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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000980-MR

STEVEN J. HODGE, M.D. — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 96-CI-01075

FELICIA M. WATTS, AS
PERSONAL REPRESENTATIVE OF
THE ESTATE OF BRENT WATTS, DECEASED;
AND LABORATORY CORPORATION OF AMERICA — APPELLEES

AND

NO. 1999-CA-001012-MR

LABORATORY CORPORATION OF AMERICA — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 96-CI-01075

FELICIA M. WATTS, AS
PERSONAL REPRESENTATIVE OF THE
ESTATE OF BRENT WATTS, DECEASED;
AND STEVEN J. HODGE, M.D. — APPELLEES

AND NO. 1999-CA-001066-MR

FELICIA M. WATTS, AS
PERSONAL REPRESENTATIVE OF THE
ESTATE OF BRENT WATTS, DECEASED CROSS-APPELLANT

v. CROSS-APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 96-CI-01075

LABORATORY CORPORATION OF AMERICA;
AND STEVEN J. HODGE, M.D. CROSS-APPELLEES

AND NO. 1999-CA-001639-MR

LABORATORY CORPORATION OF AMERICA APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 96-CI-01075

KENTUCKY MEDICAL INSURANCE COMPANY;
FELICIA M. WATTS, AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF BRENT WATTS, DECEASED; AND
STEVEN J. HODGE, M.D. APPELLEES

AND NO. 1999-CA-001699-MR

KENTUCKY MEDICAL INSURANCE COMPANY CROSS-APPELLANT

v. CROSS-APPEAL FROM WARREN CIRCUIT COURT

HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 96-CI-01075

LABORATORY CORPORATION OF AMERICA;
FELICIA M. WATTS, AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF BRENT WATTS, DECEASED;
AND STEVEN J. HODGE, M.D. CROSS-APPELLEES

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

BEFORE: BUCKINGHAM, JOHNSON AND MILLER, JUDGES.

JOHNSON, JUDGE: Steven J. Hodge, M.D. has filed one appeal and Laboratory Corporation of America has filed two separate appeals which have been consolidated for our review. Felicia M. Watts, as personal representative of the estate of Brent Watts, deceased; and Kentucky Medical Insurance Company have filed cross-appeals. Having concluded that any errors by the circuit court were harmless, we affirm.

Brent Watts, the decedent in this matter, first noticed in the summer of 1995 that his shirt collar was irritating a small growth on the back of his neck. He was examined in July 1995 by Dr. Gordon Newell, a dermatologist from Bowling Green, Kentucky. Dr. Newell performed a shaved biopsy to remove the visible part of the growth and sent the specimen to LabCorp's facility in Louisville for analysis. Dr. Hodge was practicing medicine as a dermatopathologist and was working under a contract with LabCorp. This medical malpractice claim arose from Dr. Hodge's alleged misdiagnosis of Watts' malignant tumor. Dr.

Hodge, after consultation with associates, reported to Dr. Newell that Watts had a benign tumor known as a cellular neurothekeoma. Dr. Newell gave this "good news" to Watts and no further treatment was planned.

In December of 1995, Watts noticed that the growth on his neck had returned and he went to see Dr. Newell again. Dr. Newell took another biopsy and sent this second specimen to LabCorp for analysis. Pursuant to its normal procedure, LabCorp sent the second biopsy to a different physician, Dr. Antoinette Hood of Indianapolis, Indiana. Dr. Hood reviewed slides from both the July and December biopsies that had been taken from Watts' tumor. After consulting with other pathologists, Dr. Hood diagnosed a desmoplastic neurotropic malignant melanoma. There was medical testimony that in December the tumor was ten millimeters deep and a melanoma that deep has often metastasized in other organs.

In an effort to save his life, Watts underwent an aggressive treatment plan that included two major surgeries to remove a large amount of tissue and lymph nodes, radiation, a melanoma vaccine, radiation, chemotherapy, and interferon injections. Watts' treatment included treatments in Bowling Green, Louisville, Duke University, and Houston, Texas. While Watts had some favorable results from these extensive treatments, the cancer eventually spread to his lungs, liver and brain. When this case went to a jury trial in February of 1999, Watts was clinging to life. Watts was so ill he was only able to briefly

attend the trial and he was unable to testify in person, but a videotaped deposition was introduced. He died on March 11, 1999.

The trial of this case took the better part of seven days. Each side presented extensive expert testimony and substantial issues, such as causation, were contested. The jury awarded the following damages: medical expenses, $178,482.41; past lost earnings, $149,626.00; future lost earnings, $1,000,000.00; and pain and suffering, $1,500,000.00--for a total award of $2,828,108.41. Dr. Hodge and LabCorp filed post-trial motions under Kentucky Rules of Civil Procedure (CR) 50.02 and 59.01, which were denied on March 31, 1999. This appeal followed.

I. The Dr. Hodge Appeal (1999-CA-000980-MR)

Dr. Hodge has raised the following eight issues:

I. Dr. Hodge was denied a fair trial when the trial court allowed Watts' counsel to make reference to the financial resources of the defendants.

II. Dr. Hodge was denied a fair trial when the trial court permitted Watts to present evidence and make arguments regarding an alleged spoliation of evidence even though Kentucky does not recognize such a cause of action.

III. The jury verdict is the product of passion and sympathy for the plaintiff and prejudice against the defendants and is not supported by the evidence.

IV. Dr. Hodge was denied a fair trial by the [sic] permitting the jurors to pose written and verbal questions to witnesses.

V. The trial court erred in allowing Watts to introduce expert testimony from Dr. Joseph Zaydon.

VI. Dr. Hodge was denied a fair trial by the content and manner of Watts' closing argument.

VII. The trial court erred in instructing the jury on the burden of persuasion.

VIII. Dr. Hodge is entitled to a new trial on the basis of cumulative error.

Dr. Hodge contends that he was denied a fair trial by the following reference by Watts' counsel during voir dire to the financial resources of the defendants:

> Dr. Hodge has a very good lawyer, and so does the lab, and they have unlimited resources. And they have indicated that they may call as many as a dozen expert witnesses in this case to explain why Dr. Hodge did what he did. And what I need to know from you, and I don't have those resources. I will call three or four expert witnesses and I'll tell you why in the opening statement. I need to know if the fact that so much is at stake for the doctor's reputation, and because there is so much power and resources on the other side of the case, if any of you are hesitant or intimidated or just don't feel like you can find a verdict against the doctor even though the evidence justifies it [emphasis added].

Defense counsel objected to this statement and moved for a mistrial. The request for a mistrial was denied and no further relief was requested. The four cases relied upon by Dr. Hodge in his brief involved the introduction of evidence related to the financial condition of either side of the litigation. Our

Supreme Court in Hardaway Management Co. v. Southerland,[1] reiterated that "[i]t has been the law of this Commonwealth for almost one hundred years that in an action for punitive damages, the parties may not present evidence or otherwise advise the jury of the financial condition of either side of the litigation. The same rule applies in cases where punitive damages are not sought" [citations omitted][footnote omitted].[2] However, in the case sub judice there was no evidence introduced concerning the parties' financial condition, other than appropriate evidence concerning Watts' lost earnings. Dr. Hodge's objection related to statements made by counsel during voir dire.

In deciding this issue, our analysis must focus on whether the trial court abused its discretion in refusing to grant a mistrial. It is recognized that the trial judge is in the unique position to determine whether a mistrial is required.[3] From our review of the record, we cannot conclude that there was "'a manifest necessity for such an action or an urgent or real necessity'" to declare a mistrial.[4] Accordingly, we affirm on this issue.

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[1]Ky., 977 S.W.2d 910, 916 (1998).

[2]The Supreme Court indicated that as to punitive damages the majority of jurisdictions hold otherwise; but when punitive damages are not sought, our state is in accord with the majority of jurisdictions.

[3]Grimes v. McAnulty, Ky., 957 S.W.2d 223, 228 (1997).

[4]Skaggs v. Commonwealth, Ky., 694 S.W.2d 672, 678 (1985)(quoting Wiley v. Commonwealth, Ky.App., 575 S.W.2d 166 (1969); Brown v. Commonwealth, Ky., 558 S.W.2d 599 (1977)).

The second issue concerns the allegation Watts made in his third amended complaint that Dr. Hodge and LabCorp "tampered with physical evidence in this case in violation of KRS 524.100." Watts claimed he was entitled to damages for violation of this Class D felony statute under KRS 446.070, which provides that "[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation. . . ." In Watts' brief, it is contended that "Dr. Hodge violated the statute when he ordered lab technicians to make more slides from the July biopsy to get rid of the remaining tissue[;] [c]oncealing or destroying those slides[;] . . . [and] . . . when he photographed The Duke Slide, but <u>said</u> it depicted one of the July slides" [emphasis original].

The trial court directed a verdict in favor of Dr. Hodge and LabCorp on this issue, but Dr. Hodge has claimed in his brief that he was "denied a fair trial when the trial court permitted Watts to present evidence and make arguments regarding an alleged spoliation of evidence even though Kentucky does not recognize such a cause of action."[5] Dr. Hodge observed in his brief that Watts' counsel made the following comment in his opening statement:

> So they knew there was trouble in mid-January of 1996, and that's when the evidence tampering began in this case. I'm going to

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[5]Watts in her protective cross-appeal claims the trial court erred by granting the direct verdict. The issues on cross-appeal will be addressed later.

talk about all of the evidence tampering at one time, because there was a lot of it.

Dr. Hodge's brief then states, "Watts' counsel further advanced the evidence tampering theme by calling several LabCorp employees to the stand to testify during Watts' case in chief. . . . [T]he purpose of calling LabCorp personnel . . . was to advance the cause of distracting the jury from the real issues in the case while subjecting the defendants to a hostile reaction from the jury and bias against the defendants."

Dr. Hodge notes that our Supreme Court in Monsanto Co. v. Reed,[6] refused to create "a new cause of action for 'spoliation of evidence.'" The Supreme Court stated that "[w]here the issue of destroyed or missing evidence has arisen, we have chosen to remedy the matter through evidentiary rules and 'missing evidence' instructions."

In Watts' brief, it is contended that "[t]he defense briefs have misrepresented the plaintiff's position. The Third Amended Complaint did not allege that spoliation was a tort, because Monsanto v. Reed [ ] holds it is not. However, Monsanto does not address whether tampering with evidence in violation of KRS 524.100 is a tort." Thus, Watts argues that the evidence and arguments presented regarding this issue were proper because there was a reasonable basis for this claim; in fact, Watts claims in her cross-appeal that the trial court erred by granting a directed verdict on this issue.

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[6]Ky., 950 S.W.2d 811, 815 (1997).

Relying on Monsanto, supra, Dr. Hodge and LabCorp filed motions to dismiss for failure to state a claim and stated:

> The destruction of evidence instruction is not automatically granted when a party has been accused of spoiling or destroying evidence. As with any jury instruction, the party must first produce evidence upon which the court can base the instructions. . . . In Tinsley,[7] while acknowledging that the destruction of evidence may entitle the defense to an instruction setting forth a presumption or inference favorable to the criminal defendant, the appellate court remanded the case so that the trial court could evaluate the evidence surrounding the destruction of the evidence. Tinsley reinforces the fact that ultimately, which instruction, if any, is appropriate rests with the court after careful evaluation of the evidence [emphasis original].

While the trial court in the case sub judice ultimately determined that a destruction of evidence instruction was not supported by the evidence, the trial court first had to consider the evidence in support of Watts' claim. Trial courts are regularly confronted in causes of action which have alleged multiple claims with the question of whether part of a plaintiff's cause of action should be dismissed for failure to state a claim or by summary judgment; or whether the plaintiff should be allowed to introduce evidence in support of his claim, and the claim re-evaluated on a motion for a directed verdict. When the trial court chooses to grant a defendant's motion for a directed verdict which results in the dismissal of one of the plaintiff's claims in a multiple claim cause of action, the trial

[7] Tinsley v. Jackson, Ky., 771 S.W.2d 331 (1989).

court is presented with a situation where the jury has already heard evidence which the trial court has determined did not sufficiently support the plaintiff's claim to entitle the plaintiff to a jury instruction on that claim.

When Dr. Hodge's and LabCorp's motions to have Watts' claim for destruction of evidence dismissed were denied, they did not seek in the alternative to have Watts' multiple claims tried separately. This Court has recognized a trial court's discretion in "bifurcat[ing] the proceedings by separating the ordinary damages from the punitive damages if it feels that undue prejudice would result from lumping all the claims and their proof together."[8] As this Court recognized in Rodgers, "these matters fall within the trial court's discretion under CR 42.02."[9] Finding no abuse of the trial court's discretion in the trial of these claims in the case sub judice,[10] we affirm.

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[8] Island Creek Coal Co. v. Rodgers, Ky.App., 644 S.W.2d 339, 349 (1982).

[9] Id. CR 42.02 provides:

> If the court determines that separate trials will be in furtherance of convenience or will avoid prejudice, or will be conducive to expedition and economy, it shall order a separate trial of any claim, cross claim, counter-claim, or third-party claim, or of any separate issue or of any number of claims, cross claims, counterclaims, third-party claims or issues.

See also Gray v. Bailey, Ky., 299 S.W.2d 126 (1957); See generally Bifurcation Unbound, 75 Wash.L.Rev. 705 (2000).

[10] "'Abuse of discretion in relation to the exercise of (continued...)

Dr. Hodge also claims he "was denied a fair trial by [ ] permitting the jurors to pose written and verbal questions to witnesses." Dr. Hodge does not claim to have made contemporaneous objections to these questions; but instead argues that "[t]his issue was preserved for review by Dr. Hodge's motion for a new trial[,]" or "that review is appropriate under the palpable error rule set forth in CR 61.02." We agree with Dr. Hodges that the procedure followed in the case sub judice was not in compliance with the procedure set forth by our Supreme Court in Transit Authority of River City v. Montgomery:[11]

> It was not improper, in the case, for a juror to ask any competent and pertinent questions of a witness, if permitted to do so by the court. Miller v. Commonwealth, Ky., 188 Ky. 435, 222 S.W. 96 (1920). In fact, the practice is encouraged with strict supervision by the trial judge, if it is likely to aid the jury in understanding a material issue involved. Louisville Bridge and Terminal Co. v. Brown, 211 Ky. 176, 277 S.W. 320 (1925); Stamp v. Commonwealth, 200 Ky. 133, 253 S.W. 242 (1923). Of course, if a juror should ask an incompetent or irrelevant question, counsel should object and the court should sustain such an objection. Brown, supra. Herein, each juror who proposed a question was called to the bench, with all counsel, and a preliminary review or comment as to any proposed question was discussed out of the hearing of the remaining jurors.

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[10](...continued)
judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.'" . . . "The exercise of discretion must be legally sound." Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994).

[11]Ky., 836 S.W.2d 413, 416 (1992).

In the case sub judice, the trial court allowed the first question from a juror on February 5, 1999, the third day of trial, during Watts' case in chief. The trial court initially followed a procedure consistent with Montgomery; the questions were submitted to the trial court by the jurors in writing, the trial court allowed counsel to review the questions, and by agreement one of the attorneys would ask the witness the question. In his brief, Dr. Hodge does not claim error during this phase of the trial, but contends that reversible error occurred after the procedure was relaxed:

> Unfortunately, whatever semblance of control existed in the procedure described above was abandoned by the trial court when it allowed jurors [to] ask verbal questions directly to witnesses, without any prior screening or discussion of the question by or among counsel. For example, one juror asked Dr. Brett Coldiron why, if the tumor could metastasize in the brain[ ], liver, lungs or lymphatic system, did the treating physicians not perform a scan or test of Watts' brain, liver or lungs when the biopsy of the lymph nodes was performed in 1996 [citation to record omitted]. Such a question does not directly pertain to whether Dr. Hodge or LabCorp conformed to the standard of care. Rather, it indicates that the juror is approaching the case from what could have been done in the treatment of a particular patient rather than whether treatment provided met the standard of care [emphasis original].
>
> There is another reason for not permitting a juror to ask a question regarding a substantive issue, i.e. one that is designed to elicit an answer rather than to clarify the identification of a document or the meaning of a particular term. One commentator has suggested that the most compelling argument against juror questioning

is that the jury's role will be distorted regardless of the selected method and the utilization of elaborate screening mechanisms [emphasis original]. Jeffrey S. Berkowitz, Breaking The Silence: Should Jurors Be Allowed To Question Witnesses During Trial?, 44 Vand.L.Rev. 117, 147 (1991). ("The problem, as noted in a concurring opinion in United States v. Johnson, [footnote omitted] is that the jury is intended to be a neutral fact finder in the adversary process. This neutrality is naturally at risk whenever the jury is afforded an opportunity to ask questions that move beyond basic elements of a witness's testimony [emphasis original]. Cases in which other members of the jury hear the questions that the judge refuses to ask are especially problematic because both the juror who raised the question and the other members of the jury may retain the opinion generated by the question" [emphasis original].)

Furthermore, involving jurors in the interrogation of witnesses causes them to violate, or at least substantially increases the likelihood that they will violate the admonition set forth in KRS 29A.310. Subsection (1) of that statute provides that the jury should be admonished by the court prior to each recess that it is their duty not to talk about the case or to formulate an opinion about the case until the matter is submitted to them. Indeed, the defendants notified the trial court that two jurors appeared to conference and compare notes before posing a question [citation to record omitted]. Dr. Hodge requested that the two jurors be struck from the jury, but the request was denied [citation to record omitted].

In abdicating the strict supervision of a juror questioning called for by the Kentucky Supreme Court in Montgomery, the trial court allowed the substantial rights of the defendants to a fair trial to be sacrificed in order to obtain a swift conclusion to a complex trial. Reversal is required.

As Watts argues in response, counsel for the defense did not object to the procedure followed by the trial court or to any particular questions. In fact, during Dr. Hodge's testimony he openly solicited questions from jurors and encouraged them to ask him questions. At times the testimony from Dr. Hodge and his exchanges with the jurors constituted a dialogue and had the appearance of a speaker interacting with his audience. While it would have been better for the trial court to have followed the procedure set forth in Montgomery, we cannot find that the trial court abused its discretion in using a different procedure. Furthermore, there was no objection and certainly any error did not rise to palpable error.

Dr. Hodge's next argument is that "[t]he trial court erred in allowing Watts to introduce expert testimony from Dr. Joseph Zaydon" because the "repeated injection of expert opinion testimony from a fact witness resulted in substantial prejudice and deprived him of his right to a fair trial." This claim by Dr. Hodge exaggerates the extent to which Dr. Zaydon's testimony went beyond his own knowledge of the facts of this case.

Dr. Zaydon, who is a plastic surgeon from Bowling Green, Kentucky, testified on direct examination for approximately 38 minutes.[12] He testified that he first met Watts

[12]Dr. Zaydon's testimony was interrupted approximately five times by objections by the defense. Unfortunately, we are confronted once again with videotaped bench conferences that are in a large part inaudible. We recognize the time constraints on the trial court and we realize that a bench conference is much (continued...)

when Watts replaced one of his stockbrokers and handled a "small account" for him. After Dr. Newell learned of the malignancy following the December 1995 biopsy, Dr. Newell contacted Dr. Zaydon in January 1996 to see if he would accept the referral of Watts for the purpose of making "a wider incision" to remove the tumor on Watts' neck. Dr. Zaydon became a "part of the treating team" and removed the tumor in January 1996. Dr. Zaydon continued to participate in advising Watts as to his various treatment options; and in the treatment of Watts, which included the removal of other growths.

Dr. Zaydon's testimony also included some personal observations concerning him being a "close friend" of Watts. He explained that while he considered Watts a friend when Watts was working as one of his stockbrokers, that after he and Watts both became terminally ill they had "become mutually dependent" and "close friends." He described Watts as "special," "stoic" and "brave."

In his brief, Dr. Hodge focuses on the part of Dr. Zaydon's testimony that referred to Watts' cancer as having been "misdiagnosed." Dr. Hodge refers to three different responses from Dr. Zaydon that he believes entitled him to a mistrial. First, in summarizing Watts' treatment, Dr. Zaydon referred to Watts' treatment at Duke University and stated, "But, something

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[12](...continued)
quicker than an in chambers conference; however, the bench and bar need to be made aware of problems that are presented when bench conferences are inaudible.

else happened at Duke. They reviewed the slides; and when they reviewed the slides." Defense counsel immediately objected and argued "that Dr. Zaydon was about to offer expert testimony that a mistake was made with respect to the July 1995 biopsy and that such testimony would be in violation of the court's pretrial orders and would also be hearsay and cumulative of Dr. Shea's[13] testimony." The trial court sustained Dr. Hodge's objection as to hearsay, but overruled the objection that Dr. Zaydon's testimony constituted improper expert testimony.

It is this Court's opinion that the defense actually received more from the trial court than it was entitled. As a member of "the treating team," any reports that Dr. Zaydon received from other treating physicians qualified as admissible evidence under the business records exception to the hearsay rule.[14] As to Dr. Hodge's objection that Dr. Zaydon offered expert testimony concerning the possible misdiagnosis, we fail to see how his limited reference to the concern that there had been a misdiagnosis constituted the "offer [of] expert testimony that a mistake was made with respect to the July 1995 biopsy." Dr. Zaydon never expressed an opinion, expert or otherwise, that a misdiagnosis had occurred. He merely stated that in the course of treatment of Watts other physicians had raised the question of

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[13]Dr. Raymond Shea, a dermatopathologist from Duke University, was Watts' primary expert witness.

[14]Kentucky Rules of Evidence (KRE) 803(6); Lawson, The Kentucky Evidence Law Handbook §8.65 (3d ed., 1993); Baylis v. Lourdes Hospital, Inc., Ky., 805 S.W.2d 122, 123 (1991).

a possible misdiagnosis. This was an undisputed fact; and Dr. Zaydon's testimony did nothing more than present that undisputed fact in the context of Watts' course of treatment. It must be remembered that Dr. Zaydon participated as a member of Watts' "treating team."

The second objection that Dr. Hodge relies upon in his brief relates to the following question and answer:

> Mr. Hixson: Did you receive a copy of the Duke path report indicating melanoma?[15]
>
> Dr. Zaydon: I received a copy of the review of the slides of the December biopsy and I concurred that it was indeed a deadly melanoma. Five, Clark's level 5, 10.03 [mm] in thickness.
>
> I also received, and this was the first time I noted a possible misdiagnosis of a slide that was read on July 25 [1995].

LabCorp argued to the trial court that by making the above statement Dr. Zaydon "interpreted that there was a misdiagnosis," when the Duke report did not so indicate. Watts' counsel argued that Dr. Zaydon's testimony was proper because Dr. Zaydon was the person who informed Watts of the possible misdiagnosis. The trial court indicated that it would allow the question with the understanding that Dr. Zaydon was the one who informed Watts of the possible misdiagnosis, and that "if it isn't then I might

[15]Objection to leading was understandably overruled.

sustain your motion for a mistrial." The questioning continued as follows:

> Mr. Hixson: Doctor, you did then receive a report from Duke indicating that Dr. Shea thought the slide from the July biopsy was malignant melanoma?
>
> Dr. Zaydon: The July biopsy was diagnosed as a malignant melanoma which differed from the biopsy report previously furnished to me.
>
> Mr. Hixson: Did you have to tell Brent what you had seen in that report and what it might mean? Don't, don't give any opinions about whether Dr. Hodge did anything or not, wrong . . .
>
> Dr. Zaydon: I know . . .
>
> Mr. Hixson: but did you have to tell Brent what you had learned?
>
> Dr. Zaydon: Brent knew that there was a discrepancy and Brent discussed it with me.

Dr. Hodge's counsel immediately renewed his motion for a mistrial on the grounds that the trial court's basis for allowing this testimony had been incorrect. The motion was denied. In his brief, Dr. Hodge summarizes his arguments concerning his entitlement to a mistrial due to Dr. Zaydon's testimony as follows:

> Dr. Hodge respectfully submits that the improper injection of expert opinion testimony by Dr. Zaydon warranted a mistrial. Dr. Hodge submits that the trial court erred in allowing Dr. Zaydon to testify that he too had been diagnosed with a severe illness and grew closer towards Watts through that shared

> experience, and that he prayed with Watts and his children. Zaydon also testified that he and Watts joked about which of them would be the first to die from his illness [citation to record omitted]. Dr. Hodge moved for mistrial on the basis of the admission of such irrelevant testimony, but the motion was denied. Dr. Hodge's request to exclude the aforementioned testimony or for an admonition to the jury was also denied [citation to record omitted].

As we stated previously, we believe Dr. Hodge has mischaracterized Dr. Zaydon's testimony. Dr. Zaydon did not offer any expert testimony concerning a possible misdiagnosis of Watts' cancer. His two brief references to a "possible misdiagnosis" was in the context of his involvement in the overall treatment plan for Watts and how the cancer and possible misdiagnosis had affected Watts' quality of life. The trial court did not abuse its wide discretion in refusing to declare a mistrial. We affirm on this issue.

Dr. Hodge further claims that the trial court erred by denying his motion for a directed verdict on the issue of causation. Our Supreme Court has stated the standard of review for the denial of a motion for direct verdict as follows:

> All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was

reached as a result of passion or prejudice.'"[16]

In his brief, Dr. Hodge claims that "it is clear that the verdict on liability and causation is so flagrantly against the evidence that it is obviously the product of passion and prejudice." Dr. Hodge bases this assertion on his contention that the expert witnesses, including two for Watts (Dr. Raymond Shea and Dr. Sanjiv Argawala) and two for Dr. Hodge (Dr. Douglas Reintgren and Dr. Lafayette G. Owen) "agreed that tumor thickness was probably the single most important factor to consider in determining the prognosis, or survivability, of a melanoma." Dr. Hodge argues that "[t]he experts also agreed that the July 1995 biopsy indicated a tumor of 1.8 or 1.9 millimeters in thickness, but that Dr. Newell had not removed all of the tumor and that a portion of the tumor was left behind" [emphasis original]. Dr. Hodge argues that "since the only opinions on tumor thickness were offered by the defendants' experts[,] . . . [r]eversal is required, as the jury [has] completely ignored the testimony on the issue of tumor thickness and rendered a verdict based solely on sympathy, emotion, passion and prejudice against the defendants."

In response, Watts relies on the following evidence to support the jury's finding of causation: (1) "Dr. Shea testified that [Dr.] Hodge's conduct fell below the standard of care." Dr.

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[16] USAA Casualty Insurance Co. v. Kramer, Ky., 987 S.W.2d 779, 781-82 (1999).

Shea referred to two photographs that he believed showed the melanoma. He told the jury, "I consider that to be a misdiagnosis[;]" and (2) "Dr. Agarwala said tumor thickness is one of several important factors to consider when asking whether the tumor had metastasized before the misdiagnosis." He opined, "[t]he spread of the tumor . . . occurred later in the course [later than July, 1995], because once spread occurs for metastatic melanoma, the survival of most patients is very limited; and once again historically it's about 6 to 12 months." Watts lived for three years and seven months after July 1995.

This case was vigorously practiced by all parties, numerous depositions of expert witnesses were taken and numerous experts testified in person during a lengthy trial. Dr. Hodge's main contention that all experts agreed "that tumor thickness was probably the single most important factor to consider in determining the prognosis, or survivability, of a melanoma" goes to the weight of the evidence. Evidence presented by Watts which supports a finding of causation and which must be taken as true is the in person testimony of Dr. Shea, the dermatopathologist from Duke University. Dr. Shea gave his expert opinion that Dr. Hodge's misdiagnosis of Watts' tumor in July 1995 fell below the standard of care and that this misdiagnosis caused a delay in treatment which allowed Watts' cancer to develop more rapidly which contributed to cause his death at an earlier date than if he had received timely treatment. Certainly, this constituted substantial evidence to support the jury's verdict.

Dr. Hodge also contends that if the jury award of $1 million in future lost wages was based upon Watts' evidence of an annual income of $93,516.00, then "the jury's award for future lost wages assumes that Watts would have lived 10.7 years from the date of the trial but for the alleged misdiagnosis." He concludes this argument by contending that "given the extremely low chance of long term survival from a tumor that already matastasized by July 1995, the jury's verdict is flagrantly against the evidence." Watts responds by pointing out that there was substantial evidence to allow the jury to find that "the tumor had not metastasized; otherwise, they could not award anything, due to lack of causation" [emphasis original]. Watts presented expert testimony that in July 1995, at 39.45 years of age, he had a remaining work life expectancy of 20.7 years, and a loss of earning capacity of $1.6 million. Watts' theory of his case, which was supported by expert testimony, was that if his tumor had been correctly diagnosed in July 1995 as malignant, then in this early stage his cancer would have been more receptive to treatment and his likelihood of survival would have been much higher. These factual determinations were reserved to the jury as the trier of facts, and since the evidence supports its findings, we affirm.

Dr. Hodge also claims that he "was denied a fair trial by the content and manner of Watts' closing argument." Specifically, Dr. Hodge claims the following argument by counsel

concerning the amount the jury should award to Watts for pain and suffering constituted a "golden rule" argument:

> How could you compensate him for that? Would you do it by the hour, day, week or year? Gee, I hope not.
>
> Suppose you saw a want ad and it says: here's a job-call this number to apply. There are no duties. You don't have to report for work. You can spend the day as you choose. No obligations. No bookkeeping. The job pays $500 a day, we'll send you a check every week. Nothing else to do. And it's not selling drugs.
>
> So you call and you find out, what is the job: The job has only one feature. You have to endure pain for the rest of your life. Continuing, unrelenting pain. Once you take the job, it's permanent. You can't quit. No vacation. That's it, all you gotta do is endure pain.
>
> Nobody would answer that. Nobody would take that job. But Brent has that. And none of us can undo it.

Dr. Hodge concedes that this issue was not preserved for appellate review; but he contends that we should grant relief under CR 61.02, the palpable error rule. There is no basis for such relief; the argument did not constitute a "golden rule" argument.[17] We have reviewed Watts' counsel's closing argument in its entirety and believe it to have been proper and fair.[18]

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[17] Smith v. McMillan, Ky., 841 S.W.2d 172 (1992); May v. Francis, Ky., 433 S.W.2d 363 (1968); Stanley v. Ellegood, Ky., 382 S.W.2d 572 (1964).

[18] Halvorsen v. Commonwealth, Ky., 730 S.W.2d 921, 925 (1986).

The award for pain and suffering was clearly reasonable and within the discretion of the jury, and we affirm.

The seventh issue raised by Dr. Hodge is his claim that "[t]he trial court erred in instructing the jury on the burden of persuasion." Approximately 5 ½ hours after the jury had begun its deliberations, it submitted a written question to the trial court asking, "[d]o we have to decide guilt beyond a reasonable doubt in this case or is that in criminal cases only?" Dr. Hodge and LabCorp objected to the trial court telling the jury "in criminal cases only." The defendants claimed the appropriate response should have been to tell the jury to refer to the written jury instructions. The two cases cited by Dr. Hodge in his brief do not hold that the trial court abused its discretion by providing the jury with additional instructions. Rather, the cases hold that the trial court did not abuse its discretion by not enlarging upon the instructions in an attempt to answer the jury's question.[19] As was the case in Lee v. Henderson,[20] the answer to the jury's question in the case sub judice could not be readily discerned from re-reading the written instructions. The trial court did not abuse its discretion in answering this simple question in a straightforward and correct manner, and we affirm.

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[19]Thompson v. Walker, Ky.App., 565 S.W.2d 172, 174 (1978); Kentucky & Indiana Terminal Railroad Co. v. Mann, Ky., 312 S.W.2d 451, 453 (1958).

[20]Ky., 331 S.W.2d 884, 885 (1960).

The final issue raised by Dr. Hodge is his claim that he "is entitled to a new trial on the basis of cumulative error." We have previously held that none of the seven issues raised by Dr. Hodge constituted error. We have reviewed the video record of this trial in its entirety and our conclusion is that the experienced trial judge[21] was diligent and vigilant in his efforts to afford all the parties a fair trial. Dr. Hodge has not presented any issue that merits a new trial or further discussion, and the judgment is affirmed.

II. The LabCorp Appeal Against Watts (1999-CA-001012-MR)

Lab Corp has raised the following issues:

I. The trial court directed a verdict against LabCorp in error.

A. The court's finding of express agency is unsupported by the evidence.

B. The court's finding of ostensible agency was error.

II. The trial court committed reversible error by denying LabCorp a closing argument.

III. The trial court committed reversible error by allowing the introduction of irrelevant evidence concerning slides made after the date of Dr. Hodge's diagnosis.

A. The trial court failed to limit the proof of evidence relevant to the plaintiff's claim of negligence against Dr. Hodge.

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[21] Judge Lewis told the jury before instructing it that this was his 300th jury trial as a circuit court judge.

B. The trial court erred by allowing the plaintiff to pursue a theory of recovery based on spoliation of evidence.

LabCorp claims the trial court erred by denying its motion for a directed verdict on the issue of liability, and instead, entering a verdict in favor of Watts. LabCorp argues in its brief that the trial court erred twice: (1) "The court's finding of express agency is unsupported by the evidence"; and (2) "The court's finding of ostensible agency was error." Lab Corp's position is that it contracts independently with medical specialist such as a dermatopathologist to provide the medical services required for conducting a pathological analysis of tissue samples. LabCorp puts great weight on a "Consulting Agreement" between it and Dr. Hodge, which stated in part:

> 7. It is understood and agreed that the DOCTORS have entered into this Agreement as independent contractors and, notwithstanding anything to the contrary contained herein, neither the DOCTORS nor any Substitute, shall at any time be considered either an employee of NHL[22] entitled to any of the benefits thereof or an agent of NHL entitled to act for or in behalf of NHL in any respect whatsoever. . . .

In support of its first argument, Lab Corp states in its brief as follows:

> Both the Agreement which existed between Dr. Hodge and LabCorp as well as the manner in which Dr. Hodge conducted his medical practice under that Agreement clearly

[22]NHL refers to National Health Laboratories Incorporated, which was LabCorp's predecessor.

indicate that Dr. Hodge was not LabCorp's agent, but was LabCorp's independent contractor.

. . .

The paramount inquiry in determining whether one is properly designated an independent contractor as opposed to an employee is the degree of control exercised by the person or entity employing the independent contractor over the details of the contractor's work in question. Shedd Brown Mfg. Co., 257 S.W.2d at 896.

. . .

Under the Agreement, Dr. Hodge exercised complete and unfettered control over the details of his work as a dermatopathologist [citation to record omitted]. It was Dr. Hodge, not LabCorp, who decided the best manner in which to examine a slide, which power to use when examining a slide under the microscope, how to interpret cellular patterns observed under the microscope, and the diagnosis based on observation of patterns. This is the practice of medicine. Dr. Hodge, not LabCorp, decided whether to order re-cuts or special straining, whether to show the slides around to other pathologists or whether to get an outside consultation. This is the practice of medicine. It was Dr. Hodge, not LabCorp, who rendered a diagnosis and decided what information should be conveyed to the clinician in the pathology report [citation to record omitted]. Again, this is the practice of medicine.

. . .

None of the evidence presented by Plaintiff contradicted that offered by LabCorp on the issue of control. The evidence presented below is uncontraverted that dermatopathology requires special skill. The evidence below is also uncontraverted that Dr. Hodge performed the services required under the Agreement — the practice of medicine — in his office using a

> microscope he owned and making his own unfettered decisions about what the appearance of the cells meant. Compensation due under the Agreement was tied to the number of cases read by Drs. Hodge and Owen and was not a function of hours worked.
>
> . . .
>
> The only conclusion that can be drawn from the evidence is that, when it came to the practice of medicine, Dr. Hodge operated independently. The diagnoses he reached after analyzing slides were reached by him, outside the control of LabCorp. LabCorp had neither the authority nor the ability to control or interfere with Dr. Hodge's practice of medicine. Because LabCorp exercised absolutely no control over the details of Dr. Hodge's practice of dermatopathology and specifically his examination and interpretation of slides pertaining to the Plaintiff in July of 1995, it was error for the trial court to direct a verdict on the issue of express agency in favor of the Plaintiff. Even when all inferences are drawn in favor of the Plaintiff, it remains irrefutable that, as it relates to the examination and diagnosis of tissue samples, LabCorp exercised absolutely no control over its contract dermatopathologists, including Dr. Hodge.

As to the second issue, LabCorp argues in its brief as follows:

> In addition to finding against LabCorp on the issue of express agency, the trial court curiously granted the Plaintiff's motion for directed verdict on the issue of ostensible agency. Ostensible agency, or apparent authority as this principle is sometimes called, is a substitute for express agency used to apply the principle of respondeat superior in instances where no agency exists. Because the trial court found an agency relationship did exist between LabCorp and Dr. Hodge by directing a verdict against LabCorp on the issue of express

agency it is inexplicable that the trial court ruled upon the issue of ostensible agency at all.

. . .

The Court in Paintsville Hospital found it justifiable to disregard the reality of the contractual relationship between the hospital and physician and apply ostensible agency because persons "who seek medical help through the emergency room facilities of modern day hospitals are unaware of the status of the various professionals working there." Paintsville Hospital, 683 S.W.2d at 258.

The facts that justified the application of ostensible agency in Paintsville Hospital are not present here. Dr. Newell, not the Plaintiff, made the decision to submit both the July and December specimens to Lab Corp. The Plaintiff was not even aware of LabCorp or Dr. Hodge or their involvement in his care. The Plaintiff did not choose LabCorp. Dr. Newell testified that he did not depend on LabCorp to select a pathologist. Dr. Newell was aware of Dr. Hodge's status as an independent contractor for LabCorp and assumed a contractual, not an employment, relationship existed between Dr. Hodge and LabCorp. Dr. Newell testified that he specifically chose to send his specimens to LabCorp because Dr. Hodge or one of his associates would be reading the slides and rendering a diagnosis. The pathology report prepared by Dr. Hodge and transmitted by LabCorp was received not by Plaintiff, but by Dr. Newell. LabCorp billed Dr. Newell, not the Plaintiff, as Dr. Newell was its client [citations to record omitted].

Because Dr. Hodge was not a hospital based physician and because the Plaintiff never came to LabCorp, as the plaintiff in Paintsville came to the hospital, and thus the Plaintiff never made any assumption about the relationship of Dr. Hodge and LabCorp, nor could he have done so, the Court's application of ostensible agency is erroneous.

LabCorp is correct in its reply brief that Watts' response brief failed to address the agency issues it raised. Watts' arguments concerning Dr. Hodge's "administrative duties" "as co-medical director of LabCorp's Louisville histology laboratory" and the nature of the "inherently dangerous activity" under Restatement (Second) of Torts §413, §414, §416 and §427 are irrelevant.

In deciding the issue of vicarious liability, we believe that it will be helpful to provide a general discussion of this area of the law. While there are many cases and legal articles that have addressed the issue of the liability of a hospital, sanitarium, or physician for the negligence of personnel who have provided medical services, we have not found any that deal directly with the liability of a medical laboratory for a misdiagnosis by a physician. However, we believe it is useful to consider the development of the law in this general area.

For many years the rule was that without a direct employment relationship or express agency, hospitals could not be held liable for the negligent acts of emergency room physicians; accordingly, the cases revolved around whether the particular relationship between a hospital and a physician constituted an employee-employer relationship. If the physician was found to be an independent contractor and not an employee, liability did not extend to the hospital. However, "[o]ver the past several years, courts in several states have held hospitals liable for the

negligent acts of independent-contractor physicians in the emergency room under theories of apparent authority and authority by estoppel."[23]

The annotation at 58 A.L.R.5th 613, 629, explains as follows:

> These two theories are exceptions to the rule limiting an employer's vicarious liability to the actions only of employees and agents and are derived from, respectively, the Restatement (Second) of Torts § 429[24] and the Restatement (Second) of Agency § 267.[25] Close comparison of the two sections shows one significant difference. In § 429, there is no need to show a reliance on the apparent authority itself to find liability, while § 267 requires that the third person show that he or she justifiably relied on the representation of the agency or employment in seeking the services alleged to have been negligent. In the context of medical malpractice, however, that need to demonstrate justifiable reliance has been altered significantly to a requirement to show that the third person relied on the reputation of the principle hospital in making the decision to seek health care from

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[23]Daniel L. Icenogle, J.D., M.D., Annotation, Hospital Liability as to Diagnosis and Care of Patients in Emergency Room, 58 A.L.R.5th 613 (1998).

[24]"One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants."

[25]"One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such."

> the apparent agent physician. As a result, the distinction between doctrine derived from the two different sections has been erased and the terms "apparent authority" and "authority by estoppel" are treated synonymously in this context.

When Kentucky case law is reviewed, it is evident that the development of the law in this state is consistent with the majority of jurisdictions in this country. In Paintsville Hospital Co. v. Rose,[26] our Supreme Court stated that "[t]he issue is whether the appellant, Paintsville Hospital, can be held liable on principles of ostensible agency or apparent authority for the negligence of a physician who was not employed by the hospital but who furnished treatment in the emergency room which was provided by the hospital and open to the public." The physician, Dr. Ikramuddin, was "charged with negligence causing the death of Grimsey Rose in failing to properly read head x-rays resulting in failure to diagnose a skull fracture with subdural hematoma."[27]

Unlike the case sub judice, in Paintsville Hospital, it was not disputed "that Dr. Ikramuddin had no actual agency relationship with the hospital"; the issue on appeal concerned "ostensible agency."[28] The Supreme Court noted that "the cases applying the principle of ostensible agency to the hospital/emergency room physician situation, without exception,

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[26]Ky., 683 S.W.2d 255 (1985).

[27]Id. at 256.

[28]Id.

do not require an express representation to the patient that the treating physician is an employee of the hospital, nor do they require direct testimony as to reliance. A general representation to the public is implied from the circumstances."[29] The Supreme Court observed that "[t]he landmark case applying the principle of ostensible agency to physicians not employed by the hospital but furnished through the institutional process is Seneris v. Haas, 45 Cal.2d 811, 291 P.2d. 915 (1955), where it was applied to an anesthesiologist. Since then few courts have failed to recognize the soundness of this application[.]"[30] The Supreme Court continued by citing numerous cases that have followed this approach and noted that it had "been generally applied not only to anesthesiologists, but to pathologists, radiologists, and emergency room physicians, all of whom share the common characteristic of being supplied through the hospital rather than being selected by the patient."[31]

While Paintsville Hospital involved the application of ostensible agency to support the vicarious liability of a hospital for the negligence of an independent contractor/emergency room physician and not a laboratory for the negligence of an independent contractor/pathologist, the Supreme Court noted that "the principle itself is one recognized and of

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[29]Id.

[30]Id. at 256-57.

[31]Id. at 257.

longstanding in Kentucky."[32] The Supreme Court cited Middleton v. Frances,[33] where this principle was applied "to establish the liability of a taxicab company to a passenger where the sole connection between the driver and the taxicab company was the company's name painted on the taxi and rent paid to the company for the privilege of operating it from the company office. The company did not employ the driver and received no part of the earnings from his taxicab."[34] The Supreme Court went on to quote from learned treatises as follows:

> Quoting Corpus Juris [in Middleton v. Frances], we stated:
>
> > "An apparent or ostensible agent is one whom the principal, either intentionally or by want of ordinary care, induces third persons to believe to be his agent, although he has not, either expressly or by implication, conferred authority upon him." 77 S.W.2d at 426.
>
> The principles of apparent or ostensible agent are discussed at length in Restatement (Second) of Agency § 267 (1958):
>
> > "One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one

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[32] Id.

[33] 257 Ky. 42, 77 S.W.2d 425 (1934).

[34] Paintsville Hospital, supra at 257.

> appearing to be a servant or other agent as if he were such."

> We cited the same section from the earlier edition of the Restatement of Agency with approval in Middleton v. Frances, supra. Further, the Restatement (Second) of Agency makes the following statement significant to our discussion in § 49, explaining the difference between "Interpretation of Apparent Authority Compared with Interpretation of Authority":

>> "(a) manifestations of the principal to the other party to the transaction are interpreted in light of what the other party knows or should know instead of what the agent knows or should know, ..."[35]

In Paintsville Hospital, the Supreme Court cited numerous cases from other jurisdictions and noted that "[i]n these circumstances it is unreasonable to put a duty on the patient to inquire of each person who treats him whether he is an employee or independent contractor of the hospital."[36] Similarly, this Court in Williams v. St. Claire Medical Center,[37] in applying ostensible agency to a hospital for the negligence of an independent contractor/nurse anesthetist, quoted Stanhope v. Los Angeles College of Chiropractic,[38] and stated, "it cannot seriously be contended that respondent, when he was being carried from room to room . . . should have inquired whether the

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[35]Id.

[36]Id. at 258.

[37]Ky.App., 657 S.W.2d 590, 596 (1983).

[38]54 Cal.App.2d 141, 128 P.2d 705, 708 (1942).

individual doctors who examined him were employees . . . or were independent contractors." "[T]he majority rule is that the manner in which the parties designate a relationship is not controlling, and if an act done by one person on behalf of another is in its essential nature one of agency, the one is the agent of the other, notwithstanding he is not so called" [citations omitted].[39] Accordingly, we hold that the trial court's directed verdict holding LabCorp vicariously liable for the negligence of Dr. Hodge on the theories of express agency and ostensible agency was correct as a matter of law; and we affirm on this issue.

The second issue raised by LabCorp concerns the trial court denying its counsel the opportunity to present a closing argument to the jury. Watts had received a directed verdict against LabCorp based on vicarious liability that was contingent upon a finding of liability against Dr. Hodge. Accordingly, Dr. Hodge's counsel was left to argue both the question of Dr. Hodge's liability and Watts' damages. While LabCorp was not in a position to argue Dr. Hodge's liability, it did have a continuing interest in the question of Watts' damages. Since the trial court had held as a matter of law that LabCorp would be vicariously liable for any negligence by Dr. Hodge, LabCorp did have an interest in the damages awarded to Watts.

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[39] Chevron Oil Co. v. Sutton, 85 N.M. 679, 515 P.2d 1283, 1285 (1973).

In the two cases[40] relied upon by LabCorp in its brief, the trial courts were reversed for either limiting or totally denying a party a closing argument; and these cases are easily distinguishable from the case sub judice. Watts' brief has not cited any case law to support the trial court's ruling, but our research supports the ruling.

"In almost every jurisdiction it is the rule that the time fixed for argument is within the sound discretion of the trial court, and a case will not be reversed, unless it appears that this discretion has been abused."[41] "What is reasonable time for argument depends upon the circumstances of each particular case, viewed in the light of the amount involved, the number of witnesses examined, the time consumed in developing the testimony and the number and importance of the issues to be tried."[42] "The mere fact that a longer period of argument is allowed one party than the other does not of itself make out a case of abuse of discretion justifying a reversal of the

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[40] Aetna Oil Co. v. Metcalf, 298 Ky. 706, 183 S.W.2d 637 (1944); Schachleiter v. Watson, 231 Ky. 416, 21 S.W.2d 656 (1929).

[41] Louis P. Hyman & Co. v. H.H. Snyder Co., 159 Ky. 354, 358, 167 S.W. 146, 148 (1914). See CR 43.02(e); and V. Woerner, Annotation, Prejudicial Effect of Trial Court's Denial, or Equivalent, of Counsel's Right to Argue Case, 38 A.L.R.2d 1396 (1954).

[42] Southern Express Co. v. Southard, 182 Ky. 492, 494, 206 S.W. 773, 774 (1918)(citing Hyman, supra); Michael J. Flaherty, Annotation, Propriety of Trial Court Order Limiting Time For Opening or Closing Argument In Civil Case-State Cases, 71 A.L.R.4th 130 (1989).

decision. Similarly, unequal distribution of time in cases involving numerous parties on a side [has] been upheld as proper, the courts holding that in such cases the question of distribution of time is peculiarly a matter within the discretion of the trial court."[43]

In Aultman v. Dallas Railway & Terminal Co.,[44] the Supreme Court of Texas reversed the Court of Civil Appeals and affirmed the trial court in a negligence case. Aultman had been injured when she was a passenger on a bus that collided with the rear end of a truck. Aultman and her husband sued the bus company and the company which owned the truck and the defendants sought "indemnity and contribution from each other but they were making common cause against the plaintiffs."[45] The Supreme Court held that the trial court did not abuse its discretion when it "allowed plaintiffs' counsel fifty minutes to open and close the argument before the jury and allowed counsel for each of the defendants thirty minutes to present his argument."[46]

In the case sub judice, in addition to holding that the trial court did not abuse its discretion in not allowing Lab Corp to argue the issue of Watt's damages, we also hold that LabCorp

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[43] Lemons v. St. John's Hospital, 5 Kan.App.2d 161, 165, 613 P.2d 957, 962 (1980)(quoting A.E. Korpela, Annotation, Propriety of Court's Limitation of Time Allowed Counsel For Summation or Argument in Civil Trial, 3 A.L.R.3d 1341, 1345 (1965)).

[44] 152 Tex. 509, 260 S.W.2d 596 (1953).

[45] Id. at 600.

[46] Id.

has failed to show how it was prejudiced. For a party to receive a new trial based on the denial of its closing argument, a party must demonstrate that "the error was sufficiently prejudicial, in the opinion of the court to warrant it in concluding that the complaining litigant has not had a fair or impartial trial."[47] LabCorp's interest in limiting Watts' damages was certainly shared by Dr. Hodge. We believe Dr. Hodge's experienced and able trial counsel's closing argument very adequately represented LabCorp's interest in limiting Watts' damage. LabCorp was not denied a fair or impartial trial by not being allowed to make a cumulative argument concerning Watts' damages. We affirm on this issue.

LabCorp next argues that "[t]he trial court failed to limit the proof to the evidence relevant to the plaintiff's claim of negligence against Dr. Hodge." In its brief, it states:

> The Plaintiff's proof as it relates to Dr. Hodge's negligence related only to the actions he took or did not take prior to August 1, 1995 when he issued a pathology report which identified the skin lesion removed by Dr. Newell as a cellular neurothekeoma. The criticism of Dr. Shea, the only expert offered by the Plaintiff on the issue of liability, pertained to Dr. Hodge's interpretation of cellular patterns found on the slides made on July 27 and 28, 1995.
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> . . .
>
> Slides produced after August 1, 1995 or testimony concerning slides produced after

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[47] Louisville Woolen Mills v. Kingden, 191 Ky. 568, 578, 231 S.W. 202 (1921).

that date do not make any fact of consequence to the Plaintiff's primary claim any more or less probable. However, the trial court refused to limit the issues and the trial court allowed much proof to be introduced about events that occurred after August 1, 1995. The Plaintiff spent much time questioning witnesses concerning the second tissue lesion removed by Dr. Newell and the resulting slides prepared by LabCorp from the second specimen. The introduction of this irrelevant testimony confused and obscured the issues to Dr. Hodge and LabCorp's detriment.

. . .

While typically matters relating to whether evidence is relevant and admissible are within the discretion of the trial court, when the trial court abused its discretion and the prejudice to the opposed party outweighs its probative value, the matter must be reversed. Green River Elec. Corp. v. Nance, Ky.App., 894 S.W.2d 643 (1995).

Watts responded in her brief as follows:

In January, 1996, another recut was made from the July biopsy, and it was The Duke slide. It was sent to Dr. Shea, who recognized the melanoma. Then it disappeared for thirty months. Before the Duke Slide was "discovered" in Hodge's desk only three months before trial, the defense asserted it never even existed, except in Shea's imagination, and that he must have confused the Watts case with some other patient's. After The Duke Slide re-surfaced, the defense actually made it relevant by arguing that Dr. Shea's biased opinion about it caused this litigation in the first place [emphasis original].

. . .

Slides from the December tumor were relevant because that tumor was a later growth of the July tumor. The doctors studied all the slides in their efforts to understand the tumor's biologic behavior,

> including how fast it could metastasize. That is why they made at least 144 slides from the second biopsy. When the trial began, 78 of them were still missing. Three more slides unexpectedly reappeared during the trial, found by Dr. Hood [emphases original].
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> . . .
>
> Finally, it bears repeating that only the slides Dr. Hodge saw in July were used to prove the standard of care violation, because the pictures of melanoma in Dr. Shea's testimony were made from only those slides [citation to record omitted].

Our standard of review concerning the admissibility of evidence was summarized by this Court in Nantz, supra at 645:

> Our standard of review in this matter is well-summarized in Transit Auth. v. Vinson, Ky.App., 703 S.W.2d 482 (1985):
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> > Relevancy "is a determination which rests largely in the discretion of the trial court. . . ." Glens Falls Insurance Company v. Ogden, Ky., 310 S.W.2d 547 (1958). However, the trial court possesses the power to exclude relevant evidence "if its probative worth is outweighed by the threat of undue prejudice to the opposing party." R. Lawson, The Kentucky Evidence Law Handbook, § 2.00 at 21 (2nd ed. 1984). This court will not disturb a lower court's discretionary ruling on appeal absent an abuse of discretion. Id. at 22. See also Tumey v. Richardson, Ky., 437 S.W.2d 201 (1969).
>
> 703 S.W.2d at 484.
>
> Furthermore, KRE 103(a) provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a

> substantial right of the party is affected. . . ."
>
> "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. "Evidence which is not relevant is not admissible." KRE 402.

We believe the testimony by expert witnesses concerning tissue slides that had been made of Watts' tumor after July 27 and 28, 1995, was relevant evidence. Additional samples from the July biopsy and samples from the December biopsy provided the expert witnesses information to assist them in giving an opinion concerning Watts' chances of surviving the cancer if it had been diagnosed in July 1995. Furthermore, evidence of some of these additional samples also related to Watts' claim for spoliation of evidence. The trial court did not abuse its discretion in allowing this evidence, and we affirm.

The final issue raised by LabCorp concerns Watts' separate claim for spoliation of evidence and his effort to obtain a destruction of evidence instruction. Dr. Hodge raised these same issues in his appeal and we have thoroughly addressed those issues in this Opinion, <u>infra</u> at p. 9-13, which discussion is incorporated herein. Accordingly, we affirm on all issues in LabCorp's appeal.

<u>III. The Watts Cross-Appeal (1999-CA-001066-MR)</u>

Watts has raised two issues in her cross-appeal: (1) that the tampering with evidence claim was proper; and (2) that

Watts was entitled to a jury instruction on spoliation of evidence. Theses issues have been addressed previously in this Opinion. Since Watts filed her cross-appeal only as a protective cross-appeal, and since we are affirming the judgment, no further consideration of these issues is required.

IV. The LabCorp Appeal Against KMIC (1999-CA-001639-MR)

Approximately one week prior to the trial of Watts' medical negligence action, Kentucky Medical Insurance Company was granted permission to intervene in Watts' circuit court case for the purpose of adjudicating a declaratory judgment action[48] concerning its and LabCorp's obligations for the payment of any damages arising from Watts' lawsuit. KMIC was the professional liability insurance carrier for Dr. Hodge and it had issued him a policy of insurance with coverage limits of $5 million. An agreement between Dr. Hodge and LabCorp's predecessor, NHL, provided that LabCorp would be responsible for up to $1 million in coverage after "the liability insurance required to be carried by" Dr. Hodge's primary liability coverage was exhausted [emphasis added]. LabCorp filed an answer and a counterclaim for a declaratory judgment and the matter was submitted to the trial court for decision.

On May 28, 1999, the Warren Circuit Court entered an order "sustaining intervening plaintiff's motion for declaratory judgment" and concluding "that after KMIC has paid the initial

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[48] CR 57; KRS 418.005 et seq.

$200,000 and LabCorp has paid $1,000,000 toward the satisfaction of the judgment entered against Hodge, KMIC is responsible for the balance until its $5,000,000 coverage is exhausted." This appeal followed.

LabCorp has raised the following issues:

A. The Trial Court Failed to Address LabCorp's Argument That KMIC Lacked Standing to Maintain This Action.

B. KMIC Lacked Standing to Maintain the Declaratory Judgment Action.

C. The Trial Court Erred in Construing the Contract Against LabCorp as Its Alleged Drafter, for This Rule of Contract Interpretation May Only be Utilized When a Contract Is Deemed to be Ambiguous. The Court Expressly Concluded That the Contract Was Unambiguous, Yet Applied This Rule Anyway.

D. Notwithstanding the Fact that the Principle of Construing a Contract Against Its Drafter Should Not Have Been Applied When the Trial Court Concluded That No Ambiguity Existed, the Rule Is Also Inapplicable in the Context of a Stranger to the Contract.

E. The Trial Court Further Erred in Accepting the Improper Semantic Argument Advocated by KMIC. LabCorp's Coverage Obligation Was Clearly Intended by the Actual Parties to the Contract to be in Excess of That of the Physicians' Own Carrier.

The parties are in agreement that the trial court in making its ruling correctly focused on paragraph 8 of the Dr. Hodge/NHL Agreement and the paragraph relating to excess coverage in the medical professional liability policy issued by KMIC. Paragraph 8 of the Hodge/NHL Agreement states:

> 8. The DOCTORS agree during the Term to carry general liability insurance, including malpractice liability, having limits of not less tha[n] $200,000 for each single occurrence, and $600,000 in the aggregate. NHL agrees, during the Term to carry liability insurance through a qualified insurance carrier, insuring the DOCTORS and any Substitute, for personal injury and property damage liability (including malpractice) occurring within the scope of the performance of their duties hereunder, and having the limits of not less than $1,000,000 for each single occurrence. It is understood and agreed that the liability insurance required to be carried by NHL hereunder shall be in excess of the liability insurance required to be carried by the DOCTORS hereunder.

The excess coverage paragraph in the KMIC policy states:

> How this insurance applies with other policies. Except for coverage of peer review and related activities described under Section III, the insurance provided to you under this policy is primary insurance. This means that if you have other insurance specifically intended to be in excess of primary insurance, the amount of the Company's liability under this policy will not be reduced by the existence of the other policy. When both this insurance and other policies apply to the loss on the same primary basis (except as relates to coverage for peer review services described below), we will pay a pro rata share under our coverage in settlement of a claim or in payment of a judgment (up to applicable limits) based upon our percentage of the total amount of all insurance that is available to you [emphases original].

LabCorp's first two issues relate to whether KMIC lacked standing to maintain the declaratory judgment action. While LabCorp is correct that the trial court's "decision is

devoid of any reference at all to [its] argument . . . that KMIC is a stranger to the LabCorp contract with no standing to seek enforcement of this contract[,]" we cannot accept its argument "that the failure of a trial court to even address a central issue in a proceeding is certainly sufficient cause to reverse its decision." Obviously, by granting KMIC a favorable declaratory judgment, the trial court impliedly ruled KMIC to have standing to bring the action. The real question for our consideration is whether the trial court's ruling that KMIC had standing is correct.

LabCorp argues that since KMIC's only connection to the Dr. Hodge/NHL Agreement "was that its insured, Dr. Hodge, was a party to it", and since Dr. Hodge "has not once expressed in this proceeding any type of assent [to] or agreement [with] the interpretation advocated by KMIC", "KMIC [has] created a controversy where previously there was none, deliberately injecting itself into a proceeding on the very eve of trial in order to advocate a position that benefit[t]ed only itself and not its insured." LabCorp acknowledges that the only case that it cites[49] "stands for the proposition that no stranger to a contract may sue for its breach unless the contract was made for his benefit." However, LabCorp argues that "this line of authority illustrates that our law prudently seeks to avoid a stranger's self-serving interference with other parties' contract

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[49] Sexton v. Taylor County, Ky.App., 692 S.W.2d 808, 810 (1985).

rights." LabCorp goes on to warn that "[i]f the courts of this Commonwealth do not accept the principle of law advocated by LabCorp, then there will no doubt arise other similar situations in the future where a stranger to the contract will see benefit in seizing upon purported ambiguities in other parties' contracts in order to benefit only itself." We agree with KMIC's brief in response that "[c]overage disputes between companies that are -granted -strangers to each other's contracts are quite common"; and we believe the cases cited by KMIC support its right to avail itself of the jurisdiction of the Warren Circuit Court to decide this actual controversy by a declaratory judgment.[50]

LabCorp's next two arguments are also related to each other and we will address them together. LabCorp contends that the trial court's judgment contains a "flawed legal analysis" which "undermines the validity of the ultimate conclusion that it reached." LabCorp argues that "[t]he trial court erred when it placed reliance upon the rule of construing a contract against its drafter because it failed to recognize that this rule is only utilized in situations in which a contract is deemed to be

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[50] Ohio Casualty Insurance Co. v. State Farm Mutual Auto Insurance Co., Ky., 511 S.W.2d 671 (1974); American National Fire Insurance Co. v. Aetna Casualty & Surety Co., Ky., 476 S.W.2d 183 (1972); Chicago Insurance Co. v. Travelers Insurance Co., Ky.App., 967 S.W.2d 35, 37 (1997)("opting to be self-insured does not equate to being uninsured. Walgreen must live with its decision to be self-insured"); Hartford Insurance Co. v. Kentucky Farm Bureau Insurance Co., Ky.App., 766 S.W.2d 75 (1989); State Farm Mutual Auto Insurance Co. v. Register, Ky.App., 583 S.W.2d 705 (1979); Royal-Globe Insurance Co. v. Safeco Insurance Co., Ky.App., 560 S.W.2d 22 (1977).

ambiguous."[51] LabCorp bases its argument on the trial court's statement that "LabCorp chose the specific language that was used in the Agreement and now must live with its choice." LabCorp claims that this statement by the trial court is inconsistent with other statements, such as: "This Court cannot ignore the plain, unambiguous terms of the 1984 Agreement. . . ;" and, "It is undisputed that the Agreement is not ambiguous." However, we agree with KMIC that "[t]he trial court painstakingly based its decision on the 'plain meaning' of the LabCorp contract." We believe that any references the trial court made to the rule of construction that the language of a contract is to be construed against the drafter were dicta and did not impact its ruling which was based on the rule that "[i]n the absence of ambiguity a written instrument will be strictly enforced according to its terms."[52] We also agree with KMIC that since "[n]o secondary rules of contract construction were used," "LabCorp's argument (section D) regarding strangers to a contract is [ ] irrelevant."

LabCorp's final argument, in essence, is that the trial court "incorrectly accepted KMIC's erroneous semantic argument as to the meaning of the phrase 'required to carry' and misconstrued

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[51] Citing L.K. Comstock & Co., Inc. v. Becon Construction Co., 932 F.Supp. 948 (E.D.Ky 1994), aff'd 73 F.3d 362 (6th Cir. 1995).

[52] Citing Mount v. Roberts, Ky., 388 S.W.2d 117, 119 (1965).

the contract" which it contends "is so clear as to be self-interpreted."[53] In its brief, LabCorp states:

> The central issue in this case is the correct interpretation of the following sentence: "It is understood and agreed that the liability insurance required to be carried by NHL hereunder shall be in excess of the liability insurance required to be carried by the DOCTORS hereunder." Properly understood, the reference to the insurance that Dr. Hodge was required to carry signifies his individual policy of professional liability insurance, rather than to the specific, minimum dollar amount of insurance coverage that he was required to purchase. In other words, the contractual language upon which KMIC pins its entire case has nothing at all to do with a specific dollar amount of insurance coverage, but is instead a reference to the requirement that professional liability insurance coverage must be procured.
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> . . .
>
> It bears repeating that the phrase "required to care" that appears in the LabCorp contract refers to the very fact of Dr. Hodge's professional liability insurance, not to any specific minimum dollar amount of coverage. The interpretation of the LabCorp contract adopted by the Warren Circuit Court is illogical and inconsistent with a common sense determination of what parties to such a contract would have found commercially necessary and reasonable. KMIC persuaded the trial court to contort the meaning of this straightforward contractual language in a manner that ignores the practical business realities that lead to the formation of this contract in the first place.

We begin our analysis of this issue with the observation that both parties have strenuously argued that its

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[53] Citing Ex parte Walker's Ex'r, 253 Ky. 111, 68 S.W.2d 745, 747 (1933).

interpretation of the phrase "required to carry" is the only reasonable interpretation. The parties strongly contend that the language is clear and susceptible to only one meaning — its interpretation. Since the question of ambiguity has been waived by both parties, we are left with determining whether the trial court's interpretation of the contract was correct as a matter of law. We believe it was, and we adopt portions of its opinion as our own:

> This Court focuses on the plain meaning of the Agreement between LabCorp's predecessor in interest, NHL, and Hodge. According to this Agreement, Hodge was "required" to carry the first $200,000 of liability insurance. The Agreement specifically states the "DOCTORS agree . . . to carry general liability insurance . . . having limits of not less tha[n] $200,000 . . . ." Hodge complied with this section of the Agreement and was insured by KMIC. He had much more than the minimal amount, but Hodge was only required to have $200,000 of liability insurance according to the Agreement. Thus, the Court finds that in the instant case KMIC should pay the initial $200,000 of the judgment entered against Hodge.
>
> . . .
>
> LabCorp chose the specific language that was used in the Agreement and now must live with its choice:
>
>> It is understood and agreed that the liability insurance required to be carried by NHL hereunder shall be in excess of the liability insurance required to be carried by the DOCTORS hereunder.
>
> The relevant section of the Agreement does not state [that] LabCorp would provide excess coverage over and above that coverage

> available from other sources. As seen from the above statement, the Agreement clearly states that the coverage provided by LabCorp would be "in excess of the liability insurance required to be carried by" Hodge. Although not spelled out in its brief, LabCorp, in essence, is advocating the deletion of the word "required" from the Agreement and wishes the clause to mean that the insurance provided by LabCorp would be in excess of any liability insurance carried by Hodge.
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> It is not the function of a court to change the obligation of a contract which the parties have made. O.P. Link Handel Co. v. Wright, Ky., 429 S.W.2d 842, 847 (1968)(quoting Williston on Contracts §610A (3d ed.)). Had LabCorp intended its coverage to be in excess of all of Hodge's insurance, LabCorp should have drafted the Agreement to say that. A clear, common sense reading of the Agreement requires Hodge to carry $200,000 of liability insurance and for LabCorp to insure Hodge for an amount "in excess" of the $200,000 that Hodge was required to carry. For whatever reason, Hodge chose to purchase $5,000,000 of insurance, but he was only required to purchase $200,000. This Court cannot ignore the plain, unambiguous terms of the 1984 Agreement and instead construe the KMIC policy made sometime later.

V. The KMIC Cross-Appeal (1999-CA-001699-MR)

In its cross-appeal, KMIC asks that this matter "be remanded for a factual determination as to the specific amount for which LabCorp is self-insured, as KMIC and LabCorp [should] be required to pay a pro rata share of the judgment in excess of $200,000 based upon the total coverage available to Dr. Hodge." We do not accept this interpretation of the parties' agreement or this application of the law. As we previously discussed in

detail in LabCorp's appeal, we believe the trial court correctly decided this issue. We affirm on KMIC's cross-appeal.

Based on the foregoing discussion of the three appeals and the two cross-appeals, we affirm the Warren Circuit Court's judgments and orders on all issues.

ALL CONCUR.

BRIEF FOR APPELLANT, STEVEN HODGE, M.D.:

David F. Broderick
Kenneth P. O'Brien
Bowling Green, KY

ORAL ARGUMENT FOR APPELLANT, STEVEN HODGE, M.D.:

David F. Broderick
Bowling Green, KY

BRIEF AND ORAL ARGUMENT FOR APPELLANT, LABCORP:

Barton D. Darrell
Bowling Green, KY

BRIEF FOR APPELLANT, LABCORP:

Shawn Rosso Alcott
John R. Grise
Bowling Green, KY

ORAL ARGUMENT FOR APPELLANT, LABCORP:

John R. Grise
Bowling Green, KY

BRIEF AND ORAL ARGUMENT FOR APPELLEE/CROSS-APPELLANT, FELICIA M. WATTS:

Stephen L. Hixson
Bowling Green, KY

BRIEF AND ORAL ARGUMENT FOR APPELLEE/CROSS-APPELLANT, KENTUCKY MEDICAL INSURANCE CO.:

James P. Grohmann
Louisville, KY