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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000771-MR

CARLA SKARUPA APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JOSEPH W. CASTLEN, III, JUDGE
ACTION NO. 13-CI-00217

OWENSBORO HEALTH HEALTHPARK;
OWENSBORO HEALTH MEDICAL GROUP,
F/K/A COOPERATIVE HEALTH SERVICES, INC;
OWENSBORO HEALTH, INC., F/K/A
OWENSBORO MEDICAL HEALTH;
AND THOMAS B. SMITH APPELLEES

<u>OPINION</u>
<u>AFFIRMING</u>

** ** ** ** **

BEFORE: GOODWINE, LAMBERT, AND MAZE, JUDGES.

MAZE, JUDGE: Carla Skarupa (Skarupa) appeals from a judgment of the Daviess Circuit Court confirming a jury verdict in favor of Owensboro Health Healthpark and Owensboro Health Medical Group, Inc (collectively "Owensboro Health"),

and Thomas B. Smith, LMT. Skarupa argues that the trial court erred by denying her motion to exclude the testimony of Owensboro Health's experts because they had previously reviewed the deposition testimony of her expert witnesses. We conclude that the separation-of-witnesses rule set out in KRE[1] 615 does not apply between deposition and trial, nor can it apply to conduct occurring before the motion is made. Therefore, the trial court did not err by denying the motion to exclude the witnesses or by allowing the matter to go the jury. Hence, we affirm.

The relevant facts of this appeal are not in dispute. On March 2, 2012, Skarupa sought a massage due to pain and tightness in her neck and shoulders. The massage was performed by Smith, a licensed massage therapist (LMT) and employee of Owensboro Health. Just over a month later, Skarupa suffered a stroke that left her partially paralyzed, unable to speak or walk, and blind in her left eye. After physical and occupational therapy, Skarupa recovered her ability to walk and speak, but she remains blind in her left eye and has not been able to return to her former employment as a nurse. Skarupa was 42 years old when the stroke occurred.

On February 27, 2013, Skarupa filed this action against Smith and Owensboro Health, alleging that Smith negligently performed the massage,

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[1] Kentucky Rules of Evidence.

causing a dissection of her left and right carotid arteries and the stroke. In support of her claims, she disclosed two expert witnesses: J. Gregory Roberts, M.D. (Dr. Roberts), a vascular surgeon, and Christopher Deery, LMT (Deery). Dr. Roberts, who testified by video deposition taken on February 24, 2017, stated that the March 2012 massage caused Skarupa's left carotid artery dissection and stroke in April 2012 and her right carotid artery dissection discovered in July 2012. Deery, who testified by video deposition taken on January 25, 2017, stated that Smith's massage and charting violated the standard of care for a massage therapist.

Smith and Owensboro Health countered these opinions with the testimony of Nathan Nordstrom, LMT (Nordstrom); Howard S. Kirshner, M.D., (Dr. Kirshner); and Thomas B. Naslund (Dr. Naslund), a vascular surgeon. Nordstrom opined that Smith complied with the standard of care. Dr. Kirshner and Dr. Naslund opined that the March 2012 massage could not have caused the dissections and the stroke.

In December 2017, the parties filed pretrial motions *in limine*, including a motion for separation of witnesses pursuant to KRE 615. The matter then proceeded to trial in February 2018. During his trial testimony, Nordstrom disclosed that he had been provided with Deery's deposition. Shortly thereafter, counsel for Smith and Owensboro Health disclosed that Drs. Kirshner and Naslund

had reviewed Dr. Roberts's deposition prior to trial. Both physicians also testified that they had reviewed the other depositions taken in the case.

Based on these disclosures, Skarupa moved to exclude the expert testimony, alleging that their review of the discovery depositions amounted to a violation of the separation-of-witnesses rule. The trial court denied the motion. At the close of proof, Skarupa moved for a directed verdict, arguing that the defense experts should have been excluded and, in the absence of their testimony, there was no evidence to contradict her experts. The trial court also denied this motion.

Subsequently, the jury returned verdicts in favor of Smith and Owensboro Health. The trial court entered a judgment in accord with the jury verdict on March 5, 2018. Skarupa filed motions for a judgment notwithstanding the verdict or for a new trial, which the trial court denied on April 26, 2018. This appeal followed.

Skarupa primarily argues that the trial court erred by denying her motion to exclude Owensboro Health's experts due to their violation of KRE 615. She further argues that, in the absence of contrary expert testimony, she would have been entitled to a directed verdict on liability. This Court reviews the trial court's evidentiary rulings for abuse of discretion. *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996), *overruled on other grounds by Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008). "The test for abuse of discretion is

whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

KRE 615 provides for separation of testifying witnesses as follows:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order on its own motion. This rule does not authorize exclusion of:
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> (1) A party who is a natural person;
> (2) An officer or employee of a party which is not a natural person designated as its representative by its attorney; or
> (3) A person whose presence is shown by a party to be essential to the presentation of the party's cause.

The purpose of KRE 615 is to ensure that witnesses do not alter their own testimony based on what they hear from other witnesses. *Hatfield v. Commonwealth*, 250 S.W.3d 590, 594 (Ky. 2008), (citing *Smith v. Miller*, 127 S.W.3d 644, 646 (Ky. 2004)). When requested by either party, separation of witnesses at trial is mandatory in the absence of one of the exceptions enumerated in the rule. *Mills v. Commonwealth*, 95 S.W.3d 838, 841 (Ky. 2003). Skarupa contends that allowing one party's expert to review the deposition testimony of the other party's expert effectively defeats the purpose of the rule, allowing an expert to directly address and comment of the other witness's testimony.

In *Spears v. Commonwealth*, 448 S.W.3d 781 (Ky. 2014), the Kentucky Supreme Court appears to have given some support for this position, directly suggesting that expert witnesses generally should not be permitted to hear and comment on the testimony of opposing experts.

> Appellant's suggestion would significantly alter the way a case is tried by having expert witnesses indirectly debate one another, point and counterpoint, as they go through direct examination, cross-examination, and redirect examination. We do not see that as an improvement to the truth-seeking function of the jury trial. We favor the time-honored tradition of each expert setting forth his or her opinion, subject to cross-examination by opposing counsel, and letting the jury determine the more credible view.

Id. at 789.

Federal cases interpreting the identical FRE[2] 615 have likewise noted that the rule serves to prevent an expert witness from reviewing trial testimony of the opposing party's expert. *See Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1373 (5th Cir. 1981); *In re Senior Living Properties, L.L.C.*, 309 B.R. 223, 230 (Bankr. N.D. Tex. 2004); and *Marathon Oil Co. v. United States*, 42 Fed. Cl. 267, 269 (1998), *aff'd*, 215 F.3d 1343 (Fed. Cir. 1999). Skarupa argues that the same reasoning applies when one party's expert is allowed to review the pretrial

[2] Federal Rules of Evidence.

deposition testimony of the opposing expert and comment on that witness's testimony.

However, we note that in *Spears*, the defendant asked the court to allow his expert to be permitted to attend the trial testimony of the Commonwealth's expert's witnesses. *Spears,* 448 S.W.3d at 788. Furthermore, the Commonwealth invoked KRE 615 at the beginning of trial. *Id.* Thus, the discussion from *Spears* quoted above is distinguishable from the facts of this case.

And with respect to the federal rule, there is a split of authority whether a party may invoke FRE 615 at a deposition so as to limit the number of witnesses present. *See Lumpkin v. Bi-Lo, Inc.*, 117 F.R.D. 451, 453-54 (M.D. Ga. 1987); *In re Shell Oil Refinery*, 136 F.R.D. 615, 617 (E.D. La. 1991); and *In re Levine*, 101 B.R. 260, 262-63 (Bankr. D. Colo. 1989) (allowing exclusion under Fed. R. Civ. P.[3] 26(c)(5) and FRE 615 of certain parties from each other's depositions under "rather extraordinary" circumstances involving claims that such parties were the central, active agents of a conspiracy to defraud). *But see BCI Communications Sys., Inc. v. Bell Atlanticom Sys., Inc.*, 112 F.R.D. 154, 157 (N.D. Ala. 1986) ("Since Rule 26(c), Fed. R. Civ. P., specifically requires a court order before persons may be excluded from the conduct of the depositions discovery

[3] Federal Rules of Civil Procedure.

process, it is clear that Fed. R. Evid. 615 does not apply to the taking of depositions.") Notwithstanding this split of authority, the federal cases consistently hold that the sequestration rule of FRE 615 does not apply between deposition and trial. *Lumpkin*, 117 F.R.D. at 453.[4] Consequently, it does not appear to this Court that KRE 615 was intended categorically to prevent one party's expert from reviewing the deposition testimony of the opposing party's expert. Rather, we find that, when a party seeks to prevent disclosure of his or her expert's pre-trial deposition, the appropriate remedy is to seek a protective order under CR[5] 26.03.

Moreover, we conclude that KRE 615 only requires sequestration of witnesses prospectively from the point in time that the rule is invoked. *See McAbee v. Chapman*, 504 S.W.3d 18 (Ky. 2016), holding "*upon a party's invocation of 'the rule,' i.e., upon the party's request for separation of witnesses*, KRE 615 requires the trial court to exclude trial witnesses, so that they cannot hear the testimony of other witnesses." *Id.* at 24 (emphasis added). When a timely

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[4] Owensboro Health notes the holding in *Sanders v. Drane*, 432 S.W.2d 54 (Ky. 1968) that the separation-of-witnesses rule did not disqualify the testimony of a witness who had read the pretrial deposition of another witness. *Id.* at 57. *See also Thompson v. Dreszer*, No. 2003-CA-001572-MR, 2004 WL 2755984, at *3 (Ky. App. Dec. 3, 2004). However, those cases were based upon the rule set out in the former CR 43.09, which was repealed in 2005. Unlike KRE 615, a trial court was not required to grant a motion for separation of witnesses pursuant that rule.

[5] Kentucky Rules of Civil Procedure.

motion is made, separation of witnesses is mandatory in the absence of one of the enumerated exceptions. *Mills*, 95 S.W.3d at 841. However, a motion filed after the witness has heard another witness's testimony is not timely. *Justice v. Commonwealth*, 987 S.W.2d 306, 315 (Ky. 1998).

In this case, Skarupa did not move for separation of witnesses until the pretrial conference in December 2017. In his discovery deposition taken in March 2017, Dr. Naslund stated that he had already reviewed the deposition testimony of Dr. Roberts. Likewise, Dr. Kirshner and Nordstrom each testified to being provided with the depositions of Dr. Roberts and Deery before the separation order was in place. Under these circumstances, we cannot find that there was any violation of KRE 615. Consequently, the trial court did not abuse its discretion by denying the motion to exclude Owensboro Health's experts. And since their testimony was admissible, the trial court did not err by submitting the issue of liability to the jury.

Accordingly, we affirm the judgment of the Daviess Circuit Court.

ALL CONCUR.

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