RENDERED: May 22, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-1259-MR

SCOTT McFALL, Individually and
SCOTT McFALL, As Administrator
of the Estate of JUDITH ANN McFALL — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS WINE, JUDGE
ACTION NO. 92-CI-005780

PEACE, INC., d/b/a OUR LADY
OF PEACE HOSPITAL and
MOHAMMAD A. MIAN, M.D. — APPELLEES

OPINION
AFFIRMING

* * *

BEFORE: BUCKINGHAM, GARDNER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment entered pursuant to a jury verdict in favor of a hospital and psychiatrist in a hospital negligence, medical malpractice, and wrongful death action brought by the estate of a decedent who committed suicide while a patient in the hospital. Upon reviewing appellant's arguments in light of the record herein and the applicable law, we affirm.

On September 14, 1991, Judith McFall committed suicide by hanging herself from a pant leg tied to a closet door handle in a room on a locked ward at appellee hospital, Our Lady of Peace ("OLOP"), where she had been admitted approximately twelve hours earlier. At the time of her suicide, Mrs. McFall was a patient on moderate suicide precautions at OLOP. Appellee psychiatrist, Dr. Mohammad Mian, was Mrs. McFall's designated treating physician after she was admitted, although Dr. Mian had not yet personally examined Mrs. McFall before her suicide.

On September 11, 1992, appellant, Scott McFall, individually and as administrator of the estate of Judith McFall, brought a wrongful death action against appellees, OLOP and Dr. Mian, alleging hospital negligence and medical malpractice. A ten-day jury trial commenced on March 12, 1996, which produced a voluminous record. Mr. McFall presented twenty-two witnesses, including one expert, and sixty-six exhibits; OLOP offered no witnesses, but introduced eleven exhibits; and Dr. Mian presented four witnesses, including one expert, and introduced eleven exhibits. The jury returned a verdict in favor of OLOP and Dr. Mian. This appeal by Mr. McFall followed.

The first issue raised by appellant is with regard to a Quality Assurance Review ("QAR") form completed by OLOP relating to Mrs. McFall's case, which appellant sought in discovery. According to appellees, the QAR form at issue was a routine form filled out by OLOP's nursing coordinator who reviewed and critiqued OLOP's response to the Code 300 called in Mrs. McFall's

case. Such forms are then reviewed by the nursing coordinator manager and, when appropriate, reviewed by OLOP's safety committee as part of the Hospital's comprehensive peer review program to monitor and improve the quality of patient care.

On July 13, 1994, appellant filed a discovery motion requesting that OLOP produce:

> Any and all originals and/or copies of documents regarding Judith McFall's admission, evaluation, stay, and/or discharge from Our Lady of Peace Hospital in September 1991 (including but not limited to any post-discharge documents prepared to date).

OLOP did not produce the QAR form, which appellant first learned about during a pretrial evidentiary hearing, and did not make any objection to discovery of said form in its first two responses to the original discovery motion filed on August 12, 1994 and March 8, 1995. After appellant specifically requested discovery of the QAR form, OLOP filed a third response on March 17, 1995, stating:

> Plaintiffs next ask this Court to compel the production of the 'Quality Assurance Review form regarding Ms. McFall which the defendant hospital's corporate representative JoAnn Jordan testified at the February 3, 1995 hearing was completed by Ms. Patsy Fusenager of the defendant hospital's Quality Assurance Department.' This document was never requested in any request for production of documents and is not now properly the subject of a motion to compel. Had plaintiffs requested this document within the discovery period, this defendant would have objected to its production on the basis of the peer review privilege set forth in KRS 311.377.

Thereafter, on July 6, 1995, OLOP filed a separate motion specifically seeking a protective order as to the QAR form

pursuant to the peer review privilege in KRS 311.377. The court held an in camera hearing on August 2, 1995, regarding the discovery of the QAR form and other hospital documents which we shall discuss later. On September 6, 1995, the court entered a protective order as to the QAR form pursuant to the peer review privilege in KRS 311.377.

Appellant first maintains that OLOP waived its right to assert the peer review privilege when it failed to timely object to the discovery of, or move for a protective order regarding, the QAR form. Appellant claims that OLOP's motion for protective order was untimely because it was filed after the various responses to the motion for production were filed. Appellant cites to various cases holding that a motion for protective order must be filed before the date the response to the request for production of the document at issue is due. However, said cases are not from our jurisdiction and, thus, they are not controlling.

Under the Kentucky civil rules, the trial court has broad power to control the use of the discovery process and to prevent its abuse. Hoffman v. Dow Chemical Co., Ky., 413 S.W.2d 332 (1967). The trial court has wide discretion in protecting persons from discovery abuses by issuing protective orders. Gevedon v. Grigsby, Ky., 303 S.W.2d 282 (1957). While OLOP did not raise the issue of the peer review privilege or even mention the existence of the QAR form until its response of March 17, 1995, which was after the court's February 16, 1995 order closing

discovery, we cannot say the trial court abused its discretion in entering the protective order in this case. Appellant had notice of the existence of the QAR form and OLOP's assertion of the peer review privilege well before trial, which began on March 12, 1996. We would also note that CR 26.05(c) provides that a party with a duty to supplement a discovery response may do so "at any time prior to trial through new requests for supplementation of prior responses."

Appellant also cites Shobe v. EPI Corp., Ky., 815 S.W.2d 395 (1991) as authority for his position. The Court in Shobe, supra, held that absent a motion for a protective order or an in camera review, a trial court is not required to sua sponte conduct an in camera review of a document to determine the applicability of a privilege regarding the document's discovery. The Court reasoned that a party seeking to protect the confidentiality of a document from discovery is required to assert and prove the applicable privilege. Id. Shobe is easily distinguishable from the present case by the fact that in the present case, OLOP did eventually file a motion for protective order and for an in camera review of the document at issue. Further, there was no mention in Shobe, supra, as to when such motions must be made.

Finally, we must address OLOP's argument that the QAR form was not within the original discovery request of July 13, 1994. This argument is not well taken. We do not see how OLOP can seriously contend that the QAR form was not a document

relating to Mrs. McFall's "admission, evaluation, stay and/or discharge from Our Lady of Peace Hospital in September 1991 (including but not limited to any post-discharge documents prepared to date)." Certainly, appellant could not have been expected to request a specific document of which he was not yet aware. Even though the document was privileged, it clearly related to Mrs. McFall's stay at OLOP.

Appellant next argues that even if OLOP's motion for protective order was timely, OLOP failed to establish that the QAR form was within the peer review privilege of KRS 311.377. KRS 311.377(1) and (2) provide:

> (1) Any person who applies for, or is granted staff privileges after June 17, 1978, by any health services organization subject to licensing under the certificate of need and licensure provisions of KRS Chapter 216B, shall be deemed to have waived as a condition of such application or grant, any claim for damages for any good faith action taken by any person who is a member, participant in or employee of or who furnishes information, professional counsel, or services to any committee, board, commission, or other entity which is duly constituted by any licensed hospital, licensed hospice, licensed home health agency, health insurer, health maintenance organization, health services corporation, organized medical staff, medical society, or association affiliated with the American Medical Association, American Podiatry Association, American Dental Association, American Osteopathic Association, or the American Hospital Association, or a medical care foundation affiliated with such a medical society or association, or governmental or quasigovernmental agency when such entity is performing the designated function of review of credentials or retrospective review and evaluation of the competency of professional acts or conduct of other health care

> personnel. This subsection shall have equal application to, and the waiver be effective for, those persons who, subsequent to June 17, 1978, continue to exercise staff privileges previously granted by any such health services organization.
>
> (2) At all times in performing a designated professional review function, the proceedings, records, opinions, conclusions, and recommendations of any committee, board, commission, medical staff, professional standards review organization, or other entity, as referred to in subsection (1) of this section shall be confidential and privileged and shall not be subject to discovery, subpoena, or introduction into evidence, in any civil action in any court or in any administrative proceeding before any board, body, or committee, whether federal, state, county, or city, except as specifically provided with regard to the board in KRS 311.605(2). This subsection shall not apply to any proceedings or matters governed exclusively by federal law or federal regulation.

In reviewing the sealed records, we see that the QAR form, which was submitted to the trial court in camera, was actually two forms, a Code 300 Monitoring Form and a Critical Incident Review Report. From our review of those forms, we believe the trial court properly found that they fell within the peer review privilege of KRS 311.377. They were not otherwise discoverable records simply placed in a peer review file. See Leanhart v. Humana, Inc., Ky., 933 S.W.2d 820 (1996).

Appellant next argues that the trial court improperly prohibited him from discovering certain documents relating to other suicides by hanging at OLOP prior to Mrs. McFall's suicide. Just as appellant argued with regard to the QAR form, appellant argues that OLOP filed their objection to the discoverability of

the documents pertaining to the prior suicides by hanging in an untimely manner.

OLOP first raised an objection to the discoverability of the prior suicide documents on August 12, 1994, although it was not a formal motion for protective order. On March 20, 1995, the court entered an order requiring OLOP to produce the prior suicide documents. Thereafter, OLOP apparently did not comply with said order and filed a motion for in camera review of the prior suicide documents on July 6, 1995. The court held the in camera review of the prior suicide documents at the same time it reviewed the QAR form. In the September 6, 1995 order entering the protective order as to the QAR form, the court also granted a protective order "for records pertaining to patients who committed suicide at Our Lady of Peace Hospital prior to 1991 as the Court has conducted an in camera review of same and believes they have no probative value and discovery of same will embarrass nonparties."

As we stated earlier, the trial court has wide discretion in issuing protective orders. Gevedon, supra. Thus, we cannot say the trial court was prohibited from entering the protective order as to the prior suicide documents simply because the motion for in camera review was filed after the earlier order requiring production of such documents.

Appellant also complains that OLOP never made a motion for protective order regarding the prior suicide documents as required by CR 26.03(1) and, thus, the court improperly acted sua

sponte in entering the protective order in question. This argument is devoid of merit. OLOP's July 6, 1995 motion for in camera review plainly states OLOP's objection to the discovery of the prior suicide documents on grounds of patient confidentiality and lack of relevance. Although OLOP did not explicitly state it was seeking a protective order in the motion, appellant had written notice of OLOP's opposition to the discovery of the documents at issue and of OLOP's desire for the court to decide whether said documents were discoverable. Why else would OLOP make such a motion, if not for a protective order? In any event, in Shobe v. EPI Corp., supra, the Court stated that a motion for protective order or a motion for an in camera review would be sufficient to raise the issue before the trial court such that the court would not be acting sua sponte.

Appellant also contends that OLOP did not make a showing of good cause for the protective order regarding the prior suicide documents as required by CR 26.03(1). From our review of the documents regarding prior suicides by hanging at OLOP, which are sealed in the record, we believe OLOP made a sufficient showing of good cause for the protective order to be issued. In balancing the prior patients' rights to confidentiality against the value of the records to appellant's case, the court properly found that the prior records lacked sufficient probative value to be discoverable, given their remoteness in time and lack of factual similarity to the facts in the present case.

Appellant's next assignment of error is that the trial court erred in precluding him from presenting evidence regarding OLOP's negligence in having an open loop closet door handle in Mrs. McFall's room within a locked ward at a psychiatric hospital where persons with known suicidal tendencies are routinely hospitalized. At a pretrial hearing in the case, OLOP made a motion in limine to exclude evidence on this issue because appellant was not going to present the evidence through an expert witness. OLOP maintained an expert witness was necessary because the evidence fell outside the range of common experience and observation. Appellant argued that the nature of the evidence was within the comprehension of the average juror. However, the actual evidence sought to be admitted by appellant was not admitted by avowal during the hearing. The court ruled pursuant to the motion in limine that the evidence was not admissible unless it was through an expert witness.

OLOP maintains the issue was unpreserved because the evidence appellant sought to admit was not offered by avowal either at the hearing on the motion in limine or during trial. Appellant counters that an avowal was not necessary since the matter was ruled on pursuant to a motion in limine, citing KRE 103(d). We agree with OLOP that the issue was not preserved for review.

It has long been the rule in Kentucky that a party must offer excluded evidence by avowal in order to preserve the issue of its exclusion for appeal. Partin v. Commonwealth, Ky., 918

S.W.2d 219 (1996); Freeman v. Oliver M. Elam, Jr. Co., Ky., 372 S.W.2d 796 (1963). While KRE 103(d) does state that "[a] motion in limine resolved by order of record is sufficient to preserve error for appellate review," we believe the rule was intended to eliminate the requirement that the error be raised again during trial. Therefore, in our view, where the court has excluded certain evidence, the party opposing its exclusion is still required to offer the excluded evidence by avowal either during the motion in limine or during trial in order to preserve the error. Whether the issue is presented to the court during a motion in limine or during trial, the appellate court must have the benefit of the actual evidence at issue in order to adjudge whether it was properly excluded.

O'Bryan v. Hedgespeth, Ky., 892 S.W.2d 571 (1995), cited by appellant as to this issue, is distinguishable from the case at hand by the fact that in O'Bryan, supra, the trial court did not exclude evidence, but rather ruled certain evidence admissible. Thus, an avowal was not necessary and was not at issue in that case.

The remaining issue before us is whether the trial court erred in allowing an expert witness called by Dr. Mian to testify on behalf of OLOP when OLOP had not given appellant notice prior to trial that it intended to call said expert on its behalf. During the trial, Dr. Randolph Schrodt was called by Dr. Mian as an expert witness to testify as to Dr. Mian's adherence to the standard of care he owed Mrs. McFall. Dr. Schrodt had

been identified as an expert witness for Dr. Mian and had been deposed prior to trial by appellant pursuant to the court's order. Following the conclusion of his direct examination by counsel for Dr. Mian, Dr. Schrodt was cross-examined by OLOP. During this examination of Dr. Schrodt, OLOP elicited testimony regarding the hospital's standard of care to Mrs. McFall. Appellant objected to this testimony on grounds that OLOP had not listed Dr. Schrodt as one of its expert witnesses prior to trial. The court allowed Dr. Schrodt to testify as to OLOP's meeting the standard of care it owed Mrs. McFall.

KRE 611(b) provides:

> Scope of cross-examination. A witness may be cross-examined on any matter relevant to any issue in this case, including credibility. In the interests of justice, the trial court may limit cross-examination with respect to matters not testified to on direct examination.

Our Supreme Court has held that "KRE 611 embodies the 'wide open' rule of cross-examination by allowing questioning as to any matter relevant to any issue in the case, subject to judicial discretion in the control of interrogation of witnesses and production of evidence." Derossett v. Commonwealth, Ky., 867 S.W.2d 195, 198 (1993).

Much of Dr. Schrodt's testimony on direct examination by Dr. Mian focused on the policies and procedures of OLOP and other local hospitals with regard to potentially suicidal patients. Thus, the questions of OLOP's counsel on cross-examination as to whether the policies and procedures of OLOP met

the requisite standard of care of other similarly situated hospitals was certainly within the scope of direct examination. We are not aware of any authority in Kentucky for the proposition that an expert witness cannot give expert testimony on cross-examination which is within the scope of direct examination and is favorable to the party cross-examining the expert. In any event, in reviewing the record, we see that OLOP listed Dr. Schrodt in two pretrial documents as a potential witness. Thus, appellant's claim that he did not have notice that Dr. Schrodt would testify on OLOP's behalf is without merit. Accordingly, the trial court did not abuse its discretion in allowing Dr. Schrodt's testimony on cross-examination by OLOP.

For the reasons stated above, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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