

RENDERED: December 3, 2004; 2:00 p.m.  
NOT TO BE PUBLISHED

## Commonwealth Of Kentucky

### Court of Appeals

NO. 2003-CA-001572-MR

NIKITA THOMPSON, INDIVIDUALLY;  
NIKITA THOMPSON, ADMINISTRATRIX  
OF THE ESTATE OF DALUS GAINES, JR.;  
AND DALUS GAINES, SR.

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE THOMAS J. KNOFF, JUDGE  
ACTION NO. 01-CI-004135

MOISES DRESZER, M.D.; BRENDA  
OSBORNE, M.D.; AND PEDIATRIC  
NEONATAL SPECIALISTS, P.S.C.

APPELLEES

#### OPINION AFFIRMING

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BEFORE: DYCHE, JUDGE; MILLER, SENIOR JUDGE<sup>1</sup> AND EMBERTON, SENIOR  
JUDGE.<sup>2</sup>

EMBERTON, SENIOR JUDGE. Three issues are presented in this  
appeal from a judgment based upon a jury verdict in a medical

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<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>2</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

malpractice action: (1) whether appellants were entitled to a directed verdict; (2) whether it was a violation of CR<sup>3</sup> 43.09 to allow appellees' experts to read the rebuttal testimony of one of appellants' experts prior to giving their testimony at trial; and (3) whether appellants were entitled to a default judgment against appellee Brenda Osborne, M.D. Finding no error in any of the arguments asserted, we affirm the judgment of the Jefferson Circuit Court.

The facts precipitating this appeal stem from the tragic death of a nine-month-old infant from bacterial meningitis. Appellants' negligence action against appellees was predicated upon the theory that the medical treatment rendered the infant child in the days leading up to his death fell below the prevailing standard of care. On July 19, 2000, appellant Nikita Thompson received a call from the daycare for her child Dalus Gaines, Jr. The daycare staff informed her that Dalus had a temperature of 102 degrees and that she needed to pick him up. Ms. Thompson took the child that afternoon to be seen by his regular pediatricians, Pediatric and Neonatal Specialists. Appellee Dr. Moises Dreszer examined the child. Dr. Dreszer testified at trial that the examination revealed nothing unusual in that Dalus had no temperature at that time and appeared to be acting normally. Dr. Dreszer stated that he specifically looked

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<sup>3</sup> Kentucky Rules of Civil Procedure.

for "meningeal signs" but found none, and based on the history of temperature at the daycare, diagnosed Dalus with a viral syndrome which he recommended treating symptomatically. Ms. Thompson acknowledged that she was instructed to call the pediatricians' office if the child's condition worsened or if his temperature could not be controlled. Appellants maintain that Dr. Dreszer's failure to do blood or lab work in an effort to identify the source of Dalus's earlier fever breached recognized standards of medical care.

According to Ms. Thompson's testimony, the second instance of substandard treatment occurred at approximately 6:00 p.m. on the next day, when after her return home from work, Dalus's temperature was again elevated. Ms. Thompson then called PNS and spoke with a certified medical assistant trained for after-hours triage. The notes made by the technician indicated Ms. Thompson stated that Dalus's temperature was 103.4 degrees and that he had been seen at the office the previous day. Although Ms. Thompson testified at trial that she told the technician that Dalus had been vomiting, there is no mention of vomiting in the phone record. The notes concerning the conversation do indicate, however, that the child's mother stated that he was "acting fine" and had no symptoms other than the temperature. Appellants maintain that a properly trained

person using appropriate telephone triage protocol would have sent the child to the emergency room at that point.

Appellants allege a third instance of substandard treatment occurred shortly after midnight when Ms. Thompson placed a second call to PNS. That call was routed to a pediatric nurse who handled Kosair Hospital's after-hours triage system and who performed this function for PNS after midnight. Ms. Thompson informed the nurse that Dalus had vomited and that he still had a fever. She stated that as directed by PNS she had been alternating Tylenol and Motrin and had given him Pedialyte. Ms. Thompson testified that she asked the nurse for a referral to take the child to the emergency room, but the nurse told her that it sounded like he had a virus and that she should take him to be seen by his doctor in the morning. The pediatric nurse testified that she instructed Ms. Thompson on what symptoms necessitated a trip to the emergency room or a call back to triage. She also stated that if Ms. Thompson had wanted to take the child to the emergency room, she would have told her to do so.

Ms. Thompson went to work the following day and the child's father took care of him as he had done the day before. Mr. Gaines testified that after the child awoke around 8:15 a.m., he bathed and fed him and the child went back to sleep. Around 9:00 a.m., a registered nurse from PNS called to follow-

up on a fax from Kosair Hospital regarding the previous night's phone call to their system. That nurse testified that Mr. Gaines told her Dalus was sleeping but seemed to be doing better. She advised him to call back if there were any problems. Ms. Thompson later called PNS to get an appointment for Dalus to be seen again. Although she was offered an 11:15 appointment, she selected an appointment at 3:45 p.m.

Mr. Gaines testified that when he got Dalus up around 10:30 that morning, he ate, played, had good eye contact and appeared to be acting normally. He stated that when he became fussy around 1:00 p.m., he checked his temperature and put him back to sleep. At the 3:45 appointment, Dalus was seen by Dr. Brenda Osborne who observed that the child was in respiratory distress and immediately contacted EMS to transport him to Kosair Hospital. The child died less than 12 hours later from pneumococcal bacterial meningitis.

Two procedural events pertinent to this appeal occurred prior to trial. First, by letter dated May 22, 2001, the law firm of O'Bryan, Brown & Toner notified counsel for appellants that they were representing Dr. Dreszer and his medical group and that future correspondence should be directed to them. Nevertheless, the complaint against Dr. Osborne was served on her by certified mail and she accepted service of the summons on June 26, 2001. As she was aware of a potential

malpractice action, she assumed her counsel would receive a copy of the complaint and take appropriate action. On July 24, 2001, without notifying counsel for appellees or Dr. Osborne, appellants filed a motion for default judgment which was ultimately denied by opinion and order dated August 15, 2001, which granted Dr. Osborne additional time to respond.

The second noteworthy procedural event occurred ten days prior to the scheduled trial date. Appellants filed a motion to allow them to take a video deposition of their expert, Dr. Anthony Minnefor, because he was ill and would be unable to testify at trial. The motion was granted, and the case proceeded to trial. After hearing significant medical and lay testimony, the jury returned a verdict in favor of appellees, resulting in this appeal.

Appellants first argue that the trial court erred in failing to grant their motion for a directed verdict. We do not agree. As stated in Bierman v. Klapheke:<sup>4</sup>

Generally, a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ. Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts, as well as matters affecting the credibility of witnesses.

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<sup>4</sup> Ky., 967 S.W.2d 16, 18-19 (1998).

Here, not only is there conflicting testimony as to what Ms. Thompson and Mr. Gaines told medical practitioners concerning Dalus's condition, but there is also conflicting expert evidence as to whether there was a breach of the applicable standard of care. Regardless of appellants' opinion of what the standard of care should be, there was ample evidence presented to withstand their motion for directed verdict. Accordingly, the trial court did not err in denying the motion and allowing the case to be considered by the jury.

Appellants' second assignment of error focuses upon an alleged violation of CR 43.09, the "separation of witnesses" rule. Appellants argue that the rule was violated when appellees' experts who testified at trial were not precluded from reviewing the transcript of Dr. Minnefor's "rebuttal" deposition taken four days prior to trial. We find no error.

The purpose of CR 43.09 is to prevent a witness from being unduly influenced by the testimony he hears being given by other witnesses. An issue almost identical to that advanced in this appeal was examined by the court in Sanders v. Drane,<sup>5</sup> and resolved by application of the following rationale:

As a matter of fact, depositions required to be filed in court under CR 30.06(1) become public records and are open to examination by anyone. To say that a witness who has read a deposition in a case is thereby

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<sup>5</sup> Ky., 432 S.W.2d 54, 56 (1968).

disqualified from testifying would impair the proper administration of justice. . . . We do not think CR 43.09 should be extended to defeat good trial practice and the ultimate ascertainment of truth.

Furthermore, we view the rule as intended to prevent witnesses from fashioning their testimony on disputed factual issues from conforming their testimony to that of other witnesses. The rule has little, if any, pertinence to experts whose role is to consider the opinions of other experts and assist the trier of fact by offering an opinion as to the validity of another expert's view of the evidence.<sup>6</sup>

Finally, we perceive no error in the refusal of the trial court to grant a default judgment against Dr. Osborne. The matter falls well within the wide discretion afforded trial courts to grant additional time to respond to pleadings. Appellants can point to no abuse of that discretion in this case.

The judgment is affirmed.

ALL CONCUR.

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<sup>6</sup> Kentucky Rules of Evidence (KRE) 702.