RENDERED: June 19, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

97-CA-0165-MR

JOHN J. FORD, as Guardian of David J. Wilson, a Minor — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DANIEL A. SCHNEIDER, JUDGE
ACTION NO. 92-CI-7513

HUMANA OF KENTUCKY, INC., d/b/a Humana Hospital Audubon — APPELLEE

**OPINION**

**AFFIRMING**

* * * * * * * * * * * * * * * * * * * * *

BEFORE: BUCKINGHAM, KNOX, and MILLER, Judges.

BUCKINGHAM, JUDGE. John J. Ford, as guardian of David J. Wilson (David), a minor child, appeals from a judgment of the Jefferson Circuit Court in favor of Humana of Kentucky, Inc., d/b/a Humana Hospital Audubon (Humana), resulting from a jury trial. For the reasons set forth hereinafter, we affirm.

On February 19, 1986, David's mother, Ruby Jo Wilson (Ruby), was admitted into Humana while in active labor. Ruby's obstetrician, Dr. Robert McQuady (Dr. McQuady), was notified, and he arrived at Humana approximately fifteen minutes after Ruby's admission. Dr. McQuady artificially ruptured Ruby's bag of

water, after which time fetal heartbeat irregularities were noticed. Dr. McQuady left Ruby shortly thereafter, and Ruby delivered David in her bed minutes after Dr. McQuady's departure. When David was born, no physician was present. David was several weeks premature and was placed in an isolette[1] in Humana's neonatal intensive care unit.

On March 13, 1986, while David was in the intensive care unit, his temperature elevated to 102.7 degrees. The rise in his temperature was apparently due to a malfunction of the isolette itself or a temperature probe used with the isolette. Shortly after the isolette incident, David began suffering from increased episodes of apnea and bradycardia.[2]

David suffers from cerebral palsy, which affects his motor skills and causes him to suffer from mental retardation. Suit was filed on David's behalf against Dr. McQuady and Humana, and a three-week jury trial was held in 1996. The jury found in David's favor in his suit against Dr. McQuady and awarded him damages totaling $1,640,719. However, the jury found against David in his suit against Humana. Following the trial court's denial of David's motion for a new trial, this appeal was filed.[3]

---

[1] **Isolettes are "environmentally controlled plastic containers for premature infants[.]"** The New Lexicon Webster's Dictionary of the English Language, 514 (1988 ed.)

[2] **Apnea is defined as "[a]bsence of breathing[,]"** Stedman's Medical Dictionary, 106 (25th ed. 1990), and bradycardia is "slowness of the heartbeat[.]" Id. at 208.

[3] **We will hereinafter refer to the appellant as "David,"** (continued...)

The first allegation of error concerns the trial court's order excluding the testimony of Dr. Carolyn Crawford. Dr. Crawford's deposition was taken on October 5, 1996, and again on October 13, 1996, a few days before the trial commenced on October 22, 1996. Dr. Crawford testified in her deposition that the incident with the isolette contributed to or exacerbated David's condition. Until the deposition of Dr. Crawford was taken, it had not been disclosed to Humana that Dr. Crawford or any other expert witness to be called by David had an opinion that the isolette or temperature probe was a factor in David's condition. Humana made a motion in limine on October 7, 1996, to strike Dr. Crawford's testimony on the basis that her theory concerning the isolette incident had not been previously disclosed. The trial court granted Humana's motion and excluded the testimony on the ground that it introduced a new theory into the case without sufficient pretrial notice to the other parties.

"[T]he question of whether one party has put another at an unfair disadvantage through pretrial nondisclosures must be addressed to the sound discretion of the trial court." Collins v. Galbraith, Ky., 494 S.W.2d 527, 530 (1973). As the expert opinion of Dr. Crawford was not disclosed to Humana until a few days before trial, we determine that the trial court did not abuse its discretion in not allowing the testimony to be introduced into evidence due to insufficient pretrial notice.

---

[3](...continued)
**although this action was brought by John J. Ford on David's behalf as his guardian.**

David also asserts in this regard that Dr. Ian Butler, one of Dr. McQuady's expert witnesses, testified in his deposition that a temporal relationship existed between the isolette incident and increased episodes of apnea and bradycardia. David asserts that Dr. Butler's testimony should have put Humana on notice that the isolette incident was an issue in the case. There is, however, a vast difference in Dr. Butler's statements that there was a temporal relationship between the isolette incident and David's apnea and bradycardia and Dr. Crawford's testimony that the isolette incident exacerbated David's brain damage. Dr. Crawford's testimony clearly created a new issue and theory of liability.

David also complains that the trial court was inconsistent in its rulings by allowing experts retained by Humana to testify inconsistently with the summary of their expected testimony as set forth in Humana's pretrial compliance form, while at the same time not allowing the testimony of Dr. Crawford. Whether Humana's experts also changed their theories of the case is irrelevant to the issue of the admissibility of Dr. Crawford's testimony since David admits that he did not attempt to have those experts' testimony stricken.

Further concerning the admissibility of Dr. Crawford's testimony, David contends that questioning of an intensive care nurse by counsel for Dr. McQuady "opened the door" to allow the testimony of Dr. Crawford. After the nurse testified that apnea and bradycardia were not unusual in premature infants, David's

counsel argued to the trial court that the door had been opened such that he should be allowed to present testimony that the isolette incident had greatly increased the frequency of David's episodes of apnea and bradycardia. As the isolette incident was not an issue at trial due to insufficient pretrial notice having been given to Humana of Dr. Crawford's opinion, we determine that it was not an abuse of discretion for the trial court to keep the issue out of the case despite the nurse's reference to apnea and bradycardia in response to questions asked by counsel for Dr. McQuady.

David's second argument is that the trial court erred in disallowing rebuttal testimony by Dr. George Nichols, II. An expert witness on behalf of Dr. McQuady, Dr. Richard Naeye, testified that David's brain damage was caused by an infection present in Ruby's placenta. David then sought to introduce the rebuttal testimony of Dr. Nichols that the "abnormalities which were present in Ruby Jo Wilson's placenta were not causative to the development of cerebral palsy in David J. Wilson, Jr."

David knew several months prior to trial of Dr. Naeye's theories and had apparently contacted Dr. Nichols in an effort to obtain expert testimony to counteract Dr. Naeye's testimony. David had failed, however, to list Dr. Nichols as a possible witness on any pretrial compliance reports.

The standard of review on appeal concerning a trial court's decision to exclude or allow rebuttal evidence is the abuse of discretion standard. Morrow v. Stivers, Ky. App., 836

S.W.2d 424, 430 (1992). As David was aware of Dr. Naeye's opinion several months prior to trial and yet failed to disclose that Dr. Nichols would be an expert witness and failed to disclose the opinion of Dr. Nichols, we find no abuse of discretion by the trial court in not allowing Dr. Nichols to testify as a rebuttal witness for David.

David's third argument is that the trial court erred by refusing to give the jury his proposed instruction regarding a decrease in his chance of recovery. The proposed instruction would have allowed the jury to find against Humana if it deemed that Humana had "increased the risk of harm" to David by "significantly decreasing" his "chances of recovery and ability to lead a life free from cerebral palsy and developmental delays . . . ." The instruction actually given by the trial court allowed the jury to find against Humana if it found that Humana had violated its duty to "exercise that degree of care and skill ordinarily expected of reasonable and prudent hospital employees acting under the same or similar circumstances as those in this case" and that such was a substantial factor in David's condition.

David's proposed instruction and argument are based upon Richard v. Adair Hosp. Found. Corp., Ky. App., 566 S.W.2d 791 (1978). A close reading of that case, however, reveals that it makes no reference to instructing the jury concerning diminished chances of recovery.

Kentucky has established a preference for "bare-bones" jury instructions which may be "fleshed out during summation." McKinney v. Heisel, Ky., 947 S.W.2d 32, 34 (1997). The "bare-bones" approach is also applicable to cases involving malpractice suits against hospitals. See Rogers v. Kasdan, Ky., 612 S.W.2d 133, 136 (1991). Jury instructions in these negligence-type cases "should be couched in terms of duty" and "should not contain an abundance of detail." Id. The trial court did not err in refusing to give the jury David's proposed instruction regarding a decrease in his chance of recovery.

David's final argument is that the trial court erred by giving Dr. McQuady and Humana four preemptory challenges each. Civil Rule (CR) 46.03(1) allows each opposing side to have three peremptory challenges, "but co-parties having antagonistic interests shall have three peremptory challenges each." CR 47.03(2) allows for one additional peremptory challenge for each side or antagonistic party if additional jurors are called, as was done in this case. The question, therefore, is whether or not Humana's interests and Dr. McQuady's interests were antagonistic.

The allocation of peremptory challenges "is a defined mechanism and does not depend on the exercise of judicial discretion." Kentucky Farm Bureau Mut. Ins. Co. v. Cook, Ky., 590 S.W.2d 875, 877 (1979). No actual prejudice need be shown to merit reversal if peremptory challenges are improperly allocated as the allocation of peremptory challenges "is a substantial

right" which "requires reversal as a matter of law" if improperly exercised. Id.

Factors to be considered in determining if parties' interests are antagonistic are whether cross-claims were filed and whether the parties shared the same theory of the case. Davenport v. Ephraim McDowell Mem'l Hosp., Inc., Ky. App., 769 S.W.2d 56, 59 (1988). Another factor to be considered is whether the parties were charged with independent acts of negligence. Mackey v. Greenview Hosp., Inc., Ky. App., 587 S.W.2d 249, 259 (1979). See also Roberts v. Taylor, Ky., 339 S.W.2d 653 (1960), wherein it was stated that where there are independent acts of negligence, "the interests of the defendants are most always antagonistic, because each may escape liability or reduce his liability by convincing the jury that the other was solely or primarily responsible." Id. at 656. Also, the determination of whether parties' interests are antagonistic is to be made at the time the jury is selected. Mackey, supra, at 259.

Dr. McQuady and Humana were charged with independent acts of negligence in this case. David alleged that Dr. McQuady was negligent due to the fact that he "abandoned his high-risk patient prior to her delivery" and alleged that Humana was negligent due to the "failure of the hospital staff to appropriately attend the labor and delivery and their failure to provide appropriate care after the birth . . . ." Under David's theory of the case, one defendant could have acted negligently without any negligence by the other defendant. As independent

acts of negligence were alleged and the parties were distinct and separate entities, we find no abuse of discretion by the trial court in granting each defendant four peremptory challenges.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Larry B. Franklin
Hope K. Fitzpatrick
Louisville, KY

BRIEF FOR APPELLEE:

B. Todd Thompson
Millicent A. Tanner
Louisville, KY