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**ORDERED NOT PUBLISHED BY THE KENTUCKY SUPREME COURT:
AUGUST 14, 2002 (2001-SC-1062-D)**

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001132-MR

DUANE COPASS AND
RUTH COPASS, HIS WIFE — APPELLANTS

v.

APPEAL FROM MONROE CIRCUIT COURT
HONORABLE PAUL BARRY JONES, JUDGE
CIVIL ACTION NO. 95-CI-00152

MONROE COUNTY MEDICAL FOUNDATION, INC.;
NATIONAL EMERGENCY SERVICES, INC.; AND
STEVE L. JENSEN, M.D. — APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: BARBER, GUIDUGLI, AND HUDDLESTON, JUDGES.

BARBER, JUDGE: The Appellants are Duane Copass ΑCopass@ and Ruth Copass, his wife. Duane Copass became paralyzed as the result of an epidural bleed and hematoma which occurred during his convalescence from back surgery. The Copasses raise three issues on appeal claiming (1) the trial court abused its discretion by refusing to allow Copass's expert, Dr. Ravenscraft, to testify about the standard of care; (2) the trial court erred in concluding that ***if*** the jury had found the emergency room physician to be negligent, such negligence would have been too

remote in time to constitute a causative factor; and (3) the trial court erred in directing a verdict against plaintiffs for failing to meet their burden of proof on standard of care.

On September 17, 1992, Copass underwent a lumbar fusion performed by Dr. Glassman in Louisville, Kentucky. Following his discharge from the hospital, Copass returned home to Tompkinsville. On the afternoon of Saturday, September 26, 1992, Copass experienced sudden, severe low back pain uncontrolled by medication. He was unable to urinate. Copass was taken by ambulance to Monroe County Medical Center in the early morning of Sunday, September 27, 1992.

Copass was seen in the emergency room by Dr. Steven Jensen, a urology resident, who had been licensed to practice medicine for three months. At the time, Dr. Jensen was moonlighting through National Emergency Services, Inc., which had contracted with the Medical Center to provide physicians to work in the E.R. Dr. Jensen drained Copass's bladder using a catheter and consulted with Dr. Kenneth Crabtree, Copass's family physician, by phone. Dr. Crabtree admitted Copass to the Medical Center. Approximately 26 hours after Copass's admission, his lower extremities became permanently paralyzed.

Dr. Jensen testified that he completed four years of medical school at the University of Utah and a one-year general surgery internship at the University of Kentucky (July 1991 to July 1992) before entering the urology (residency) program. Interns work under the supervision of an attending physician and

are not licensed to practice medicine. During his internship, Jensen had rotated through different fields of surgery. Jensen told the jury that complications can occur with any type of surgery. As an intern, he would inform surgery patients of possible surgical complications using a standard form devised by the University. Jensen named several categories of surgical complications: death, respiratory complications, bleeding, infection, bowel difficulties, urinary retention/incontinence, pain and clots.

The Copasses contend that Dr. Jensen failed to recognize the signs and symptoms of a surgical complication -- an epidural hematoma -- when he saw Copass in the E.R. They further contend that had Dr. Jensen done so he could have transferred Copass to a surgeon in time to evacuate the hematoma, which would have prevented paralysis. According to Dr. Jensen, the Medical Center did not have MRI or myelogram capabilities, nor did it have a neurologist or neurosurgeon on call in September 1992.

At trial, the Copasses called Dr. Howard Ravenscraft as their expert witness to testify about the standard of care that Dr. Jensen should have exercised. Dr. Ravenscraft's discovery deposition had previously been taken. Dr. Ravenscraft testified at trial about his education, training and experience. A graduate of the University of Louisville School of Medicine, Dr. Ravenscraft, began practicing in 1956 and practiced continuously until his retirement in May 1998. He testified that he has more than 42 years of Ahand-on experience@ treating patients. Dr.

Ravenscraft has acted as a consultant since the mid-1970’s. He is licensed to practice in Kentucky, Indiana and Ohio, and he is board-certified in family practice. His current certification is effective until the year 2003.

Dr. Ravenscraft served as an adjunct clinical professor at U.K. taking senior medical students into his practice for hands-on training. Prior to the recognition of emergency room medicine as a Aboard-certifiable@ specialty, Dr. Ravenscraft served on three different emergency room committees at St. Elizabeth Hospital Medical Center and at St. Luke Hospitals, East and West, which involved hiring, discussing contracts and setting up schedules.

Dr. Ravenscraft has specialized training in anesthesiology, and he completed what he called a Amini-residency@ at Indiana University. Dr. Ravenscraft explained that in the years before there were any board-certified anesthesiologists in Northern Kentucky, where he practiced, he was approached by some other physicians to take additional training in anesthesiology. Doctors in the emergency room would contact Dr. Ravenscraft when they wanted to put their patients on respirators. During this time, Dr. Ravencroft was called to the E.R. once or twice a week to intubate patients.

Although never a Asalaried employee@ of a hospital E.R., Dr. Ravenscraft has treated patients in the E.R. He explained that he saw his own patients if they presented to the E.R. while he was in the hospital making rounds. The physician

in the E.R. would stabilize the patient, then Dr. Ravenscraft would come to the E.R. to examine the patient and make the decision whether or not to admit the patient to the hospital. Additionally, Dr. Ravenscraft provided emergency medical care to patients in his own office. Dr. Ravenscraft testified that he had a very large family practice, Acradle to grave@ equipped with an emergency room with a separate entrance. The clinic was located about ten miles from the hospital on a major interchange near the airport. Dr. Ravenscraft explained that he took care of a lot of trauma from the interstate, provided emergency care and kept a lot of people from having to go to the hospital E.R.

At trial, the court granted a motion to exclude Dr. Ravenscraft's testimony about the standard of care of an emergency room physician on the ground that he was not qualified. At the conclusion of their case in chief, the trial court entered a directed verdict against the CopassesC

> At the conclusion of Plaintiffs' case in chief, Defendant, Monroe County Medical Foundation, Inc. moved for a Directed Verdict on various grounds, including that the Plaintiffs failed to meet their burden of proof, as they were unable to present evidence of a prima facie case of medical malpractice through the testimony of a duly qualified expert witness.
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> AThe burden of proof in a malpractice case is, of course, on the party charging negligence or wrong.@ <u>Johnson v. Vaughn</u>, Ky., 370 S.W.2d 591, 596 (1963). The Plaintiffs have failed to meet their burden of proof as they have been unable to put on evidence of a prima facie case of medical malpractice. The Plaintiffs are required to present evidence that Dr. Jensen breached his

duty owed to his patient, Mr. Copass, and that Mr. Copass's injury was the result of that breach.

Because this is a case of medical malpractice, the Plaintiffs must present expert testimony on both the issues of causation and liability. AThe rule of malpractice cases is that negligence must be established by medical or expert testimony unless the negligence and injurious results are so apparent that laymen with a general knowledge would have no difficulty in recognizing it.@ Harmon v. Rust, Ky., 420 S.W.2d 563, 564 (1967) (citing Johnson v. Vaughn, Ky., 370 S.W.2d 591 (1963)[)].

In this action, the only standard of care expert identified by the Plaintiffs was Howard Ravenscraft, M.D. However, **Dr. Ravenscraft does not possess the education, training or experience necessary to qualify him as an expert in emergency medicine, and thus he was prohibited from expressing any opinions concerning the standard of care expected of emergency room physicians and whether Dr. Jensen met that standard of care when he examined Mr. Copass.** Without expert testimony concerning that Dr. Jensen breached the standard of care, the Plaintiffs fail to meet their burden of proof, and thus the Defendant, Monroe County Medical Foundation, Inc., is entitled to a directed verdict. The Court, therefore, directed a verdict in favor of the Defendant, Monroe County Medical Foundation, Inc., and dismissed the Complaint of Plaintiffs, Duane and Ruth Copass, against said Defendant, with the objection of the Plaintiffs duly noted.

In addition, the Defendant, Monroe County Medical Center, and the Third-Party Defendant, Dr. Steven Jensen, move the Court for a directed verdict on the basis that the evidence . . . demonstrated that Dr. Jensen saw the Plaintiff for a 30-minute period at 5:00 a.m. on Sunday, September 27, 1992, in the . . . Emergency Room and, therefore, Mr. Copass was admitted to the Monroe County Hospital under the exclusive care of his family physician Dr. Kenneth Crabtree. The

> undisputed evidence demonstrated that Dr. Jensen, from the time that Duane Copass was admitted . . . under the care of Dr. Kenneth Crabtree, had no further authority or responsibility for the care or treatment of Duane Copass.
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> Although the evidence in this case was somewhat inconclusive as to the exact time that Duane Copass's condition causing his lower extremity paralysis became irreversible, it is clear from the undisputed evidence that Mr. Copass continued to be able to move his legs up until late evening on Sunday, September 20, 1992, and therefore, had he had proper surgical intervention before [sic] experienced total paralysis, his condition would not have resulted in Duane Copass's loss of the use of his lower extremities.
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> . . . .
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> The Defendant, Monroe County Medical Hospital [sic], and the Third-Party Defendant, Dr. Steven Jensen, as an additional part of their Motion for Directed Verdict, maintain that even if a jury should have concluded Dr. Jensen somehow was negligent, then his evaluation of care of the Plaintiff (such showing in fact was not made by the Plaintiffs for the reasons stated above) would be too remote in time so as to constitute a causative factor of the Plaintiffs' damages. Given the lapse of time from when Dr. Steven Jensen had any responsibility or control over the care and management of Duane Copass that such care had become the direct responsibility of his family physician who had admitted Duane Copass to the Monroe County Medical Center, the Court further finds that the aforesaid motion of the Defendant and Co-Defendant are meritorious and serve as an independent additional basis for a directed verdict. (Emphasis added.)

The Copasses filed a motion for a new trial which was denied by order entered April 5, 2000. The court stated:

> [T]he Plaintiffs' motion for a new trial . . . is overruled. The present sitting Judge did not preside over the trial or enter the Judgment in this action . . . . While the present sitting Judge may have ruled differently and may not agree with the former Judge, extreme caution should be exercised in undertaking to review a Judgment of his predecessor. This Judge has the authority to set the Judgment aside and grant a new trial. However, respect for the Judicial process will be best served for the Judgment to be reviewed by an Appellate Court.

The Copasses filed their notice of appeal on May 2, 2000. Their first argument on appeal is that the trial court abused its discretion by refusing to allow their expert, Dr. Ravenscraft, to testify about standard of care. A[A]buse of discretion is the proper standard of review of a trial court's evidentiary rulings." Goodyear Tire & Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 577 (2000).

The Medical Center contends that the Copasses failed to preserve the issue because they did not offer Dr. Ravenscraft's testimony concerning standard of care by avowal. Kentucky Rules of Civil Procedure (CR) 43.10.

The Copasses reply that Dr. Ravenscraft's opinion is of record contained in supplemental answers to interrogatories filed December 1, 1997 and in his deposition filed March 19, 1998. The Copasses provide references to Dr. Ravenscraft's deposition testimony regarding his opinion that Dr. Jensen deviated from the standard of care. Although the Copasses designated the entire original record, it does not include depositions not read at

trial. CR 75.01(1) provides, in part, that:AThe designation shall . . . list any depositions or portions thereof as have been filed with the clerk but were not read into evidence and are thus required by Rule 75.07(1) to be excluded from the record on appeal.@ Richman v. First Sec. Nat'l Bank & Trust Co., Ky. App., 652 S.W.2d 671 (1983). Nevertheless, neither Appellee has moved to strike portions of the reply brief referring to Dr. Ravenscraft's deposition testimony, nor have they raised noncompliance with CR 75.01 as an issue; thus, we consider any objection waived.

AThe purpose of an avowal is to permit a reviewing court to have the information needed to consider the ruling of the trial court.@ Underhill v. Stephenson, Ky., 756 S.W.2d 459, 461 (1988). We have sufficient information to properly consider whether the trial court abused its discretion in ruling that Dr. Ravenscraft did not possess the education, training or experience necessary to qualify him to express an expert opinion in this case.

KRE 702 provides: AIf scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.@ Appellees devote pages of their well-researched briefs to a discussion of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and

its progeny; however, we do not believe that analysis applies here. Rather, we believe this case is more akin to Collins v. Commonwealth, Ky., 951 S.W.2d 569 (1997). In Collins, the appellant challenged the testimony of a physician who had testified as both the treating physician of a sexual abuse victim and as an expert in the physical aspects of child sexual abuse cases, although there is no recognized specialty in child sexual abuse in Kentucky:

> Appellant also challenges the substance of Dr. Bates's testimony on the grounds that it did not satisfy the test set forth in Daubert . . . . Daubert provides that when faced with a proffer of expert scientific testimony, the trial court must determine at a preliminary hearing "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." Id. at 592, 113 S.Ct. at 2796. The Daubert decision was based upon the Supreme Court's interpretation of Federal Rule of Evidence 702 . . . . Kentucky Rule of Evidence 702 contains the same language as its federal counterpart . . . .
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> . . . .
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> This Court adopted the Daubert analysis in Mitchell v. Commonwealth, 908 S.W.2d 100 (1995). The Mitchell opinion discusses the factors a lower court should consider in determining the admissibility of expert scientific testimony, including whether the theory or technique can be tested; whether it has been subjected to peer review; whether it has been generally accepted; and the known or potential rate of error. Id. at 102.
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> Having articulated that Kentucky follows the Daubert analysis for the admissibility of scientific evidence, we conclude that such analysis is not, in fact, triggered in this case. Daubert and Mitchell use the catch

> phrases "expert scientific testimony@ "theory," "technology," and "methodology." Dr. Bates's testimony, on the other hand, concerned basic female anatomical findings. Her examinations did not involve any novel scientific techniques or theories. . . . We discern nothing of a scientific nature to trigger the necessity of applying the Daubert analysis.
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> In accordance with KRE 702, Dr. Bates was qualified as an expert based upon her knowledge, experience and training. Her testimony clearly assisted the trier of fact to understand a fact in issue . . . .
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> Id. at 574-575.

In the case *sub judice*, Dr. Ravenscraft's opinion is not based upon some untested theory; rather his opinion concerns facts in issue, such as recognition of the signs and symptoms of a hematoma following recent back surgery and the standard of medical care. The Medical Center asserts that the trial court ruled Dr. Ravenscraft was not qualified to testify due to his Alack of any experience in actually practicing emergency medicine . . . .@ The Medical Center states that A[w]ithout the specialized training and experience required to practice emergency medicine, Dr. Ravenscraft's offered testimony lacked . . . [a] reliable basis . . . @ We consider the Medical Center's attack upon Dr. Ravenscraft's qualifications close to an admission that it had an unqualified physician covering its own E.R. on September 27, 1992. Dr. Jensen did not specialize in emergency medicine. He was a urology resident who had just completed a one-year general surgery internship. Dr. Jensen

lacked experience *practicing* in any field of medicine because he had only been licensed to practice for three months.

In Owensboro Mercy Health System v. Payne, Ky. App., 24 S.W.3d 675 (1999), this Court declined to promulgate a blanket rule regarding the qualification of a physician to express an opinion on medical matters outside his area of expertise. In that case, the hospital argued that a pulmonary specialist was incompetent to testify about standard of care and breach of that standard by the hospital and its staff in treating post-op patients being transferred to the ICU. This Court held that the pulmonary specialist, although Anot experienced in post-operative care, he was competent to testify regarding the effects of anesthetic on the pulmonary system and the measures required to prevent medical tragedy.@ Id. at 678. Any lack of specialized training goes only to the weight not the competency of the expert testimony. Id. at 677.

Dr. Ravenscraft is competent to testify as an expert in this case based upon the entirety of his education and training, his 40-plus years of experience in a Acradle to grave@ family practice, his knowledge of the E.R. setting, as well as his actual experience treating his own patients in the E.R. and providing emergency medical care in his own clinic. The trial court abused its discretion in excluding Dr. Ravenscraft’s testimony. In light of our determination, we do not reach the issue of whether the trial court erred in directing a verdict on

the ground that the Copasses failed to meet their burden of proof on standard of care.

The remaining issue is whether the trial court erred in determining that had the jury found Dr. Jensen to be negligent, his negligence would have been Atoo remote in time@ to be a causative factor. In their motion for directed verdict, Appellees had argued the remoteness in time between Dr. Jensen's care and Copass's paralysis severed any causal connection. The court found this argument Ameritorious@ and an Aindependent additional basis@ for the directed verdict.

Appellants rely upon NKC Hospitals, Inc. v. Anthony, Ky. App., 849 S.W.2d 564 (1993). There, plaintiff's decedent, Margaret Anthony, was 30 weeks along in an uneventful pregnancy. She was taken to the E.R. on the evening of September 5, 1989 with nausea, vomiting and abdominal pain. Despite her continued pain, the treating obstetrician discharged Mrs. Anthony from the hospital the next morning. At the time of her discharge, Mrs. Anthony had not been clinically seen or examined by a physician. Mrs. Anthony returned to the hospital later the same morning, and she was readmitted. The next day, September 7, it was determined that she had a serious respiratory problem. On September 8, she was transferred to ICU. On September 9, the baby was delivered by Cesarian section. At that time, it was determined that Mrs. Anthony had a perforation of the appendix at the large bowel, which was undetected at the time of the first admission. Mrs. Anthony died three weeks later, still in the hospital, of acute

adult respiratory distress syndrome, a complication of the delay in diagnosis.

The jury attributed causation 65% to the obstetrician and 35% to the hospital. As did Dr. Crabtree, in the case *sub judice*, the treating obstetrician had settled prior to trial. On appeal, the hospital argued the trial court erred in failing to direct a verdict. The hospital contended that no negligence was committed by the hospital after Mrs. Anthony's readmission on September 6, reasoning that the obstetrician's conduct became the superseding cause of Mrs. Anthony's death, Abreaking the chain of causation and cutting short the negligence and liability of the hospital.@ NKC Hospitals, Inc. v. Anthony, 849 S.W.2d at 567. That is essentially the Appellees' argument B that after Mr. Copass was admitted to the Medical Center as Dr. Crabtree's patient, Dr. Jensen was no longer responsible, and Dr. Crabtree's conduct became the superseding cause of Copass's paralysis.

The Court of Appeals explained that A[n]egligence may rest on an omission as comfortably as positive acts; the consequence is the same.@ Id. The hospital's defense of superseding cause Apresupposes, ipso facto, negligence on its on behalf.@ Where the resultant injury is Areasonably foreseeable from the view of the original actor, then the other factors causing to bring about the injury are not a superseding cause.@ Id. at 568. The Court concluded that the foreseeability by the original or antecedent actor B the hospital B negated an

otherwise superseding cause B the obstetrician B Awhich means the hospital is left on the liability hook@ Id.

In Michels v. Sklavos, Ky., 869 S.W.2d 728, 732 (1994), a legal malpractice case, our Supreme Court held:

> However, if [the first attorneys] can prove [that the second attorney] was also negligent . . . the negligence of a second attorney would not relieve the first attorneys who were also negligent from the consequences of their wrongdoing. It does not qualify as an intervening cause because it is simply one of the "collective . . . causes for which it ['the law'] lays responsibility." House v. Kellerman, Ky., 519 S.W.2d 380, 382 (1975). It would not be an intervening or superseding cause because it is not . . . a new cause of an Aextraordinary or unforeseeabl@ nature "overriding and eliminating the legal significance of . . . antecedent causation." Id. at 383.

Appellants state that Dr. Natelson, a neurosurgeon, testified that the signs and symptoms of the epidural hematoma were present when Dr. Jensen saw Copass in the E.R. Dr. Natelson testified that had Copass been transferred out of the E.R. for treatment he would not be paralyzed today. We certainly cannot say that, as a matter of law, any negligence on Dr. Jensen’s part was Atoo remote@ in time to be a causative factor in Copass’s paralysis. It was improper for the trial court to direct a verdict on the issue.

The judgment of Monroe Circuit Court is reversed, and this matter is remanded with direction to grant Appellants a new trial.

ALL CONCUR.

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