, we cannot say the circuit court abused its discretion.

D. Testimony of Defense Expert Dr. George Thomas

Dornbusch also contends the circuit court abused its discretion when it permitted defense expert Dr. George Thomas to testify on St. Luke's behalf, despite St. Luke's violation of an order, agreed upon by the parties and approved by the circuit court, that each party's live witnesses would be disclosed twenty-four hours in advance and "no later than at the end of the previous day's trial session." In response, St. Luke asserts it twice informed Dornbusch, well in advance, that it intended to call Dr. Thomas as an expert witness.

These are the facts relevant to this issue. On Friday morning, April 29, 2011, the parties and the circuit court discussed the witnesses St. Luke intended to call on the following Monday, May 2, 2011. At that time, St. Luke identified four witnesses, including Dr. Thomas. At the close of evidence on Friday afternoon, the parties and the circuit court again discussed St. Luke's Monday witnesses. St. Luke identified two more witnesses for a total of six. Regarding Dr. Thomas, St. Luke's counsel explained that because two emergency medicine expert physicians already testified, St. Luke was considering not calling Dr. Thomas.

When Monday arrived, Dornbusch sought to prevent Dr. Thomas from testifying. As grounds, Dornbusch stated that St. Luke indicated the previous Friday it was seriously considering not calling Dr. Thomas as an expert witness and did not notify Dornbusch it was *definitely* calling Dr. Thomas until 9:30 p.m. on Sunday, May 1, 2011. Dornbusch viewed this as a blatant violation of the parties' agreed order.

The circuit court ultimately concluded the St. Luke did not violate the order, noting that, on Friday, April 29, 2011, St. Luke clearly indicated all six of its witnesses would testify on Monday, May 2, 2011, with the *possibility* that St. Luke would cut a few. The circuit court also found, and we readily repeat, that St. Luke did not waive its right to call Dr. Thomas as an expert witness.

Our review of the record reveals the circuit court's interpretation of the parties' discussions on Friday, April 29, 2011 was sound. We understand Dornbusch's counsel's confusion. The circuit court concluded that St. Luke had done what was required by the agreed order to maintain the right and possibility of calling Dr. Thomas. We cannot say the circuit court abused its discretion regarding this ruling.

E. Jury Instructions

Finally, Dornbusch asserts the circuit court improperly emphasized certain portions of the instructions submitted to the jury, resulting in reversible error. The circuit court instructed the jury, in relevant part, as follows:

INSTRUCTION NO. 3

It was the duty of the Defendant, Dr. Brian Miller, in treating the Plaintiff, James Dornbusch, to exercise that degree of care and skill of a reasonably prudent physician, acting under the same or similar circumstances as described in the evidence of this case.

QUESTION NO. 2

Do you find from the evidence that the Defendant Brian Miller, M.D., (a) failed to perform his duty as described in Instruction No. 3, and (b) that such failure was a substantial factor in causing injury to Plaintiff?

INSTRUCTION NO. 4

It was the duty of the Defendants, St. Luke Hospitals, Inc., through its nurses, in treating the Plaintiff, James Dornbusch, to exercise that degree of care and skill of a reasonably prudent hospital (through its nurses), acting under the same or similar circumstances as described in the evidence of this case.

QUESTION NO. 3

Do you find from the evidence that the Defendant St. Luke Hospitals, Inc., though its agents and employees, (a) failed to perform its duty as described in Instruction No. 4, and (b) that such failure was a substantial factor in causing injury to Plaintiff?

Dornbusch takes issue with the circuit court's decision to separate the breach and causation elements by using the modifiers (a) and (b), and to underline the word "and". Dornbusch maintains this alleged "undue emphasis was improper and prejudicial to [Dornbusch] in that it heightened and unnecessarily drew attention to the dual nature of the burden required to be met." (Appellant's Brief at 17). We reject Dornbusch's argument. In fact, we find the contrary to be true.

"[B]are bones" jury instructions are the norm – and are perfectly proper – in Kentucky. *Cox v. Cooper*, 510 S.W.2d 530, 535 (Ky. 1974). The instructions serve "to furnish guidance to the jury in their deliberations and to aid them in arriving at a correct verdict." *Ballback's Adm'r v. Boland–Maloney Lumber Co.*, 306 Ky. 647, 208 S.W.2d 940, 943 (1948). Jury instructions survive scrutiny if they are "based upon the evidence and they . . . properly and intelligibly state the law." *Howard v. Commonwealth*, 618 S.W.2d 177, 178 (Ky. 1981).

The elements of a medical negligence action do not differ from any other negligence action: duty, breach, causation, and injury. *Grubbs ex rel. Grubbs v. Barbourville Family Health Ctr., P.S.C.,* 120 S.W.3d 682, 687 (Ky. 2003). Absent one element, a jury's verdict for the plaintiff will not survive. *See Hyman & Armstrong, P.S.C. v. Gunderson*, 279 S.W.3d 93, 113 (Ky. 2008); *Reams v. Stutler*, 642 S.W.2d 586, 588 (Ky. 1982).

In *Geyer v. Mankin*, 984 S.W.2d 104 (Ky. App. 1998), this Court affirmatively stated that "[i]t is the law in this state that instructions should not give undue prominence to certain facts or issues." *Id.* at 108. However, in the case before us, the instructions do not, as Dornbusch suggests, imbue any *facts* or *issues* with undue prominence. Instead, by bifurcating "breach" and "causation" into two elements and underlining the word "and", the circuit court merely reminded the jury there are multiple elements in a medical malpractice claim, each of which must be established by the evidence in order to justify a verdict in Dornbusch's favor. *Grubbs*, 120 S.W.3d at 688 ("In Kentucky, if the physician's service falls

below the expected level of care and skill and this negligence proximately caused injury or death, then all elements of a malpractice action have been met."). The instructions as written did not serve to confuse or mislead the jury, but rather to clarify that the jury could not impose liability unless it found from the evidence that all the elements of negligence were met. *See id.; Hilsmeier v. Chapman*, 192 S.W.3d 340, 344 (Ky. 2006) ("Blending separate and distinct legal propositions in the same instruction is bad form and it is much better practice to incorporate each proposition in a separate instruction[, or in separate paragraphs or items]." (citation omitted)).

The jury in this matter asked a single question of the circuit court during deliberations: "If question part 'A' has a majority of yes votes but question part 'B' has a majority of no votes can we award damages solely on part 'A'?"[5] This question is telling. It indicates that, but for the jury instructions as written, the jury may have returned a verdict awarding damages even though a majority voted that St. Luke's breach of duty was not a substantial factor in Dornbusch's injury. The jury instructions plainly served their stated purpose, *i.e.* to guide the jury's deliberations "and to aid them in arriving at a correct verdict." *Ballback's Adm'r*, 208 S.W.2d at 943.

The emphasis placed on the conjunctive in the instruction was intended to assure that the jury would not treat elements of the cause of action in a disjunctive manner. Dornbusch cites cases from foreign jurisdictions in support of

[5] The question related to St. Luke's liability under Question Number 3 (set forth above).

his argument that this is improper, but those cases are easily distinguishable. Rather, "the general rule, recognized in these cases, is that jury instructions should not give undue emphasis to any phase of the case favorable to either side[.]" *Slaubaugh v. Slaubaugh*, 466 N.W.2d 573, 580 (N.D. 1991). For example, in *Slaubaugh*, the trial court violated this rule by underlining one part of jury instruction that said "any damages allowed shall be diminished or reduced in proportion to the amount of negligence attributable to the plaintiff." *Id.* This was not even a jury function in that jurisdiction but "may well have misled the jurors into believing that it was their function to diminish or reduce [the plaintiff's] actual damages." *Id.* Without distinguishing each case cited individually, suffice it to say they none of these cases persuades us that our analysis is incorrect.

The jury instructions in this matter accurately reflect Kentucky law. *See Howard*, 618 S.W.2d at 178. We find no error.

V. Conclusion

For the foregoing reasons, the Boone Circuit Court's May 12, 2011 Trial Order and Judgment in favor of the Appellees is affirmed.

Our decision to affirm the circuit court on all issues raised on direct appeal renders the Appellees respective cross-appeals moot and we decline to further address them.

ALL CONCUR.

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