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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000136-MR
AND
NO. 2006-CA-000192-MR

LAKE CUMBERLAND, LLC, D/B/A LAKE CUMBERLAND REGIONAL HOSPITAL — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 02-CI-00586

SCOTTIE DISHMAN, ADMINISTRATOR OF THE ESTATE OF VENA DISHMAN, DECEASED; JOE DISHMAN — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING IN PART AND
REVERSING AND REMANDING IN PART

** ** ** ** ** ** ** **

BEFORE: LAMBERT AND STUMBO, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Lake Cumberland, LLC, d/b/a Lake Cumberland Regional Hospital (the Hospital), appeals from a judgment entered following a jury verdict adjudging the Hospital, through it agents and employees, negligent in its care and

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

treatment of Vena Dishman, deceased, and awarding damages to Vena's estate and her surviving husband, Joe Dishman. For the reasons stated below, we affirm in Appeal No. 2006-CA-000136-MR and reverse and remand in Appeal No. 2006-CA-000192-MR.

Vena Dishman had a history of non-insulin dependent diabetes, chronic obstructive pulmonary disease, and colon cancer. After complaining of worsening dizzy spells for several months, Vena, age 67, was admitted to Lake Cumberland Regional Hospital on June 25, 2001, for a bilateral cartoid artery angiogram to further evaluate her condition.

The angiogram was completed at 1:30 p.m. without complication. Vena was returned to her in-patient hospital room at approximately 1:45 p.m. A post-procedure concern following an angiogram is the possibility of the patient suffering a stroke. Accordingly, the standard of care for a post-angiogram patient includes monitoring and observation for the onset of stroke symptoms. According to the appellees, Hospital employees, including Nurse Lou Ellen Ward, Vena's assigned nurse, failed to properly monitor and observe Vena during the period following the angiogram procedure.

At some point – most likely around 2:20 p.m. according to the appellees, most likely nearer to 7:10 p.m. according to the Hospital – Vena suffered a stroke. At 7:10 p.m., following a shift change, at which time Nurse Ward went off duty and Nurse Irene King came on duty and was assigned to Vena, Nurse King discovered Vena suffering from stroke symptoms. After being informed, neurologist Dr. Magdy El-Kalliny, Vena's assigned post-procedure physician, ordered a CT scan, the results of

which indicated that Vena had suffered an ischemic stroke, that is, a stroke brought about by a blood clot in the arterial system.

As will be discussed further below, a "clot busting" drug known as t-PA[2] is available to treat an ischemic stroke victim, but it must be administered within three hours of the onset of the stroke. The drug can substantially reduce the damage caused by a stroke, though it is successful in only about 30% of the patients who receive it. Regardless of what time the stroke occurred, the drug was not administered to Vena.

As a result of the stroke, Vena lost her ability to walk, became mentally confused, and could not use her left leg or left side. She remained a patient at the Hospital until July 18, 2001, at which time she was transferred to a nursing home. Vena died at the nursing home on July 27, 2003.

In the meantime, on May 31, 2002, Vena and Joe filed a civil complaint in Pulaski Circuit Court naming Lake Cumberland Regional Hospital as defendant. The complaint alleged that the Hospital, through its agents and employees, breached the applicable duty of care following the administration of the angiogram by failing to properly monitor Vena and by delays resulting in the loss of the opportunity to administer t-PA. Subsequent to Vena's death, her administrator, Scottie Dishman, was substituted as a party in Vena's place.

The trial was held beginning on December 7, 2004. At the conclusion of the trial, the jury found the Hospital liable under the claims brought by the plaintiffs. The jury awarded damages of $119,177.16 for past medical expenses, $500,000 for pain and

[2] t-PA stands for "tissue plasminogen activator."

suffering, and $350,000 for loss of consortium, for a total award of $969,177.16. Lake Cumberland filed a motion to alter, amend, or vacate and/or for a new trial. The trial court granted the motion insofar as it sought to reduce the award for past medical expenses to the amount actually expended by Medicaid. The motion was denied in all other respects.

On December 29, 2005, an amended judgment reducing the award for past medical expenses from $119,177.16 to $91,838.73 was entered.[3] Lake Cumberland appeals on various grounds (Appeal No. 2006-CA-000136-MR), and the Dishmans cross-appeal (Appeal NO. 2006-CA-000192-MR) on the grounds that the trial court erred by reducing the award for past medical expenses.

APPEAL NO. 2006-CA-000136-MR

We first address the issues raised by the Hospital in its appeal.

CAUSATION

First, Lake Cumberland contends that it was entitled to a directed verdict because the appellees failed to establish proximate causation between its conduct and the injuries suffered by Vena. In substance, Lake Cumberland contends that the appellees failed to establish that its conduct was a substantial factor in causing injury to Vena because the medical literature establishes that the administration of t-PA benefits less than 30 percent of the stroke patients to whom it is administered, whereas the substantial

[3] The delay occurred because Lake Cumberland filed its notice of appeal from the original judgment prior to the trial court's entry of an amended judgment reflecting the reduced medical expenses. Because the appeal was interlocutory, this necessitated the dismissal of the original appeal. *See* Appeal No. 2005-CA-001833-MR. Upon remand the trial court finally entered the amended judgment.

factor test requires that there be greater than a 50 percent chance that its breach of duty caused Vena's injury.

When reviewing a jury verdict, the appellate court is restricted to determining whether the trial judge erred in failing to grant a motion for directed verdict. The reviewing court must consider all evidence favoring the prevailing party as true and is not at liberty to determine the credibility or weight that should be given to the evidence. *Lewis v. Bledsoe Surface Mining Co.*, 798 S.W.2d 459, 461 (Ky. 1990). The reviewing court must draw all reasonable inferences in favor of the claimant and must refrain from questioning the credibility of the claimant and from assessing the weight that should be given to any particular item of evidence. *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999). The appellate court is required to consider the evidence in the strongest light possible in favor of the opposing party. *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky.App. 1985). After completion of the evidentiary review, the decision must be affirmed unless the verdict rendered is "'palpably or flagrantly' against the weight of the evidence so as 'to indicate it was reached as a result of passion or prejudice.'" *Bledsoe Surface Mining Co.,* 798 S.W.2d at 461-62.

The elements of a medical malpractice action are the same as any negligence action (i.e., duty, breach, causation, and injury). *Grubbs ex rel. Grubbs v. Barbourville Family Health Center, P.S.C.*, 120 S.W.3d 682, 687 (Ky. 2003), citing *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245 (Ky. 1992). Duty, breach, and injury are not at issue here, only causation.[4]

[4] The Hospital does not challenge the jury's determination that it breached its duty of care.

> The fact . . . that a physician may have been negligent is not sufficient to render him liable, and the complaining patient must prove that the injury complained of proximately resulted from such want of care or skill. A bare possibility of such result is not sufficient. That the negligence of a physician was the proximate cause of injury to his patient need not be established with certainty, but probability is sufficient.

Walden v. Jones, 439 S.W.2d 571, 574 (Ky. 1968) (quoting 41 AM JUR *Physicians and Surgeons* Sec. 131, page 244).

Though the term "proximate cause" is still frequently used, in *Deutsch v. Shein*, 597 S.W.2d 141 (Ky. 1980), the Kentucky Supreme Court made clear that the test for causation in this jurisdiction is the "substantial factor" test as set forth in Restatement (Second) of Torts § 431 (1965). Thus, in combination with the reasonable probability standard as set forth in *Walden*, the burden upon the plaintiff in establishing causation may be stated as follows: he must demonstrate within a reasonable degree of probability that the defendant's breach of duty was a substantial factor in producing the injury.

Reasonable probability is defined as "more probable than not" or "more likely than not." See 61 AM JUR 2D *Physicians, Surgeons, and Other Healers* § 332 (2002*); Miller v. Paulson*, 646 N.E.2d 521, 522 (Ohio App. 1994). From a statistical viewpoint, reasonable probability is equated with a greater than 50 percent chance. *See Dalebout v. Union Pac. R.R. Co.*, 980 P.2d 1194, 1199 (Utah Ct.App. 1999); *Fid. & Guaranty Ins. Underwriters, Inc. v. Gary Douglas Elec., Inc.*, 357 N.E.2d 388, 392 (Ohio App. 1974).

Thus, the focus of our review is whether the evidence presented by the Dishmans was such that the jury could reasonably have concluded that there was a greater than 50 percent chance that the Hospital's failure to administer t-PA to Vena was a substantial factor in causing her injuries.

The expert medical testimony presented in the case was unanimous that the medical literature and peer reviewed studies establish that t-PA provides a benefit to only about 30% of the patients who receive it within the three-hour window. For example, in his videotaped trial deposition, which was played to the jury, upon cross-examination, Dr. Lawson Bernstein, the Dishmans' expert witness, conceded as follows:

> Q. And you would agree with all the statistics and studies that have been done nationally and in Europe that even in the best of circumstances, the most ideal of circumstances, with appropriate patient population as determined by the physician, who are given TPA in the face of ischemic stroke, less than 30 percent of those patients get a beneficial effect from the TPA; correct?
>
> A. That is what the literature shows, that's correct.
>
> Q. Okay. And Mrs. Dishman, assuming that she was an appropriate candidate for TPA and assuming that her doctor decided to give her TPA when this occurred, she would have then had a less than 30 percent chance of getting a beneficial effect from the TPA, correct?
>
> A. Right. She would have been in a better position to be in the good outcome group. But the good outcome group is somewhere between 27 and 29 percent of the patients who receive the drug.
>
> Q. Right. Absolutely. So even if her physician had decided to give her TPA in a timely manner, Mrs. Dishman would have had a less than 30 percent chance of having a beneficial outcome from the TPA administration; correct?

A. Right. Versus zero percent without it. But that's correct.

Q. I understand that. But that's correct, isn't it?

A. Yes, that's a correct statement.

Upon direct examination, Dr. Bernstein stated that Vena had a greater than 50 percent chance of having a significantly better outcome if t-PA had been timely administered:

> Q. All right. Doctor, recognizing that the opinions are within a reasonable degree of medical probability, what do you think the most probable outcome for [Vena] would have been in terms of her ability to maintain a lifestyle on her own following this [if TPA had been timely administered]?
>
> A. If at 14:20 it was recognized that she was having an incipient stroke, pretty good. I won't say she wouldn't have been left with some residual deficits. But I think she would have been a whole lot more functional than she ended up being.
>
> Q. Okay. Doctor, I gather from a previous deposition that was just taken today that somewhere around 30 percent of the persons benefit from TPA?
>
> A. Correct.
>
> Q. Is the critical choices here governing whether she becomes part of that 30 percent of the 70 percent?
>
> A. Exactly. . . .
>
> Q. Doctor, in your opinion, what are --- again to a reasonable degree of medical probability, what are the factors that led you to conclude that she would likely have been in this 30 percent versus 70 percent had timely intervention arrived?
>
> A. Well, she was relatively young. She was in a reasonably good functional status prior to this happening. This could

> have been caught quite early. She was in a facility to have the capability of doing TPA. She didn't have an hemorrhagic stroke. She didn't have the other circumstances. She was on the runway for TPA but for this delay.
>
> . . . .
>
> Q. Doctor, is it your opinion within a reasonable degree of medical probability that Mrs. Dishman would have had a significantly better outcome than what's demonstrated in Exhibits Nine and Ten [exhibits describing Vena's post-stroke condition] had she been timely administered TPA?
>
> A. Yes.

In effect, Dr. Bernstein subgrouped t-PA patients based on age, functionablity prior to the stroke, the severity of stroke, and the patient's location when the stroke occurred. Based upon this subgrouping, into which Vena fit, Dr. Bernstein stated that "within a reasonable degree of medical probability that Mrs. Dishman would have had a significantly better outcome . . . had she been timely administered TPA."

The Hospital would have us believe that the statistics cause this case to fall within the principles of the *Walden* case wherein the court stated that "proof of causation must go beyond a showing of a possibility that the injuries arose from the defendant's negligence." *Id*. at 574. The Hospital would have us conclude that the statistics mean that a person suffering a stroke has a 30 percent chance of benefiting from t-PA being administered within three hours of the onset. However, the statistics are that 30 percent of such persons actually benefit from the administering of t-PA. The two statistics are vastly different.[5]

[5] The difference is whether the statistics state that there is a 30 percent chance of some recovery or whether they state that 30 percent have a chance of some recovery.

Here, the statistics were that 30 percent of the persons administered t-PA within three hours of the onset actually benefited. Dr. Bernstein testified that to a reasonable probability Mrs. Dishman would have so benefited.

Under the *Bledsoe Surface Mining* case, we are required to consider the evidence in the strongest light possible in favor of the Dishmans. As such, based upon Dr. Bernstein's testimony that "within a reasonable degree of medical probability . . . Mrs. Dishman would have had a significantly better outcome . . . had she been timely administered TPA," we are persuaded that the Hospital was not entitled to a directed verdict on the issue of causation.

CONTRAINDICATION FOR TPA

Next, the Hospital contends that it was entitled to a directed verdict because regardless of when the stroke was discovered, t-PA should not have been administered to Vena in any event because the drug is contraindicated for a post-arterial incision patient.

There was expert medical testimony presented to the effect that t-PA is contraindicated for a post-arterial incision patient because, as an anti-clotting drug, if a hemorrhage occurs at the incision site, the t-PA's anti-clotting characteristic may result in an inability to stop the bleeding.

However, there was also expert medical testimony by Dr. Bernstein to the effect that the contraindication is only applicable to non-compressible sites and that the femoral artery incision on Vena's leg was a compressible site. This expert testimony established that because the site was compressible, t-PA was not contraindicated. This expert testimony was sufficient to overcome a directed verdict vis-à-vis the Hospital's

theory that there was no breach of the standard of care because t-PA was contraindicated. *Bledsoe Surface Mining*, *supra*.

LOSS OF CHANCE PRO RATA DAMAGES INSTRUCTION

Next, the Hospital contends that the trial court erred in "permitting a loss of chance recovery without giving the jury a separate loss of chance instruction." The Hospital states this argument as follows:

> . . . the trial judge should have given the jury a separate "loss of chance" instruction, which it did not do. That instruction should advise the jury that Plaintiff's damages must be reduced in proportion to the percentage chance of recovery which has been destroyed by Defendant's actions. For example, in the instant case, plaintiff had only a 30% chance of recovery to begin with. Accordingly, even under a loss of chance theory Plaintiff should be entitled to recover no more than 30% of her total damages, because she never had more than a 30% chance of recovery.

As noted by the Hospital, the "loss of chance" doctrine has been adopted in other jurisdictions. *See*, *eg.*, *Smith v. Washington*, 734 N.E.2d 548 (Ind. 2000); *Mead v. Adrian*, 670 N.W.2d 174 (Iowa 2003); *Graham v. Willis-Knighton Medical Center*, 699 So.2d 365 (La. 1997); *Alberts v. Schultz*, 975 P.2d 1279 (N.M. 1999); and *McMackin v. Johnson County Healthcare Center*, 88 P.3d 491 (Wyo. 2004). A feature of the doctrine is, normally, a pro rationing of damages instruction as described above. Kentucky has not specifically adopted this doctrine.

While perhaps this case consists of a factual pattern which would fit within the loss of chance doctrine, neither party litigated the case as such, and issues surrounding the doctrine are not before us. The Hospital does not cite us to its

preservation of the issue, nor are we able to locate a tendered instruction of this nature in the record. Kentucky Rule of Civil Procedure (CR) 51(3) states:

> No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

See also Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 416 (Ky. 1998). Further, it is elementary that a reviewing court will not consider for the first time an issue not raised in the trial court. *Caslin v. General Elec. Co.*, 608 S.W.2d 69, 70 (Ky. App. 1980). Hence, this issue is not properly preserved for our review.

DISCOVERY VIOLATION/VIOLATION OF COURT ORDER

The Hospital next contends that the testimony of the Dishmans' medical expert, Dr. Bernstein, should have been excluded because he failed to answer relevant questions in his deposition and subsequently violated a court order to provide answers to the questions.

In the course of deposing Dr. Bernstein, the Hospital inquired into his experience in prescribing t-PA. Dr. Bernstein testified that at his hospital the decision was made as a team with other physicians and that he had personally signed t-PA orders himself. The Hospital then sought the names of the other team members he normally worked with, and Dr. Bernstein refused to answer. Shortly before trial, the Hospital obtained an order from the trial court compelling Dr. Bernstein to answer the question;

however, Dr. Bernstein persisted in refusing to identify the other team members. Dr. Bernstein's position was that he did not want to bring his colleagues into matters concerning his outside consulting activities.

It appears that the Hospital sought the names of the team members because it suspected that Dr. Bernstein was being untruthful in his testimony that he had signed t-PA orders. It sought to contact the other team members to confirm this suspicion and, thereafter, to use the team members' contradictions to impeach Dr. Bernstein.

The trial court has broad discretion to regulate discovery. *Sexton v. Bates, 41 S.W.3d 452, 455 (Ky.App. 2001)*; *CR 26.03*. We will not reverse the trial court on such matters in the absence of clear abuse. The test for abuse of such discretion is whether the trial judge's ruling 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).

In its order denying the Hospital's motion for a new trial on this issue, the trial court thoroughly discussed the matter, including its initial misunderstanding at the time it entered the order compelling Dr. Bernstein to disclose the team members' names, and its ultimate conclusion that the discovery sought was a collateral matter:

> [Lake Cumberland] has also moved for a new trial arguing that Dr. Bernstein should have been excluded as a witness. This Court had previously overruled a motion to exclude Dr. Bernstein based on a delayed disclosure and will adopt its prior ruling in that regard. [Lake Cumberland] raises the issue that Dr. Bernstein refused to answer question in the defendant's discovery taken of Dr. Bernstein that asked:

"Who do you work with most often who is critical care, the physician there who does most of the critical care who you work with I assume?"

". . . Who is the critical physician and the neurologist and the neurosurgeon that you work with most often at St. Margaret's when you guys collaborated to make decisions?"

Dr. Bernstein refused to answer citing as his reasons that he did not want to involve other physicians who were entitled to their privacy, that his consulting in this case did not involve St. Margaret's or those other physicians.

[Lake Cumberland] raised this issue by motion heard on December 3, 2004. At that hearing, this court considered the motion without the benefit of a transcript. By Order entered on December 8, 2004, the requested information was directed to be furnished within three (3) days. The trial concluded on December 10, 2004. An Order is not effective until it is entered. Stuton v. Poly Weave Bag Co., 930 S.W.2d 397 (1996) and Murrello v. City of Hurstborne Acres, 401 S.W.2d 60 (1966).

During the course of the trial, this issue was raised at various times by [Lake Cumberland]. During the trial, this court expressed misgivings about its order after reviewing the depositions and hearing further argument of counsel, but did not rescind its order. This court did overrule motions to exclude the testimony and overruled a request to admonish the jury that Dr. Bernstein had violated a court order as the order had not been entered.

. . . .

The defendant was allowed to cross-examine Dr. Bernstein on his refusal to answer the questions in issue and that his refusal violated open discovery under Kentucky law. Defense counsel commented extensively about the doctor's refusal to name his co-professionals during closing argument.

. . . .

[Lake Cumberland] complains of the following rulings of this Court:

. . . .

(2) Dr. Bernstein should have been excluded based on his refusal to answer the questions in issue.

(3) this court's not allowing the defendants an instruction that Dr. Bernstein had refused to comply with this court's order.

This Court is of the opinion that it did not abuse its discretion in allowing Dr. Bernstein to testify and further that the absence of the information sought by the defendant did not deny the defendant the right of a fair trial nor did the inability of the defendant to characterize the events as a violation of a court order.

This court notes that Dr. Bernstein's refusal to answer the questions at issue was a personal choice that was not encouraged by the plaintiffs or their counsel. The Court's Order entered on December 8, 2004 was made without the benefit of the context in which the questions were asked. As the trial progressed, the court expressed to the parties that it had misgivings about its prior rulings. The plaintiffs have filed an affidavit by its counsel, Lance Turner, who attended the hearing on the motion to compel. According to this affidavit, counsel for the defendant's stated purpose in seeking to compel Dr. Bernstein was to get the information to use in another case in which Dr. Bernstein was a witness on a similar issue. The defendant has not rebutted that affidavit. Such a reason would not support the defendant's grounds for a new trial. . . .

. . . .

This court has been cited Miller v. Marymount Medical Center, 125 S.W.2d 274 (Ky. 2004) and Primm v. Issacs, 127 S.W.3d 630 (Ky. 2004). Both cases address issues relating to discovery and admissibility/cross-examination of matters relating to credibility. Both cases hold that evidence of bias of a witness is almost always admissible because it exposes a

> motive to slant testimony and is therefore relevant. Dr. Bernstein answered all questions posed to him regarding his testifying experience including the fact that he advertises as someone willing to review medical/legal cases, that he charged $2,500.00 in advance to give his deposition, and that his testifying fee was $500.00 per hour. The defendant fully explored and argued the type of evidence held admissible in both Miller, (supra) and Primm, (supra).
>
> Primm tells us that a balance must be achieved between the potential impeachment evidence and the right of a litigant to retain an expert witness and not have such a witness burdened to the extent he will refuse to testify. This balance includes weighting the probative value of the desired evidence against the prejudicial and burdensome effects of such a request. Primm, (supra) cautioned against intruding into an expert's personal and professional relationships.
>
> At the time this court made its initial decision, it did not have the benefit of the transcribed testimony of Dr. Bernstein. Now having had the benefit and observing the testimony of defendant's expert, the court is of the opinion that the desired questions proposed to Dr. Bernstein had minimal, if any, value for impeachment purposes and Doctor Bernstein's testimony was properly admitted. The defendant was not deprived of a fair trial. Had Dr. Bernstein answered these questions, and named names, it is inconceivable that a jury would have placed any significance on the answer. Accordingly, the order compelling is rescinded and the motion for a new trial is overruled.

The trial court's discussion of the issue unmistakably demonstrates that it did not abuse its discretion in refusing to exclude Dr. Bernstein's testimony based upon his refusal to disclose the names of the other team members or in refusing to permit the Hospital to inform the jury that Dr. Bernstein had violated a court order. In addition to what the trial court has already stated on the matter, we note that if the Hospital was skeptical that Dr. Bernstein had previously written t-PA orders, rather than asking him to

identify the names of colleagues, it could have simply asked him to provide copies of prior t-PA orders that he had written (redacted of the patient's name if necessary). If Dr. Bernstein was unable to produce such orders, and assuming the issue was not collateral, the Hospital thereafter could have impeached him without involving his professional colleagues.

In short, the trial court did not abuse its discretion by denying the Hospital's motion to exclude Dr. Bernstein's testimony for refusing to answer the discovery questions and/or for violating a court order requiring his answer, nor did the trial court err by refusing to permit the Hospital to comment to the jury that Dr. Bernstein had violated a court order.

NURSE LOGAN'S QUALIFICATIONS AS EXPERT WITNESS

Next, the Hospital contends that the testimony of Nurse Penny Logan should have been excluded because she was not qualified to testify as an expert witness regarding the nursing care provided in this case. The Hospital contends that Logan should not have been qualified as an expert because she does not know the national standard of care required for nurses taking care of post-angiogram patients, she has never cared for a post-angiogram patient, and the hospital where she works does not perform angiograms.

Kentucky Rule of Evidence (KRE) 702, which governs testimony by expert witnesses, provides that a witness qualified as an expert by knowledge, skill, experience, training, or education may provide opinion testimony if scientific, technical, or specialized knowledge will assist the trier of fact. A trial court's determination as to

whether a witness is qualified to give expert testimony under KRE 702 is subject to an abuse of discretion standard of review. *Farmland Mut. Ins. Co. v. Johnson*, 36 S.W.3d 368, 378 (Ky. 2000); *Fugate v. Commonwealth*, 993 S.W.2d 931, 935 (Ky. 1999); *Murphy by Murphy v. Montgomery Elevator Co.*, 957 S.W.2d 297, 299 (Ky.App. 1997).

Logan is a registered nurse whose purpose in the litigation was to critique the nursing care provided to Vena following the angiogram. The record discloses that Logan received an associate's degree in nursing from Somerset Community College where she took her hospital training at Lake Cumberland Regional Hospital. She became licensed as an RN in 1995. She has nursing experience in the emergency room, ICU, med-surgical unit, and as a floor nurse. In addition she served as director of nursing for a nursing home. She has been in charge of quality improvement at the Clinton County Hospital where she educates nurses on proper practices and procedures, and she is currently the ICU supervisor at Clinton County Hospital. She has a B.A. degree in nursing and is pursuing her Master's Degree. She is also certified as a nurse legal consultant.

Based upon Logan's education, background, and experience, we cannot conclude that the trial court abused its discretion in qualifying her as an expert witness on the standard of nursing care applicable in this case. While Logan does not have particular experience in the area of caring for angiogram patients, she nevertheless has extensive experience in the general area of patient care and the corresponding duty of care. In short, the limitations of Nurse Logan's testimony go to the weight and not the

admissibility of the evidence. To conclude, we cannot say the trial court abused its discretion in admitting Nurse Logan's testimony.

CARE AFTER 5:20 P.M.

Finally, the Hospital contends that the trial court erred in allowing the appellees to criticize its care of Vena after 5:20 p.m. It argues that since the Dishmans' theory was that the stroke occurred at 2:20 p.m., the three-hour t-PA window ended at 5:20 p.m., and any evidence critical of the Hospital's care of Vena after that time had no probative value.

The Hospital, however, contended at trial that the stroke occurred at a later time, perhaps even as late as 7:10 p.m. when symptoms of a stroke were first detected. If the jury believed the stroke occurred at a later time, the Hospital's care of Vena during the three ensuing hours was relevant to its failure to timely administer t-PA. Accordingly, the Hospital's care of Vena in the hours beyond 5:20 p.m. was relevant, and the trial court did not abuse its discretion by permitting evidence critical of that care.

APPEAL NO. 2006-CA-000192-MR

The jury verdict and original judgment awarded the Dishmans $119,177.16 for medical expenses. This amount was later reduced to $91,838.73 to represent the amount actually expended for medical expenses by Medicaid. The Dishmans contend that the $27,278.33 difference was related to medical discounts and that the Hospital is not entitled to the benefit of the discounts pursuant to *Baptist Health Care Systems, Inc. v. Miller*, 177 S.W.3d 676 (Ky. 2005). We agree.

In *Miller* the Kentucky Supreme Court held that it was improper to reduce a medical expense damage award for Medicare discounts similar to those at issue here. In so doing, the court stated as follows:

> First, the wrongdoer should not receive a benefit by being relieved of payment for damages because the injured party had the foresight to obtain insurance. Second, as between the injured party and the tortfeasor, any so-called windfall by allowing a double recovery should accrue to the less culpable injured party rather than relieving the tortfeasor of full responsibility for his wrongdoing. Third, unless the tortfeasor is required to pay the full extent of the damages caused, the deterrent purposes of tort liability will be undermined.
>
> Along with the considerations underlying granting any windfall to the injured party is the fact that [the plaintiff] paid her premiums and deserves all appropriate benefits. Moreover, it is absurd to suggest that the tortfeasor should receive a benefit from a contractual arrangement between Medicare and the health care provider. Simply because Medicare contracted with [the plaintiff's] physician to provide care at a rate below usual fees does not relieve a tortfeasor from negligence or the duty to pay the reasonable value of [plaintiff's] medical expenses.

Id. at 683-684 (citation omitted).

The Hospital contends that *Miller* is distinguishable because Medicare involves the payment of premiums whereas "[i]n contrast to Medicare, Medicaid benefits are paid on behalf of indigent members of society, under circumstances where no premiums have been paid by or on behalf of the individual receiving benefits." However, the payment of premiums is only one of three policy considerations that led to the court's decision in *Miller*. Also relevant were the distribution of any so-called windfall and the deterrent purposes of tort liability. These latter two considerations are sufficient to bring

the present case within the *Miller* rule. We accordingly reverse the trial court's reduction of medical expenses and remand for the entry of a judgment reinstating the amount awarded by the jury.

CONCLUSION

For the foregoing reasons, we affirm upon the issues raised by the Hospital in Appeal No. 2006-CA-000136-MR. We reverse upon the issue raised by the Dishmans in Appeal No. 2006-CA-000192-MR and remand for the entry of a judgment reinstating the medical expenses as awarded by the jury.

ALL CONCUR.

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