RENDERED: June 9, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002896-MR

J. DENIS GIULIANI, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF MARY K. GIULIANI, DECEASED; AND AS FATHER AND NEXT FRIEND OF JAMES M. GIULIANI, KATHERINE M. GIULIANI, DAVID M. GIULIANI, AND MARY K. GIULIANI

APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 93-CI-00223

MICHAEL GUILER, M.D.; RICHARD BENNETT, M.D.; AND BAPTIST HEALTH CARE SYSTEMS, INC., D/B/A CENTRAL BAPTIST HOSPITAL

APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, JOHNSON, AND SCHRODER, JUDGES.

JOHNSON, JUDGE: This is an appeal from a judgment in favor of the defendants in a wrongful death action based upon allegations of medical negligence. It presents three questions: (1) whether there were errors in the selection of the jury, (2) whether the trial court erred in allowing an expert witness to testify beyond

the scope of the opinions contained in his CR[1] 26.02(4) disclosure, and (3) whether the trial court erred in admitting other expert testimony over appellants' Daubert[2] challenge. Finding no abuse of discretion in these rulings of the trial court, we affirm.

On January 21, 1992, thirty-three-year-old Mary Giuliani died after giving birth to her fourth child. Mrs. Giuliani was a high risk patient due to a mild thyroid condition and the presence of an excessive amount of amniotic fluid in her uterus. Because of her hydramnios, and because Mrs. Giuliani was at term, her obstetrician, Dr. Michael Guiler, decided that her labor should be induced. Mrs. Giuliani entered the hospital on the evening of January 20, 1992, for a planned induction of labor. Her labor progressed slowly throughout the morning and afternoon of January 21, and she was monitored by Dr. Guiler and the nursing staff at the appellee hospital, Central Baptist Hospital. That evening, while Dr. Guiler was having dinner away from the hospital, Mrs. Giuliani's condition took a rapid turn for the worse. Dr. Guiler gave orders to nurses over the phone to stop administering the inducing drug, Pitocin, at 7:52 p.m. A few minutes later, at around 7:57 p.m., when the monitor on the baby showed signs that the fetus was in distress, he ordered that she be given terbutaline, a drug designed to ease uterine contractions.

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[1]Kentucky Rules of Civil Procedure.

[2]Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

Even though she was no longer being given Pitocin, Mrs. Giuliani's labor continued to progress rapidly. Dr. Guiler did not arrive before the baby was delivered at 8:12 p.m. on January 21. Instead, Mrs. Giuliani was attended by an obstetrical resident, Dr. Velma Taorimina, and the appellee, Dr. Richard Bennett, an obstetric anesthesiologist. By the time Dr. Bennett arrived on the scene at approximately 7:45 p.m., Mrs. Giuliani was experiencing chest pains and was cyanotic. Because the labor was progressing at such a fast rate, a Cesarean-section was not then indicated. Mrs. Giuliani collapsed immediately after the birth of the baby and a code was called. Efforts to revive Mrs. Giuliani were not successful.

A lawsuit was filed in January 1993 by J. Denis Giuliani, Mrs. Giuliani's husband, individually and in his capacity as the administrator of Mrs. Giuliani's estate, and as the father and next friend of the appellants, the parties' four children, James M., Katherine M., David M., and Mary K. Giuliani.[3] At trial there was some disagreement regarding the cause of Mrs. Giuliani's death,[4] however, most experts opined that she died as a result of the rare, unpredictable, and often

[3]In an interlocutory appeal from the trial court's dismissal of the children's claims, the Supreme Court of Kentucky recognized an infant's claim for loss of parental consortium. Giuliani v. Guiler, Ky., 951 S.W.2d 318 (1997).

[4]The appellants offered testimony that Mrs. Giuliani died as a result of a thyroid storm, or from the injection of terbutaline after being given too many fluids. They also attempted to establish that if Mrs. Giuliani had been intubated by Dr. Bennett prior to her collapse, she could have been saved even if the cause of death were attributable to amniotic fluid embolism.

fatal condition, amniotic fluid embolism.[5] Dr. George Nichols, II, a forensic pathologist and the former Chief Medical Examiner for the Commonwealth, was called by the appellants. He testified that, in his opinion, Mrs. Giuliani died as a result of an amniotic fluid embolism, a condition which he described from his experience and from the literature he had read, as being associated with high morbidity (illness) and high mortality (death). He testified that once the syndrome starts, the patient is in a serious condition for which there is no cure. Dr. Nichols also testified that in his opinion, Mrs. Giuliani could not have survived after 8:11 p.m.[6]

At the conclusion of the trial, which lasted nearly four weeks in June 1998, the jury determined that neither Dr. Guiler, Dr. Bennett, nor the hospital were negligent in causing injury or death to Mrs. Giuliani.[7] A judgment in favor of the appellees was entered on July 7, 1998. On July 13, 1998, the appellants filed a motion for a new trial pursuant to CR 59.01 on the grounds (1) that a "number of jurors" remained on the panel with "direct personal connections to the Defendants," to which peremptory strikes were required to be exercised, (2) that Dr.

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[5]The expert testimony regarding the percentage of fatalities associated with amniotic fluid embolism ranged from 22% to 95%.

[6]The appellants called Dr. Nichols to testify that if a Cesarean section had been performed earlier on January 21st, Mrs. Giuliani would have survived. Dr. Nichols, who is not an obstetrician, did not testify that a C-section had been indicated earlier, nor did he opine that any of the persons providing Mrs. Giuliani with medical care failed to provide the appropriate standard of care.

[7]The verdict was 9 to 3 in favor of Dr. Guiler and Central Baptist Hospital, and 10 to 2 in favor of Dr. Bennett.

Michael Ehrie, the lung specialist called by Dr. Bennett, was allowed to testify beyond his CR 26.02(4) disclosures, and (3) that certain opinions of Dr. Steven Clark, Dr. Guiler's expert witness, were erroneously admitted over the appellants' Daubert challenge.

A hearing on the motion was conducted on September 21, 1998, at which time evidence was presented to support the appellants' claim that one juror, Tracie Sanborn, had misrepresented her employment status on her Juror Qualification Form and again during voir dire. In its opinion and order entered on October 28, 1998, the trial court found that there was "no factual basis to make a determination under CR 59.01 that there was any 'irregularity' or 'misconduct' to justify the granting of a new trial." As to the evidentiary matters, the trial court reaffirmed the rulings that it had made during the trial. The request for a new trial was denied and this appeal followed.

The appellants first argue that reversible error occurred during the jury selection process. Specifically, the appellants point to the trial court's ruling concerning three jurors, who either served on the jury or for whom they were required to use a peremptory strike. The appellants claim that the trial court's refusal to strike these three jurors for cause resulted in them being prejudiced and deprived them of a fair trial.

The appellants insist that they were substantially prejudiced by "having on the jury a person whose livelihood

stemmed from assisting physicians, and even a former neighbor of Appellee Guiler's at that[.]" The juror to which this argument refers is Juror Sanborn, who identified herself as a "student" on the Juror Qualification Form. Another juror, Timothy Wojen, testified at the post-trial hearing that Juror Sanborn told other jurors that she was a physician's assistant and that she criticized him and other jurors for questioning the decisions made by the medical professionals in their treatment of Mrs. Giuliani. Juror Sanborn testified that she had been truthful in completing the Juror Qualification Form and that she had not been employed during the trial. She stated that she had been working as an unpaid doctor's assistant as part of a clinical rotation required in her course of study. At the conclusion of her training and after being certified, she began her employment with Dr. Price, the month following the trial. The last witness at this hearing, Dr. Price, confirmed Juror Sanborn's testimony about the date of her employment as his assistant. He also testified that he was not aware of the lawsuit against Dr. Guiler, that he was not aware of Juror Sanborn's service as a juror, that he had never discussed the case with either Juror Sanborn or Dr. Guiler, and that Dr. Guiler had never been his neighbor.[8]

The appellants disagree with the trial court's determination that Juror Sanborn's failure to volunteer the nature of her studies during voir dire did not rise to the level

[8]Dr. Price testified that at one time, Dr. Guiler's girlfriend (now wife) had lived on his street, but that to his knowledge, Dr. Guiler had never resided there.

of "irregularity or misconduct" required to set aside the jury's verdict. It is a fundamental tenet that a litigant is entitled to have his "cause heard by an unbiased and unprejudiced jury."[9] However, even if we agreed with the appellants' position that Juror Sanborn should have voluntarily revealed the nature of her studies and her participation in a clinical rotation, we would not necessarily conclude that the trial court erred in denying their motion for a new trial. Clearly, "not every incident of juror misconduct requires a new trial."[10]

The standard this Court must employ in its review of the issue of alleged juror misconduct is whether the trial court's findings are clearly erroneous, or whether its ruling constitutes an abuse of discretion.[11] The issue concerning Juror Sanborn is similar to that raised in Harris, supra, in which this Court reasoned as follows:

> Finally, Harris maintains that the trial court erred by failing to grant a new trial due to juror misconduct. We do not agree. Harris claims that he is entitled to a new trial on the grounds that a juror, William Clayton Neal, engaged in misconduct by failing to make full disclosure during voir dire. Had Neal responded appropriately to questions addressed to the panel on voir dire, Harris contends, he (Neal) would have used a peremptory strike to eliminate him from the jury. Harris charges that juror Neal failed to acknowledge having had a deed prepared for him by Herb Sparks, the defendants' attorney. He also argues that Neal was required to disclose the fact that

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[9]Brumfield v. Consolidated Coach Corp., 240 Ky. 1, 40 S.W.2d 356, 360 (1931).

[10]Haight v. Commonwealth, Ky., 938 S.W.2d 243, 246 (1996).

[11]Harris v. Stewart, Ky.App., 981 S.W.2d 122 (1998).

> his wife worked for Metcalfe County Nursing Home where Sparks served on the Board of Directors.
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> Accompanying Harris's motion were supporting affidavits, which were countered by a memorandum and affidavits submitted by the defendants' attorney. Upon considering the matter, the trial court rendered its findings of fact and conclusions, which are not clearly erroneous and do not reveal an abuse of discretion. As the Supreme Court has recently noted:
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> > We can hardly conceive of a circumstance in which greater deference should be granted to the findings of the trial court. . . . The trial judge was immersed in the case and it would be utterly extraordinary for an appellate court to disregard his view as to questions of candor and impartiality of a juror.[12]

Having reviewed the testimony at the post-trial hearing, it is clear that the testimony of Juror Sanborn and Dr. Price support the trial court's findings. Sanborn was a student at the time of trial; she was not employed during the trial in any capacity; she was not paid for her participation in the clinical rotation. Further, there was no evidence that Juror Sanborn, who was not asked about her field of study, answered any questions untruthfully, or withheld any information during voir dire in order to conceal any bias.[13] Under these circumstances, we determine there to have been no abuse of the trial court's

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[12]Harris, supra at 127 (citing Haight v. Commonwealth, supra at 246).

[13]See Hicks v. Commonwealth, Ky., 670 S.W.2d 837, 839 (1984).

discretion in denying the appellants' motion for a new trial with respect to Juror Sanborn's participation in the trial.

The next argument in this vein concerns the venireman, Jim Hays. Juror Hays informed the trial court during voir dire that he was employed as an insurance adjuster in the area of non-standard automobile claims, primarily PIP claims, and that he had some experience in the field of homeowners' claims. Juror Hays also volunteered that his father, Ed Hays, was a retired attorney whose practice had been primarily comprised of insurance defense work. In response to the trial court's questions, Juror Hays responded that he would not have a problem listening to the evidence and making a decision based thereon. The trial court denied the appellants' motion to strike Juror Hays for cause and the appellants used one of their peremptory strikes to excuse Juror Hays from the jury.

During the trial, the appellants' counsel learned that Juror Hays' father's former law partner, Deddo G. Lynn, had been retained by Dr. Guiler to advise him regarding his personal exposure arising from this lawsuit. Mr. Lynn was not an attorney of record and did not make an appearance in the matter. Nevertheless, the appellants contend that

> it is abundantly clear that Appellee Guiler's [trial] counsel had an affirmative obligation as an officer of the Court to reveal information exclusively within his knowledge, *i.e.* Mr. Hays' affiliation with appellee Guiler's personal counsel, none of which information was volunteered.

The appellants further suggest that "[t]he information withheld by Appellee Guiler, when coupled with Juror Hays' extensive

experience in evaluating claims, would plainly justify his dismissal for cause." In response, Dr. Guiler's trial attorney denies any such ethical breach of conduct and counters that the "Appellants' accusations of a failure to disclose information to the Court. . . are a patent falsehood, and in and of themselves an ethical violation [footnote omitted]."

All three appellees argue that the alleged relationship between Juror Hays and Dr. Guiler's personal attorney, that is, his now retired father's former partner, is not the "close relationship" required by the case law to require a removal for cause for implied bias. Nevertheless, the appellants insist that Juror Hays' relationship to Dr. Guiler was "at least as close a relationship" as those described in Fugate v. Commonwealth,[14] a case in which the trial court's failure to remove three jurors for cause resulted in a reversal of the guilty verdict ultimately reached by the jury. The offensive jurors in Fugate included two jurors who had either a past, or present, direct professional relationship with the prosecuting attorney. The third juror had played Little League baseball and attended school with a witness ten years prior to trial, and admitted that the prior relationship "'might kind of affect'" his ability to be impartial.[15]

In our opinion, the relationship between Juror Hays and Dr. Guiler's personal attorney does not come close to the relationships discussed in Fugate. For that reason, we disagree

[14]Ky., 993 S.W.2d 931 (1999).

[15]Id. at 939.

with the appellants' assertion that if the trial court had been aware of the former partnership relationship between the juror's father and Dr. Guiler's personal attorney, it would have been compelled to strike Juror Hays for cause. This case more close resembles Stockdale v. Eads,[16] in which a juror who had a business partnership with his brother, failed to disclose that trial counsel had prepared his partnership income tax returns at his brother's request. The juror had never been to the attorney's office and "there had never been a direct employment or representation."[17] Although the tax return "affected the income tax liability of the juror," the Court held that the juror's relationship to the opposing party's trial counsel "was so casual and indirect that it [did] not indicate probable bias on the part of the juror."[18]

In this case, there is no evidence that Juror Hays was aware that his father's former law partner had any involvement in this litigation. There is no evidence that Juror Hays' father had anything to gain from this litigation. There is certainly no evidence that Dr. Guiler's trial counsel was aware of the juror's father's former relationship to Mr. Lynn. Accordingly, regardless of the accusation that Dr. Guiler's trial counsel failed to disclose to the court the relationship of the juror to his client's personal attorney, it is readily apparent that the

[16]Ky., 263 S.W.2d 133 (1953).

[17]Id. at 135.

[18]Id.

relationship is not one that would implicate a finding of implied bias in the first instance.

Finally with respect to the jury's composition, the appellants argue that the trial court erred in refusing to strike Scott Townsend for cause. Juror Townsend, a college student, testified that he had gone to high school with Dr. Guiler's daughter and that she currently lived across the street from him. In response to the trial court's questioning, Juror Townsend stated that he had never dated Dr. Guiler's daughter, that he did not consider her to be a "good friend," and that he had never been in Dr. Guiler's home. He further stated that his relationship with Dr. Guiler's daughter did not go beyond saying, "hello" to her and that his relationship with her would not effect his judgment.

The case law in this area provides that "[i]rrespective of the answers given on voir dire, the court should presume the likelihood of prejudice on the part of the prospective juror because the potential juror has such a close relationship, be it familial, financial or situational, with any of the parties, counsel, victims or witnesses."[19] However, the record simply fails to disclose the existence of a "close relationship" between Juror Townsend and any party, attorney, or witness, and, at best, reveals a casual social relationship between the juror and a party's daughter. Under these circumstances, we fail to discern

[19]Ward v. Commonwealth, Ky., 695 S.W.2d 404 (1985).

any abuse of the trial court's discretion in failing to strike Juror Townsend for cause.[20]

The second issue raised by the appellants concerns the trial court's ruling that allowed Dr. Bennett, over appellants' objection, to elicit testimony from Dr. Ehrie which exceeded the pre-trial disclosure of the expert's opinion. In response to the appellants' interrogatory requests pursuant to CR 26.02(4), Dr. Bennett disclosed the identity of three expert witnesses, including Dr. Ehrie, who were expected to testify that "the treatment rendered by Dr. Bennett to the plaintiff was within the standard of care required by law." On October 2, 1996, a year and a half before trial, the appellants moved for an order prohibiting Dr. Bennett from eliciting any testimony from his proposed expert witnesses "beyond the simple statement that it is the witness's opinion that Dr. Bennett 'was within the standard of care required by law.'" At the hearing on this motion in November 1996, the trial court denied the motion and commented that it was "'common practice' to take depositions of expert witnesses to develop the specifics of what the witnesses had to say." The trial court also informed appellants that it would order the depositions of the experts if Dr. Bennett refused to voluntarily allow them. The appellants scheduled the depositions of all three expert witnesses, however, the deposition of Dr. Ehrie was canceled by the appellants and never rescheduled.

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[20]See Sanders v. Commonwealth, Ky., 801 S.W.2d 665 (1990) (no implied bias attributable to juror who had a passing acquaintance with the victim).

At trial, it became apparent, during Dr. Bennett's opening statement on June 2, 1998, that Dr. Bennett intended during Dr. Ehrie's testimony to elicit causation testimony from him. The appellants made no effort to object to the scope of Dr. Ehrie's testimony until immediately prior to that testimony over

three weeks later.[21] At that time, the appellants moved to limit

[21]At oral argument, in response to Dr. Bennett's counsel's argument that the appellants' counsel was on notice at least at the time of his opening statement that Dr. Ehrie would be testifying about causation, the appellants' counsel, Attorney Ann B. Oldfather, insisted that there was nothing in that opening statement to alert her to request a recess in order to depose Dr. Ehrie. She urged this panel to look at the video tape of Dr. Bennett's counsel's opening statement to see exactly what was said regarding Dr. Ehrie's anticipated testimony. Having reviewed that portion of the trial tape, it is apparent from the following portions of the opening statement by Attorney Kenneth W. Smith that Dr. Ehrie was not going to address the standard of care issue, but rather causation:

> Now, you will learn that what is happening . . .when this amniotic fluid and debris gets into the blood, it causes, in the lungs, in addition to clogging up the lungs (that's part of it), what's called an anaphalactoid reaction in which, basically, the blood vessels in the lungs slam shut. I'm going to call one witness, Dr. Michael Ehrie from Ashland, who is a lung specialist and who has reviewed the slides in this case, the lung tissue taken from the autopsy, and he will explain to you how the lung works. When we take a breath, air gets into our lungs, but that's just part of it. For that air to do us any good, it has to get into the blood that's flowing through our lungs and take that oxygen to all parts of our body. What happens with an AFE is those blood vessels slam shut. Dr. Ehrie will tell you that, based on what he saw, the massive AFE that this lady had . . . and he doesn't mean this in any disrespect, but you could have put a garden hose into her lung and pumped air in and it would not have done any good because the blood vessels in her lungs have slammed shut and the oxygen can't get from the lungs to her blood. She was getting oxygen. . . but once the oxygen got in her lungs, her blood vessels were closed.

We further note that immediately prior to Dr. Ehrie's testimony, the appellants' counsel made the following objection predicated precisely on what she had heard in the opening statement:

(continued...)

Dr. Ehrie's testimony to the issue of whether Dr. Bennett's care of Mrs. Giuliani comported with the appropriate standard of care. The appellants alleged both surprise by Dr. Bennett's use of Dr. Ehrie as an expert on the cause of Mrs. Giuliani's death and prejudice as he was the last witness to testify and his testimony would inure to the benefit of all three appellees.

Dr. Bennett's counsel informed the trial court that he had orally disclosed to appellants' counsel prior to the scheduling of Dr. Ehrie's aborted deposition, that Dr. Ehrie was

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[21](...continued)

Oldfather:	Judge, we're going to have, I mean you know, Ehrie, . . . I've heard Ken [Smith] say in opening statement that he's going to be a pulmonologist and come in here and talk about the pathologies of AFE. That topic was not mentioned in the disclosure statement. Not mentioned!
Smith:	That's exactly right.
Oldfather:	And, Rule 26 means something.
Smith:	That's exactly right, and Ms. Oldfather and I discussed at length, long ago, what Dr. Ehrie was going to testify to--that he was strictly going to be a causation expert and he was not going to testify as to standard of care. . . She's known for years that Dr. Ehrie was going to be testifying to the effect, what affect amniotic fluid embolism has on the lungs.

Attorney Oldfather told the trial court that she could "neither affirm nor deny" whether she had such a conversation with Dr. Bennett's counsel.

a pulmonologist and that he would be a causation witness. He additionally stated that he obtained autopsy slides from the appellants' counsel for Dr. Ehrie to examine for the purpose of forming an opinion as to the cause of Mrs. Giuliani's death. The appellants' counsel told the trial court that she did not remember such a conversation with Dr. Bennett's counsel. Apparently satisfied that the appellants were neither surprised nor sufficiently prejudiced by Dr. Ehrie's testimony to warrant its exclusion, the trial court overruled the appellants' objection and allowed Dr. Ehrie to testify regarding his opinion of the cause of Mrs. Giuliani's death.

The substance of Dr. Ehrie's testimony was that Mrs. Giuliani died as a result of the massive damage done to her lungs as a result of an amniotic fluid embolism. Dr. Ehrie also testified that the damage was irreversible and that there was nothing that Dr. Bennett could have been done to save Mrs. Giuliani's life after the symptoms of the amniotic fluid embolism became manifest. Dr. Ehrie was also of the opinion that the reason some women have such an overwhelming negative response to the presence of amniotic fluid in their system is explained by a chemical reaction, similar to an allergic reaction.

The appellants insist that the trial court committed reversible error in providing Dr. Bennett "free rein to elicit from Dr. Ehrie any opinion he wanted." They argue that

> it was Appellee Bennett's obligation to either provide the CR 26.02 disclosure or its substantial equivalent prior to trial. It is admitted that he did not do this in any way, shape or form. There has not been any compliance with the letter or the spirit of

> CR 26.02. Indeed, the situation here is more similar to that in Clark v. Johnston, Ky., 492 S.W.2d 447 (1973) where the Supreme Court held that witnesses who were not included in the list of witnesses furnished to the court and to the opposing party at the pretrial conference could not be called at trial [emphasis original].

Our review of this issue is clearly governed by the abuse of discretion standard. "[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."[22] CR 26.02(4) reads in pertinent 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.

The purpose of this rule is to allow counsel to adequately prepare for trial and to effectively cross-examine the experts retained by opposing parties.[23] In addressing the

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[22]Collins v. Galbraith, Ky., 494 S.W.2d 527, 530 (1973).

[23]See Newsome by and through Newsome v. Lowe, Ky.App., 699 S.W.2d 748, 751 (1985). See also Phillips, 6 Kentucky Practice, CR 26.02, cmt. 10, (5th Ed. 1995), which states that "[t]he objectives of CR 26.02(4)(a)(i) [are] that[,] absent extenuating circumstances, a party's answers to expert witness interrogatories should provide the adverse party with a basis for preparing for cross-examination." The same treatise also stated (continued...)

federal counterpart, Fed.R.Civ.P.[24] 26b(4)(A)(i), one court reasoned that the disclosure required by the rule was "consonant with the federal courts' desire to 'make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practical extent.'"[25]

There is no question that Dr. Bennett's CR 26.02(4) disclosures were lacking in the required content contemplated by the discovery rule. However, we cannot accept the appellants' position that the only appropriate sanction was a ruling that Dr. Ehrie not be permitted to testify at trial. Such a sanction would have been particularly harsh given the fact the appellants had an opportunity, but did not seek, a lesser sanction. Even if Dr. Bennett's counsel did not orally disclose the substance of Dr. Ehrie's testimony to the appellants' counsel as he has claimed, and assuming that the appellants' counsel had no idea as to the use Dr. Ehrie would put the autopsy slides, the appellants learned no later than June 2, 1998, during Dr. Bennett's opening argument, that Dr. Ehrie would testify and offer opinions on the issue of causation. Yet, during the three weeks of the trial prior to his trial testimony, the appellants did not seek a continuance or a recess to depose Dr. Ehrie. We agree with the

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[23](...continued)
that "[m]ost attorneys have recognized that the use of interrogatories is a totally unsatisfactory method of providing needed information from trial experts." Id.

[24]Federal Rules of Civil Procedure.

[25]Thibeault v. Square D Co., 960 F.2d 239, 244 (1st Cir. 1992) (citing United States v. Proctor & Gamble Co., 356 U.S.677, 682, 78 S.Ct. 983, 986-87, 2 L.Ed.2d 1077 (1958)).

appellees that in determining the sanction a court should impose, it should "look to the conduct of the trial, the importance of the evidence to its proponent, and the ability of the [opposing party] to formulate a response."[26]

Further, as the appellees point out, Dr. Ehrie's opinions were not unfamiliar to the appellants. Certainly his opinion as to the cause of Mrs. Giuliani's death was the same as that of the appellants' own witness, Dr. Nichols. Dr. Ehrie's testimony that there was nothing that could have been done to save Mrs. Giuliani was previously elicited from another obstetrician, Dr. Gary Hankins, the hospital's expert witness, as well as from Dr. Nichols. Where Dr. Ehrie's testimony deviated from Dr. Nichols' testimony, that is, his opinion that the process is the result of an allergic reaction in the lungs to the amniotic fluid rather than a mechanical problem or blockage cause by the fetal debris, it presented a theory on which the appellants were well versed and on which, as the record shows, their counsel was very prepared to very ably cross-examine Dr. Ehrie. The record simply does not support the appellants' claim that they were surprised and prejudiced, and given their failure to seek lesser sanctions, we fail to perceive any abuse of the trial court's discretion in the matter.

In the last issue raised by the appellants, they allege that the trial court erred by allowing Dr. Guiler's expert witness, Dr. Steven Clark, an obstetrician on the staff of the

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[26] Johnson v. H.K. Webster, Inc., 775 F.2d 1, 8 (1st Cir. 1985)(citing DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1198, 1201-02 (3d Cir. 1978)).

University of Utah with a specialty in high-risk pregnancies, to testify over their Daubert challenge. It was Dr. Clark's opinion that Mrs. Giuliani died as a result of an amniotic fluid embolism, that Dr. Guiler's failure to be at her bedside did not alter the outcome, and that Mrs. Giuliani would have died regardless of the care Dr. Guiler provided.

Daubert requires a trial court "[w]hen faced with a proffer of expert testimony" to determine "'whether the expert is proposing to testify to (1) scientific [,technical or other specialized] knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.'"[27] Essentially, Daubert emphasizes that a trial court should, in performing its "gatekeeping" duties, ensure that all scientific evidence this is admitted be both reliable and relevant.[28] "Proposed testimony must be supported by appropriate validation--i.e., 'good grounds,' based on what is known. In short, the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability."[29] Daubert contains a non-exhaustive list for a trial court to apply in making its assessment, including:

> (1) whether a theory or technique can be and has been tested; (2) whether the theory or

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[27]Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 578 (2000)(citing Daubert, 509 U.S. at 592, 113 S.Ct. at 2796, 125 L.Ed.2d at 482).

[28]Daubert, 509 U.S. at 589 n.7, 113 S.Ct. at 2795, n.7, 125 L.Ed.2d at 480 n.7; Mitchell v. Commonwealth, Ky., 908 S.W.2d 100, 101-02 (1995).

[29]Mitchell at 101 (quoting Daubert at 509 U.S. at 590, 113 S.Ct. at 2795, 125 L.Ed.2d at 481).

> technique has been subjected to peer review and publication; (3) whether, with respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific, technical, or other specialized community.[30]

As with the other two issues raised in this appeal, our review is confined to the question of whether the trial court's evidentiary ruling constituted an abuse of its discretion.[31] "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles."[32] The Daubert hearing in the case sub judice was conducted by written memoranda. On the first day of trial, the trial court informed the parties that it understood their positions and had decided to deny the appellants' motion to exclude Dr. Clark's opinion testimony. The trial court offered to prepare a written ruling, but the appellants' counsel indicated that that was not necessary. Thus, the record does not contain the findings or reasoning for the trial court's ruling. Presumably, the trial court determined that Dr. Clark's opinions were both sufficiently relevant and reliable to be admitted.[33]

There is no issue concerning Dr. Clark's credentials

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[30]Goodyear, supra at 578-79.

[31]Id. at 577.

[32]Id. at 581 (citing Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999)); see also Kentucky National Park Commission ex rel. Commonwealth v. Russell, 301 Ky. 187, 191 S.W.2d 214, 217 (1945).

[33]See Goodyear, supra at 583.

and we will not extend this Opinion by reciting his many achievements. We note briefly that Dr. Clark is a board certified obstetrician and serves on the editorial staff of several medical publications, including the New England Journal of Medicine, and has written several articles about amniotic fluid embolism beginning in the mid 1980s. Further, there is no question about the relevancy of Dr. Clark's opinions.

It was the issue of reliability that the appellants raised in their challenge to Dr. Clark's testimony. In particular, the appellants point to an article co-authored by Dr. Clark and published in 1995 entitled "Amniotic fluid embolism: Analysis of the national registry," as evidence supporting their allegation that Dr. Clark's research methods are suspect and less than reliable. Dr. Clark established a registry in 1988 for doctors to send reports of actual cases of amniotic fluid embolism in an attempt to study and better understand the syndrome. The article, which contains an analysis of the cases forwarded to the registry, concludes that "[d]espite optimal care . . . most patients with this syndrome die, and most of the survivors are neurologically impaired." It also states that there are "striking similarities between clinical and hemodynamic findings in amniotic fluid embolism and both anaphylaxis and septic shock suggest a common pathophysiologic mechanism for all these conditions." In more simple terms, Dr. Clark opined that the syndrome resembles a chemical allergic reaction by a susceptible individual to the leakage of amniotic fluid in her circulatory system. The article also suggests a mortality rate

of 61%.

The registry article was both published and peer reviewed. Dr. Guiler's Daubert memorandum pointed out that the views of Dr. Clark were generally accepted and published in more than one text on obstetrics. However, the appellants learned that more than half of the cases reported in the registry article came from cases in which Dr. Clark had been asked to testify.[34] The appellants argue that such data skew the results and conclusions and are unreliable. In his cross-examination, Dr. Clark admitting to having similar concerns inherent with a registry, particularly the potential for bias.

Despite the limitations of the registry and the lack of reliability of its results and conclusions, the record reveals that Dr. Clark's opinions about Dr. Guiler's care of Mrs. Giuliani and his opinions about the nature of amniotic fluid embolism are not dependent on the registry and/or the data it represents. Dr. Clark's opinions are the result of years of training and experience as an obstetrician and researcher. We do not believe that the trial court erred in refusing to exclude Dr. Clark's opinion testimony based on the appellants' claim that one of his many published articles is distorted and biased. Instead, such alleged "deficiencies. . . must go to the weight [of the evidence] rather than to its admissibility."[35] The evidence

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[34]Although the article did not reveal the source of the registry's cases, Dr. Clark testified that the spread sheets containing several variables did identify the medical/legal cases and was available to anyone reviewing the article.

[35]Fugate, supra at 935.

presented to the jury reveals that there is still much uncertainty about the etiology of amniotic fluid embolism and why it results in death in some of its victims and not others. The jury was allowed to hear Dr. Clark's theories in that context and the appellants' counsel did an excellent job, as Daubert contemplates, of subjecting Dr. Clark and his opinions to "extensive cross-examination."[36] Again, we cannot say that the trial court abused its discretion in the admission of this evidence.

Accordingly, for the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

[36]Daubert, 509 U.S. at 593, 113 S.Ct. at 2797, 125 L.Ed.2d at 469 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.").

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