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TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2013-CA-001677-MR

KATHY McABEE

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT  
HONORABLE JAMES C. BRANTLEY, JUDGE  
ACTION NO. 11-CI-00387

DARREN C. CHAPMAN, M.D.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON, COMBS, AND VANMETER, JUDGES.

COMBS, JUDGE: Kathy McAbee appeals the judgment of the Hopkins Circuit Court which ruled in favor of Dr. Darren Chapman in a medical negligence action. After reviewing the record and the law, we affirm.

Only the procedural facts are pertinent to this appeal. McAbee filed a lawsuit against Dr. Chapman claiming medical malpractice. A jury trial began on

August 20, 2013. Both parties presented expert witnesses in support of their claims. On August 23, the jury found in favor of Dr. Chapman. McAbee then filed this appeal.

The sole issue before us is the trial court's ruling concerning separation of witnesses. On the second day of trial, the court ruled that experts were permitted to remain in the courtroom during testimony. The court invoked what is known as "the rule," which is the vernacular for Kentucky Rule[s] of Evidence (KRE) 615. The rule allows a court to order witnesses to remain outside the courtroom when they are not testifying. The purpose of KRE 615 is to prevent witnesses' being influenced by the testimony of other witnesses. *Smith v. Miller*, 127 S.W.3d 644, 645-646 (Ky. 2004). However, it includes three exceptions:

- (1) A party who is a natural person;
- (2) An officer or employee of a party which is not a natural person designated as its representative by its attorney; or
- (3) A person whose presence is shown by a party to be essential to the presentation of the party's cause.

KRE 615. In this case, the experts were subject to the third exception; *i.e.*, the trial court found that they were essential to the parties' presentations.

A trial court has broad discretion in deciding whether a witness is essential. *Hatfield v. Commonwealth*, 250 S.W.3d 590, 594 (Ky. 2008); Robert G. Lawson, *Kentucky Evidence Law Handbook*, §11.40(3)(b) at 881 (5<sup>th</sup> Edition 2013). We may overturn a decision of the court only if it has abused its discretion; *i.e.*, if it

has acted arbitrarily, unreasonably, unfairly, or in a manner “unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Our Supreme Court has not spoken in detail regarding the application of KRE 615(3).<sup>1</sup> However, it has provided some guidance in *Hatfield v. Commonwealth, supra*, in which the Court reversed the trial court’s decision to allow a witness to remain in the courtroom because there had been no basis demonstrated<sup>2</sup> to support the decision. The trial court had made a conclusory ruling. In contrast, the Supreme Court held that the ruling was improper, holding that before the exception may be invoked, the requesting party must make a showing that its witness is essential to the party’s case. *Id.* at 594

Because of the scarcity of Kentucky case law, for further analysis, we have reviewed federal law, which considers the identical Federal Rule[s] of Evidence (FRE) 615. *See Meece v. Commonwealth*, 348 S.W.3d 627, 698 (Ky. 2011). The Sixth Circuit has explained that “[t]he essential witness exception set out in Rule 615(3) ‘contemplates such persons as an agent who handled the transaction or an **expert needed to advise counsel in the management of the litigation.**’” *U.S. v. Phibbs*, 999 F.2d 1053, 1073 (6<sup>th</sup> Cir. 1993) (quoting the Advisory Committee Notes to [FRE] 615) (Emphasis added). Additionally, in the case of a criminal prosecution, it has reasoned that:

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<sup>1</sup> In the Kentucky Law Evidence Handbook, *supra*, in 2013, Professor Lawson noted that the Supreme Court of Kentucky had not rendered any decisions affirming the excepting of expert witnesses from the rule. We have been unable to find any subsequent to publication of his statement.

<sup>2</sup> Additionally, the witness at issue in *Hatfield* was a lay witness, not an expert.

[t]he case agent is the prosecutor's information source and even if the agent were excluded, the prosecutor would still have to reveal to him what other witnesses had said and done in order to map out strategy. This [revelation] would defeat the whole purpose of sequestration.

*U.S. v. Martin*, 920 F.2d 393, 397 (6<sup>th</sup> Cir. 1990).

As was the trial court, we are persuaded that the case before us is similar to the situation contemplated by the law. As directed by *Hatfield, supra*, the trial court conferred with the parties before ruling on whether to allow the expert witnesses to remain in the courtroom. Dr. Chapman indicated that his expert witness was essential for management of the case. Neither expert would be testifying regarding the facts; both would offer their opinions.

Due to the type of testimony proffered by the experts, the trial court was satisfied that the experts would not influence each other regarding the facts. The facts had been provided to the experts by way of the medical records. Neither expert had participated in the treatment of McAbee.

As the trial court noted, the experts would be offering different opinions about the same set of facts. Each party would necessarily need to address the opinions of the opposing party on cross-examination. Because of the technical nature of the evidence, trial strategy would require input of the experts. As in *Martin, supra*, this necessary consultation would defeat the purpose of exclusion of witnesses. Therefore, the trial court's final assessment was that allowing the

experts to listen to each other firsthand would be both expedient and helpful to the jury.

McAbee does not show that she was prejudiced in any way by the presence of Dr. Chapman's experts during the testimony of her expert. Accordingly, we are unable to conclude that the trial court abused its discretion. Its decision was supported by law and was not unreasonable; nor was it unfair. Witnesses for both parties were allowed to remain in the courtroom.

Therefore, we affirm the Hopkins Circuit Court.

ALL CONCUR.

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