

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001832-MR

DOROTHY MILLER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. McDONALD, JUDGE
ACTION NO. 02-CI-009034

JEWISH HOSPITAL HEALTHCARE SERVICES,
INC., D/B/A JEWISH HOSPITAL

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: BARBER AND JOHNSON, JUDGES; MILLER, SENIOR JUDGE.¹

JOHNSON, JUDGE: Dorothy Miller has appealed from the August 26, 2004, final judgment of the Jefferson Circuit Court, which dismissed her negligence action against Jewish Hospital following a jury verdict in favor of the hospital. Having concluded that the trial court did not abuse its discretion in making various evidentiary rulings, we affirm.

¹ 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.

On February 6, 2002, Miller presented to her family physician² with complaints of shortness of breath and other upper respiratory symptoms,³ which she had been having for five days. After reviewing a chest x-ray, the doctor suspected that Miller had pneumonia in her left, lower lung, and admitted Miller to Jewish Hospital. Miller was initially diagnosed with exacerbation of chronic obstructive pulmonary disease (COPD). On February 26, 2002, after being hospitalized for approximately two weeks, Miller's condition began to deteriorate, causing Jewish Hospital to call in Dr. Lawrence Rouben, a lung specialist, and Dr. Julio Melo, an infectious disease specialist. Because a culture was not taken when Miller was admitted, she was diagnosed with nosocomial⁴ atypical pneumonia. On February 28, 2002, a bronchoscopy was performed, in which several pieces of tissue were removed from Miller's lung and tested. Cultures performed on the tissue revealed the presence

² There is some dispute as to which physician Miller saw on this date. Miller claims in her brief she saw "Dr. Jones", while Jewish Hospital states that Miller "incorrectly identifies the doctor whom she visited . . . as 'Dr. Jones[,]' and instead refers to Miller treating with Dr. Julie Brown.

³ Miller has a long history of chronic obstructive pulmonary disease (COPD), including bronchiectasis, which led to the surgical removal of a portion of her lung, and since 1988 Miller had been seen for severe lung problems by Dr. Robert Scharff.

⁴ Nosocomial refers to a condition that originates or takes place in a hospital environment.

of several organisms,⁵ including *aspergillus flavus*,⁶ *aspergillus fumigatus*, and *norcardia*.⁷ Because the bronchoscopy did not reveal the cause of Miller's pneumonia, her physicians conducted a lung biopsy on March 16, 2002, wherein an even larger portion of the affected lung tissue was removed. It was determined that these tissues did not show aspergillosis, the disease caused by *aspergillus*.

In order to diagnose aspergillosis, it is common practice to perform fungal stains in order to find the organism that causes the inflammatory reaction in the lungs. Stains performed on Miller's tissue were negative for the presence of fungal organisms. Because Miller's physicians were unable to determine the exact cause of her illness, they treated her with empiric therapy⁸ for nocardiosis and aspergillosis. Miller was treated with antifungal and antibiotic medications,⁹ in order to aggressively treat the many possible causes of her pneumonia.

Miller was continually treated for this condition at

⁵ The organisms initially resembled *norcardia* and *striptonyces*. The pathology report reported the organisms as *aspergillus flavus* and *scedosporium*.

⁶ *Aspergillus* is a fungus that is found throughout the environment and includes many common molds.

⁷ *Nocardia* is a bacteria that is most commonly found in soil. It is difficult to grow and diagnose.

⁸ Empiric therapy is treatment for a disease that has yet to be determined, when the benefits outweigh the risks.

⁹ These medications included Sporanox and Bactrim.

Jewish Hospital until March 16, 2002, when she was discharged and sent to Frazer Rehab Center. The following day, Miller suffered respiratory failure and was immediately transferred back to Jewish Hospital, where she was diagnosed with invasive aspergillosis. A critical dispute in this case is whether Miller was colonized¹⁰ before she was admitted to Jewish Hospital, or whether she contracted the infectious disease while in the hospital.¹¹ She continued treatment for pulmonary aspergillosis at Jewish Hospital until May 3, 2002, when she was again discharged to Frazer Rehab Center. Ultimately, Miller recovered and her pulmonary function returned to the same level after her recovery from the pneumonia as it had been prior to her illness. Further facts will be developed as necessary throughout this Opinion.

Miller filed this action against Jewish Hospital on November 27, 2002. In her amended complaint, Miller alleged that “[a]s a result of the unsafe and unsanitary conditions of the rooms in Jewish Hospital and Jewish Hospital’s lack of care, Miller was exposed to Aspergillus spores and other bacterial and fungal organisms and contracted aspergillosis, norcardiosis and

¹⁰ Colonization refers to a situation where organisms are present in the respiratory tract or lungs, but the organisms are not causing disease.

¹¹ According to testimony from Miller and her children, the two rooms Miller stayed in at Jewish Hospital were unclean. They testified that housekeeping never dusted either of the rooms, there were old pills and bloody gauze bandages lying underneath the beds, and the family had to bring in cleaning supplies to sanitize the room for their own safety.

other nosocomial infections." A jury trial was held August 10, 2004, through August 13, 2004.

At trial, Miller offered expert testimony from Dr. George Nichols, this state's former Chief Medical Examiner. Dr. Nichols opined that more likely than not the cause of Miller's acquiring aspergillus and nocardia while she was a patient at Jewish Hospital was her exposure to dust and dirty carpet. Miller and her children, Linda Ferguson and Bobby Miller, testified that the hospital was unclean during Miller's stay at the hospital.¹²

Jewish Hospital offered the testimony of several experts, including Dr. Rouben and Dr. Melo. Both Dr. Rouben and Dr. Melo discussed Miller's medical history prior to her hospitalization. Based on this history, both physicians opined within a reasonable degree of medical probability that Miller was colonized with both aspergillus and nocardia at the time she was admitted to Jewish Hospital; that she was treated empirically; that Jewish Hospital did not place Miller in an unsafe environment; and that Jewish Hospital did nothing to cause injury to Miller. Jewish Hospital also offered expert testimony from Dr. William Shaffner, the hospital epidemiologist

¹² Neither Dr. Rouben, nor Dr. Melo, testified that Miller or any member of her family complained to them about the condition of Miller's hospital rooms.

at Vanderbilt University.¹³ Dr. Shaffner confirmed the opinions of Dr. Rouben and Dr. Melo.¹⁴

The jury was presented with the following jury instruction:

You will find for Dorothy Miller if you believe from the evidence . . . that by reason of the presence of aspergillus and/or nocardia [sic] at the hospital, the hospital was not in a reasonably safe condition for Dorothy Miller; and . . . that Dorothy Miller's injuries were caused by aspergillus and/or nocardia [sic] at the hospital. If you do not believe the above scenario occurred based on the evidence, you will find for the Defendant, Jewish Hospital.

The jury found in favor of Jewish Hospital; and pursuant to that verdict, final judgment dismissing Miller's action against Jewish Hospital was entered on August 26, 2004. This appeal followed.

Miller raises three evidentiary issues on appeal: (1) that the testimony of Dr. Rouben was not admissible because he violated The Health Insurance Portability and Accountability Act of 1996 (HIPPA) and the Kentucky Rules of Medical Ethics; (2) that it was an abuse of discretion for the trial court to exclude the testimony of her proffered expert witness, William

¹³ Dr. Shaffer did not treat Miller, but formed his opinion based on medical records and his education and experience.

¹⁴ All three physicians testified that Miller did not need a specialized environment. Dr. Shaffner testified that this was because Miller had normal circulation of white blood cells.

Nellis; and (3) that the trial court abused its discretion in excluding from evidence, certain of Jewish Hospital's business documents. "[A]buse of discretion is the proper standard of review of a trial court's evidentiary rulings" [citations omitted].¹⁵ "Rulings upon admissibility of evidence are within the discretion of the trial [court]; such rulings should not be reversed on appeal in the absence of a clear abuse of discretion."¹⁶ "The test for abuse of discretion is whether the trial [court's] decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles" [citations omitted].¹⁷

TESTIMONY OF DR. ROUBEN

The trial court's civil jury trial order, entered on January 16, 2004, required both parties to exchange a list of witnesses, along with a brief description of their anticipated testimony, 90 days prior to trial. Expert witnesses were to be disclosed by Jewish Hospital 30 days prior to trial. On April 26, 2004, Jewish Hospital filed its witness list, identifying Dr. Rouben as an expert witness to testify on its behalf at trial. On that same date, Jewish Hospital filed a disclosure of Dr. Rouben's testimony and stated as follows:

¹⁵ Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575, 577 (Ky. 2000).

¹⁶ Simpson v. Commonwealth, 889 S.W.2d 781, 783 (Ky. 1994).

¹⁷ Goodyear Tire & Rubber Co., 11 S.W.3d at 581.

Dr. Rouben is a board certified pulmonologist and one of Dorothy Miller's treating physicians. It is anticipated that Dr. Rouben will testify as Ms. Miller's treating physician. It is further anticipated that Dr. Rouben will testify that Ms. Miller was colonized with *Aspergillus* prior to admission at Jewish Hospital. It is anticipated that he will explain the physiology of Ms. Miller's underlying pulmonary conditions, such as COPD. It is anticipated that he will testify that *Aspergillus* colonization is not unusual for patients with COPD, and that in Ms. Miller's case, she did not suffer from nosocomial invasive pulmonary aspergillosis. He is expected to testify about the significance of Ms. Miller's multiple other medical issues, and that Jewish Hospital in no way caused any harm to Ms. Miller.

Neither party deposed Dr. Rouben,¹⁸ nor was he subpoenaed to appear at trial. Miller did not file a motion in limine, nor did Miller object¹⁹ to his testimony until her cross-examination, when Dr. Rouben testified that he spoke with Jewish Hospital's counsel without obtaining Miller's consent. A bench conference ensued and the trial court overruled Miller's objection.

Miller argues to this Court that Dr. Rouben's ex parte conversations with Jewish Hospital were violations of both HIPPA and the Kentucky Rules of Medical Ethics. She states that, while she provided several medical records to Jewish Hospital with the notice of intent to use them at trial, she did not

¹⁸ Miller opted not to take his deposition due to the exorbitant cost.

¹⁹ Miller's objection was based on an alleged violation of HIPPA.

provide consent for Jewish Hospital to consult Dr. Rouben, to access additional medical records, or to allow Jewish Hospital to call Dr. Rouben as a witness.

Jewish Hospital denies that any of its actions in relation to Dr. Rouben constituted a violation of HIPPA. Further, Jewish Hospital argues that Miller must have known at the time of its disclosure of Dr. Rouben as a witness that it would talk to him before he testified. Further, while Miller could have brought any objection before the trial court at any time from April 26, 2004, until 30 days prior to trial,²⁰ she waited until the jury had heard Dr. Rouben's direct examination testimony and her cross-examination had begun. For the above reasons, Jewish Hospital argues that Miller failed to preserve this issue for appeal. We agree.

In reviewing the record in this case, it appears that Miller's objection to Dr. Rouben's testimony at trial was based on a violation of the rules of HIPPA. There was no mention of a violation of medical ethics until this appeal. Therefore, the alleged violation of medical ethics was not preserved for appellate review.²¹ Further, we also conclude that Miller's

²⁰ The trial court's civil jury trial order indicated that all motions in limine were to be filed 30 days prior to trial.

²¹ See Crain v. Dean, 741 S.W.2d 655, 657 (Ky. 1987)(stating that "[o]n request, a party must state the grounds for his objection or request and inform the court of its actual basis. If a party chooses to state grounds in the absence of a request from the court, he is bound thereby").

objection to Dr. Rouben's testimony based on alleged HIPPA violations, including ex parte discussions with Jewish Hospital, was not timely presented.

KRE 103(a)(1) and (c) state, in relevant part, as follows:

- (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
 - (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, and upon request of the court stating the specific ground of objection, if the specific ground was not apparent from the context; or
 . . .
- (c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

The general scope of Dr. Rouben's trial testimony was clear from Jewish Hospital's disclosures. In her brief, Miller raises objections to Dr. Rouben's testimony that she was colonized with aspergillus prior to admission to the hospital and that she was treated empirically during her hospital stay, as this testimony was the product of ex parte communications

with Jewish Hospital. However, this exact testimony was offered by Jewish Hospital as part of its direct examination of Dr. Rouben, and no objection was made at that time. While it is proper to wait until cross-examination for a party to object to a witness's testimony if the error required cross-examination to develop,²² there was no need for such delay in this case.

Regardless, of the appropriateness of Dr. Rouben's testimony, we conclude that even if the trial court did abuse its discretion in allowing the testimony, this error was not responsible for Miller obtaining an adverse verdict, and thus was harmless error.²³ In reviewing the evidence in the case before us, the expert testimony overwhelmingly supported the jury's verdict. Therefore, even if Dr. Rouben's testimony was improperly admitted, such an error was harmless error.

EXCLUSION OF NELLIS'S TESTIMONY

Miller argues that the trial court abused its discretion in excluding Nellis's testimony at trial without holding a Daubert²⁴ hearing on Jewish Hospital's motion in

²² Commonwealth, Department of Highways v. Riley, 388 S.W.2d 128, 129-30 (Ky. 1965).

²³ See Conley v. Fannin, 308 Ky. 534, 215 S.W.2d 122, 123 (1948) (quoting Honaker v. Crutchfield, 247 Ky. 495, 57 S.W.2d 502, 504 (1933)) (stating that "'admission of incompetent evidence is harmless if the facts are otherwise shown by proper evidence, or when the verdict or judgment is supported by other sufficient evidence'").

²⁴ Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

limine. Miller disclosed Nellis as an expert on her witness list filed on May 7, 2004, stating that Nellis had expertise in the area of hospital administration, particularly on the issue of the standard of care applicable to infection control in hospitals. Jewish Hospital took Nellis's deposition on May 11, 2004, which revealed that he had neither a clinical background, nor formal education in health care or hospital administration, and at that time Nellis had not reviewed Jewish Hospital's policies and procedures.

On July 9, 2004, Jewish Hospital filed a motion in limine to exclude Nellis's testimony arguing that Nellis's testimony was not based on personal knowledge, training, or experience. Further, Jewish Hospital argued that Nellis had failed to rely upon any type of specific standard or specialized knowledge to opine that Jewish Hospital had committed violations of infection control standards, but rather resorted to "common sense", and that he was unable to testify as to causation. Miller argued in response that Jewish Hospital's arguments went merely to the weight of Nellis's testimony, rather than its admissibility.²⁵ Miller further argued that Nellis's testimony would have established the standard of care and proof of breach

²⁵ Miller cited Washington v. Goodman, 830 S.W.2d 398, 400 (Ky.App. 1992), in support of this argument.

and, even if the proof were limited to the proper procedures, the testimony would have still assisted the jury.²⁶

The trial court agreed with Jewish Hospital and on August 3, 2004, entered an order prohibiting Nellis from testifying. At the trial on August 12, 2004, Miller asked the trial court to reconsider its exclusion of Nellis and offered portions of his deposition into evidence. At this time the trial court held a Daubert hearing, during which the trial court reviewed Nellis's deposition and heard arguments from counsel for both parties. Based on all the information before the trial court, it upheld its order to exclude Nellis's testimony.²⁷

Initially, this Court must conduct a de novo review of whether the trial court used the proper legal test in excluding Nellis's expert testimony.²⁸ "While the [trial] court has discretion in the manner in which it conducts its Daubert analysis, there is no discretion regarding the actual performance of the gatekeeper function" [emphases original].²⁹ If we determine the trial court used the proper legal test, we

²⁶ Miller further argued that Jewish Hospital's experts testified that the standard to be used is not ordinary common sense. Miller argued that while it is common sense that a hospital should be kept clean, the proper procedures to follow in accomplishing the appropriate cleanliness are more than common sense.

²⁷ Miller ultimately placed Nellis's deposition in the record by avowal.

²⁸ Goebel v. Denver & Rio Grande Western Railroad Co., 215 F.3d 1083, 1087 (10th Cir. 2000).

²⁹ Id.

then review the trial court's decision to admit the testimony under the abuse of discretion standard.³⁰

"[T]he decision as to the qualifications of an expert rests in the discretion of the trial court" [citations omitted].³¹ The party offering expert testimony has the burden of proving by preponderance of the evidence that the testimony of his or her expert is reliable.³² "[T]he trial [court] must determine at the outset . . . 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."³³

"The appropriate test of admissibility depends on the trial court's determination of a reliable foundation and relevance to the issues at trial."³⁴ "Expert opinion evidence is admissible so long as: (1) the witness is qualified to render an opinion on the subject matter[;] (2) the subject matter

³⁰ Id.

³¹ Ford v. Commonwealth, 665 S.W.2d 304, 309 (Ky. 1983) (cert. denied, 469 U.S. 984, 105 S.Ct. 392, 83 L.Ed.2d 325 (1984)).

³² Wellman v. Norfolk & Western Railway Co., 98 F.Supp.2d 919, 923 (S.D. Oh. 2000).

³³ Daubert, 509 U.S. at 592; see also KRS 702 (stating that "[i]f 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"). See also Lawson, The Kentucky Evidence Law Handbook, § 6.15, p. 293 (3d ed. 1993)(stating that in evaluating whether the expert is qualified, "Kentucky's case law clearly indicates that the decision required of the trial judge is to determine if an expert has 'adequate' rather than 'outstanding' qualifications").

³⁴ Marbled Murrelet v. Babbitt, 83 F.3d 1060, 1066 (9th Cir. 1996).

satisfies the requirements of [Daubert][;] (3) the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403[;] and (4) the opinion will assist the trier of fact per KRE 702."³⁵

Miller argues that the trial court abused its discretion by failing to hold a hearing on Jewish Hospital's motion in limine, prior to striking Nellis's testimony. Our Supreme Court in Commonwealth v. Christie,³⁶ stated as follows:

This assessment does not require a trial court to hold a hearing on the admissibility of the expert's testimony. . . . But a trial court should only rule on the admissibility of expert testimony without first holding a hearing "when the record [before it] is complete enough to measure the proffered testimony against the proper standards of reliability and relevance" [citation omitted].

"Usually, the record upon which a trial court can make an admissibility decision without a hearing will consist of the proposed expert's reports, affidavits, deposition testimony, existing precedent, and the like" [citations omitted].³⁷

In reviewing the record in the case before us, it appears that in fact a Daubert hearing was held on the issue and

³⁵ Stringer v. Commonwealth, 956 S.W.2d 883, 891 (Ky. 1997) (cert. denied, 523 U.S. 1052, 188 S.Ct. 1374, 140 L.Ed. 522 (1998)).

³⁶ 98 S.W.3d 485, 488 (Ky. 2002).

³⁷ Christie, 98 S.W.3d at 488-89.

at that time the trial court, within its discretion, determined that Nellis's testimony should be excluded. "It is axiomatic that an expert, no matter how good his credentials, is not permitted to speculate."³⁸ The trial court determined that Nellis's opinion regarding the infection issues was not based on any type of specific standard or specialized knowledge and was nothing more than speculation based on common sense. We cannot say that in so finding the trial court abused its discretion. We reject Miller's argument that Nellis would have provided a scientific basis for his opinion, if he had been allowed to testify. The burden was on Miller to present the grounds for his expert opinion to the trial court so it could determine if he were qualified to testify as an expert.

EXCLUSION OF VARIOUS DOCUMENTS

Lastly, Miller argues that the trial court abused its discretion in granting Jewish Hospital's motions in limine to exclude various business records, including three state hospital inspection reports completed on January 14, 2000, August 16, 2001, and June 10, 2002, the surveyor notes upon which those reports were based, and a letter dated October 24, 1995, to the CEO of Jewish Hospital from a consultant microbiologist outlining recommendations for preventing aspergillosis at the hospital. Miller argues that because she was the plaintiff in

³⁸ Goebel, 215 F.3d at 1088.

this premises liability case,³⁹ and it was her burden to show Jewish Hospital's breach of its duty to keep the hospital sanitary,⁴⁰ these documents were relevant to proving the elements of her claim,⁴¹ and that the documents provided detailed instances of Jewish Hospital's breach of duty to its patients. Miller acknowledges that the dates of the reports and the

³⁹ The parties stipulated prior to trial that Miller was a business invitee of Jewish Hospital during the time of the alleged injury. Restatement (Second) of Torts § 343 (1965 & Supp. 2005) stated as follows:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.

⁴⁰ Martin v. Mekanhart Corp., 113 S.W.3d 95, 98 (Ky. 2003)(stating that "the customer retains the burden of proving that: (1) he or she had an encounter with a foreign substance or other dangerous condition on the business premises; (2) the encounter was a substantial factor in causing the accident and the customer's injuries; and (3) by reason of the presence of the substance or condition, the business premises were not in a reasonably safe condition for the use of business invitees" [citations omitted]).

⁴¹ The jury instruction stated the standard as "exercise ordinary care to keep and maintain the hospital in a reasonably safe condition for its patients." See Vick v. Methodist Evangelical Hospital, 408 S.W.2d 428, 430 (Ky. 1966)(stating that a hospital patient is entitled to "such reasonable care and attention for his safety as his mental and physical condition known or discoverable by the exercise of ordinary care may require"); see also Berry v. Jorris, 303 Ky. 799, 803, 199 S.W.2d 616, 618 (1947)(stating that "[a] negligent act cannot be said to be the proximate cause of an [injury] unless the [injury] could have been avoided in the absence of such negligent act").

alleged occurrences were not within the time period she was in the hospital. However, she argues that this fact goes to the weight, not the relevance, of the evidence.

In response, Jewish Hospital argues that the survey reports are irrelevant to any facts at issue, as none of the reports covers the time period in which Miller was actually a patient in the hospital, nor do any of them involve the area of the hospital where Miller was prior to being diagnosed with her illness. As to the 1995 and 1996 reports, Jewish Hospital makes several points. First, Miller was not in the same category of patients who experienced problems in the mid-1990's. Second, the hospital was undergoing a large construction project in the mid-1990's in which brick was being removed from the exterior of the building and a new facade put into place. Also, there had not been any unusual increases in positive aspergillus cultures at Jewish Hospital since 1995 and 1996.

We must determine whether the trial court abused its discretion by excluding this evidence at trial. KRE 402 states that "[a]ll relevant evidence is admissible," except as otherwise provided by law. "The term 'relevant' as applied to evidence means that the evidence tends to establish or disprove an issue in litigation. 'Where there is nothing in the issues presented to warrant the proof offered, it is properly

excluded.'"⁴² "There is no precise test of relevancy, but it is a determination which rests largely in the discretion of the trial court and must be exercised according to the teachings of reason and judicial experience, considering its probative value."⁴³

KRE 404(2)(b) states as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

- (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
- (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

The general rule regarding evidence of other acts is set out in Massie v. Salmon,⁴⁴ wherein this Court stated as follows,

"[E]vidence of other acts, even of a similar nature, of the party whose own act or conduct or that of his agents and employees is in question, of other similar

⁴² O'Bryan v. Massey-Ferguson, Inc., 413 S.W.2d 891, 893 (Ky. 1966) (quoting 20 Am.Jur. Evidence § 247). See KRE 401.

⁴³ Glens Falls Insurance Co. v. Ogden, 310 S.W.2d 547, 549 (Ky. 1958) (citing 31 C.J.S. Evidence §§ 158-159).

⁴⁴ 277 S.W.2d 49, 51(Ky. 1955) (quoting 20 Am.Jur. Evidence § 302); see also Moore v. Bothe, 479 S.W.2d 634 (Ky. 1972).

transactions with which he has been connected, of a former course of dealing, of his conduct or that of his agents and employees on other occasions, or of his particular conduct upon a given occasion is not competent to prove the commission of a particular act charged against him, unless the acts are connected in some special way, indicating a relevancy beyond mere similarity in certain particulars. This rule obviously excludes evidence of all collateral facts or of those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute."

Given the highly deferential standard governing our review, under the circumstances of this case, we hold that it was not an abuse of discretion for the trial court to refuse to admit the business documents as evidence under the knowledge exception of KRE 404(2)(b)(1), or that the documents were so inextricably intertwined with other evidence essential to the case to be admissible under KRE 404(2)(b)(2).

Having concluded that the Jefferson Circuit Court did not abuse its discretion in any of the evidentiary rulings at issue in this case, its judgment is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Laurence J. Zielke
Nancy J. Schook
Hays Lawson
Louisville, Kentucky

BRIEF FOR APPELLEE:

Karen L. Keith
Shannon M. Gordon
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANT:

Laurence J. Zielke
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Karen L. Keith
Louisville, Kentucky