RENDERED: JUNE 10, 2011; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001595-MR

THE ESTATE OF JUDITH BURTON — APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, JR., JUDGE
ACTION NOS. 04-CI-00225
AND 05-CI-00932

THE TROVER CLINIC FOUNDATION, INC.,
D/B/A REGIONAL MEDICAL CENTER OF
HOPKINS COUNTY; AND DR. PHILIP C. TROVER — APPELLEES

AND 2009-CA-001726-MR

THE TROVER CLINIC FOUNDATION, INC.,
D/B/A REGIONAL MEDICAL CENTER OF
HOPKINS COUNTY — CROSS-APPELLANT

v.

CROSS-APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, JR., JUDGE
ACTION NOS. 04-CI-00225
AND 05-CI-00932

THE ESTATE OF JUDITH BURTON;
AND DR. PHILIP C. TROVER — CROSS-APPELLEES

AND 2009-CA-001735-MR

DR. PHILIP C. TROVER CROSS-APPELLANT

v. CROSS-APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, JR., JUDGE
ACTION NOS. 04-CI-00225
AND 05-CI-00932

DEE LESLIE BURTON, EXECUTOR
OF THE ESTATE OF JUDITH BURTON;
THE TROVER CLINIC FOUNDATION, INC.,
D/B/A REGIONAL MEDICAL CENTER
OF HOPKINS COUNTY CROSS-APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CAPERTON, AND CLAYTON, JUDGES.

CAPERTON, JUDGE: The Estate of Judith Burton (hereinafter "Burton") appeals from a judgment in the Hopkins Circuit Court whereby the jury found in favor of the Appellee, the Trover Clinic Foundation, Inc. (hereinafter "TCF"), in the first phase of a bifurcated medical negligence and negligent credentialing trial. Thereafter, the remaining claims against TCF and the third-party defendant, Dr. Philip Trover, were dismissed. Burton asserts numerous trial errors which are discussed *infra*. TCF and Dr. Trover cross-appeal from the trial court's denial of their motion for a change in venue and assert that the trial court committed error in admitting testimony regarding Dr. Trover's workload and speed with which he

interpreted radiological film. After a thorough review of the parties' arguments, the record, and the applicable law, we find reversible error and, accordingly, reverse and remand for further proceedings.

On April 7, 2004, Burton filed suit[1] against TCF[2] and Dr. Trover,[3] alleging that Dr. Trover, a radiologist for TCF, had "misread" three chest CT scans during late 2003 and early 2004 and, as a consequence, Burton's lung cancer had gone undiagnosed and was no longer treatable. Burton also alleged that during Dr. Trover's lengthy employment with TCF, Trover had a dangerous habit of reading radiological films at a rate far in excess of the average workload for a typical private practice, and this resulted in Trover's "misreading" a disturbing number of radiological films.

Burton further alleged negligence *per se,* negligent misrepresentation, negligent and intentional distress, outrage, negligent credentialing, failure to obtain informed consent, and fraud. However, by the time of trial all claims except the medical negligence and negligent credentialing had either been dismissed voluntarily or by the trial court upon Appellees' motion. For purposes of trial, the trial court bifurcated Burton's claim for medical negligence from the negligent credentialing claim. The court ordered that the medical negligence claim be tried

[1] The suit was originally filed as a class action with forty-nine plaintiffs. The trial court denied Plaintiff's motion for class certification and Burton was the first to proceed to trial.

[2] TCF operates a hospital and eight outpatient clinics in Western Kentucky.

[3] Burton died on October 4, 2008, from either cancer or other pre-existing lung conditions brought about by a lifetime of smoking. Her Estate revived the action only against TCF. In turn, TCF impleaded Dr. Trover on a third-party complaint. Consequently, at the time of trial, the defendant was TCF with Dr. Trover as a third-party defendant.

as phase one, and if Burton prevailed at the close of that phase then the negligent credentialing claim would be tried before the same jury as phase two.

At trial, as well as prior to trial by motion, Burton attempted to admit into evidence investigative documents generated by TCF during both peer review and investigation of Dr. Trover.[4] After several hearings, the trial court declared the peer review documents, consisting of the Ad Hoc Committee minutes and the Medical Executive Committee ("MEC") minutes and reports, inadmissible as untrustworthy and unduly prejudicial. Following a three-week trial, the jury found in favor of TCF and Dr. Trover and a judgment was entered in conformity therewith. It is from this judgment and the prior trial court rulings that the parties now appeal.

On appeal, Burton presents six arguments, namely, (1) bifurcation of Burton's medical negligence claims from Burton's remaining claims against TCF was reversible error; (2) the trial court erred in excluding the Ad Hoc and MEC reports and minutes; (3) the MEC members should have been able to speak as to paragraph 7 of the MEC report; (4) the trial court erred in granting summary judgment in Appellees' favor on Burton's claim of fraud; (5) the trial court committed prejudicial error by depriving Burton of the right to cross-examine an indentified expert as to his qualifications; and (6) the court improperly limited Burton's cross-examination of Kim Robinson.

[4] Peer review was initiated after concern was expressed by Dr. Neil Kluger, an oncologist with TCF, over Dr. Trover's misreads.

TCF and Dr. Trover both present two arguments, namely, (1) that the trial court erred in admitting testimony regarding Dr. Trover's workload and speed of film interpretation; and (2) that the trial court erred in failing to grant a change of venue. With these arguments in mind, we now address the parties' arguments in turn.

Burton first argues that bifurcation of its medical negligence claim from its remaining claims was reversible error. In support thereof, Burton argues that Kentucky Revised Statutes (KRS) 411.186 mandates that the jury consider all issues concurrently; that the trial court deprived Burton of its constitutional right to conduct full voir dire; and that both errors resulted in reversible error.

As a preliminary matter, we note that the tort of negligent credentialing has not been formally recognized in Kentucky. At least 28 states recognize this cause of action and the parties in the matter *sub judice* proceeded under the assumption that negligent credentialing would be recognized in this Commonwealth. We believe it is proper for this Court to now recognize the tort of negligent credentialing in Kentucky. *See Oakley v. Flor-Shin, Inc*., 964 S.W.2d 438, 441 (Ky.App. 1998) (wherein this Court recognized the tort of negligent hiring in

Kentucky).[5] As such, we now set out the elements of the tort of negligent credentialing as noted by Peter Schmit in 18 Causes of Action 2d 329:

> In order to establish a prima facie case based on negligent credentialing (also known as negligent privileging) the plaintiff must prove:
>
> > 1. The defendant hospital owed the patient a duty to insure a competent medical staff.
> >
> > 2. The hospital breached that duty by granting privileges to an incompetent or unqualified physician.
> >
> > 3. The physician caused harm to the patient. The underlying medical malpractice claim must be proved.[6]

Turning now to the bifurcation issue presented by Burton, we note that, according to Kentucky Rules of Civil Procedure (CR) 42.02, a trial court may order separate trials for any claim, cross-claim, counterclaim or third-party claim if the trial court determines that separation will be in furtherance of judicial convenience or will avoid prejudice. Moreover, it has long been held that such a decision is within the sound discretion of the trial court and will not be reversed on

[5] We believe that it is a logical step to recognize the tort of negligent credentialing given *Oakley*. The Court in *Oakley* cited *Joiner v. Mitchell County Hospital Authority*, 125 Ga.App. 1, 186 S.E.2d 307, 309 (1971) (*affirmed at* 229 Ga. 140, 189 S.E.2d 412 (1972)), wherein the plaintiff was allowed to proceed against the hospital on allegations that it was negligent in selection of a physician, and the defense by the hospital that the doctor was licensed and recommended by other doctors on staff did not overcome the averments that the hospital was negligent in failing to exercise care in determining his professional competency. *Oakley* at 441-42.

[6] We note that there was not an argument that this Court should recognize that a hospital may be held liable under a theory of corporate negligence independent of the negligence of a third person, such as a doctor or nurse, such as the court in *Welsh v. Bulger*, 548 Pa. 504, 698 A.2d 581 (1997), held. The court stated that the negligence in cases of corporate negligence is based on the institution's own negligent acts and a corporation can be held liable directly, rather than vicariously. *See* 98 American Law Reports (A.L.R.)5th 533. 13b. (2002).

appeal absent abuse of that discretion. *Malcolm v. Poland*, 277 Ky. 512, 126 S.W.2d 1098, 1101 (Ky. 1930); *see also Massie v. Salmon*, 277 S.W.2d 49 (Ky. 1955) (The determination of whether actions involving common questions of law or fact should be heard together is committed to the discretion of the trial court.).[7] A trial court can exercise its discretion and order bifurcation of a trial to prevent the confusion of the jury in a complex case. Indeed, the learned treatise, Kentucky Practice Series Rules of Civil Procedure, explains:

> The Rule is quite broad in coverage. It authorizes separate trials on any or all claims or issues presented by original claims, cross-claims, counterclaims or third-party claims. The matter lies within the court's discretion, but the Rule is so worded that the court is required to order separate trials if it determines that they "will be in furtherance of convenience or will avoid prejudice, or will be conducive to expedition and economy . . . .
>
> . . . .
>
> There can be no doubt that this Rule authorizes the trial court to order separate trials of liability and damages in a particular case. However, such discretion should be exercised with caution. In considering whether bifurcation is appropriate, the trial judge should consider potential prejudice to the parties, potential confusion to the jury, and the relative convenience and economy which would result.

7 Kurt A. Philipps Jr. & David V. Kramer & David W. Burleigh, *Kentucky Practice – Rules of Civil Procedure Annotated* § 42.02 *Separate Trials* (6th ed. 2010).

[7] The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky.1999).

In the case *sub judice,* we must conclude that the bifurcated proceedings did not constitute abuse of discretion by the trial court. The trial court was in the best position to determine if the jury and parties would benefit from a bifurcated proceeding. While we do not believe that the trial court was necessarily required to bifurcate, it did not err in doing so. In bifurcating a trial, as in the case *sub judice,* the trial court should consider the potential prejudice to the parties, potential for confusing the jury, and the relative convenience and economy which would result from bifurcating or not bifurcating the trial. Lastly, the trial court should consider whether an admonition pursuant to Kentucky Rules of Evidence (KRE) 105 could avoid misuse of the evidence, prejudice or confusion[8] and be mindful of the effect that bifurcation may have if the issues are intertwined or the evidence overlapping.

We also disagree with Burton's assertion that this procedure violated KRS 411.186, which mandates that the jury consider all issues concurrently to include punitive damages. In the case *sub judice* the trial court bifurcated Burton's *claims* as between defendants but did not bifurcate the punitive damages claims from either liability or compensatory damages as to each individual defendant. Thus, Burton was free to pursue punitive damages and introduce evidence to support said

[8] To hold otherwise would disregard our jurisprudence that the jury is presumed to follow the court's instructions, including admonitions and jury instructions, given by the court. *See Johnson v. Commonwealth*, 105 S.W.3d 430, 436 (Ky. 2003); *see also Scobee v. Donahue*, 291 Ky. 374, 164 S.W.2d 947, 949 (1942); *United States v. Davis*, 306 F.3d 398, 416 (6th Cir. 2002); *Matheny v. Commonwealth*, 191 S.W.3d 599, 606 (Ky. 2006).

damages in the first phase and second phase of the trial. Therefore, we find no violation of KRS 411.186 by the trial court.

Burton also asserts that bifurcation of its claims resulted in the trial court depriving Burton of its constitutional right to conduct a full voir dire. Burton submitted voir dire questions solely on the first phase of trial, i.e., the medical negligence claim.[9] In our opinion, Burton should have been permitted to conduct a full and complete voir dire initially concerning both phases of the trial, given that only one jury was to hear all causes of action. Nevertheless, we find any error harmless as to those questions applicable to the second phase of trial concerning negligent credentialing because the jury did not find Trover to be negligent during the first phase of the trial, thus the second phase of the trial was not conducted.[10] TCF's and Dr. Trover's concerns over what thoughts might be raised in the minds of the jury by Burton's questions on voir dire are without sound basis in light of the instructions given by the court that the jury was to consider the evidence presented at trial, and our jurisprudence that statements made during opening, arguments during closing, and the questions presented in voir dire are not evidence to be considered by the jury. *Garland v. Com*. 127 S.W.3d 529, 542, 543 (Ky.

[9] We disagree with Burton's assertion that to submit voir dire questions concerning the second phase of the trial would have been futile. Indeed, it is questionable as to whether this issue is preserved for our review.

[10] We note that it is well established that the trial court has broad discretion in conducting voir dire. *Manning v. Commonwealth,* 23 S.W.3d 610 (Ky. 2000); *Farrow v. Cundiff*, 383 S.W.2d 119 (Ky. 1964).

2003); *Louisville & N. R. Co. v. Turner,* 379 S.W.2d 749, 752 (Ky. 1964). Thus, Burton's claimed error is not reversible error. *See* CR 61.01.

Burton next argues that the trial court erred in excluding the Ad Hoc and MEC reports and minutes (collectively referred to herein as "the reports"). Burton sought to use the reports to establish Dr. Trover's habit of reading radiological films at a dangerously fast pace. This habit, asserts Burton, led Dr. Trover to misread the radiological films because Dr. Trover spent insufficient time to properly read the films. Burton argues that the reports, as evidence of habit, could have been authenticated as business records under KRE 803(6) or as admissions against interest under KRE 801A. TCF counterargues that the reports were properly excluded for seven reasons, namely, (1) they do not constitute proper habit evidence; (2) they do not constitute proper KRE 803(6) business records; (3) they do not constitute admissions against interest; (4) they are not trustworthy; (5) they are not relevant; (6) any probative value they may have is far outweighed by the prejudice they would cause; and (7) the reports are replete with instances of hearsay within hearsay, unqualified opinion testimony, rumors, speculations, innuendos, and inflammatory personal criticisms of Dr. Trover. Dr. Trover likewise argues that the reports were properly excluded as they were more prejudicial than probative, were hearsay, were not admissions against Dr. Trover, and were not records of regularly conducted activity. Various rules of evidence govern the admittance or rejection of these records and each rule will be discussed as applicable.

We review a trial court's ruling regarding the admission or exclusion of evidence for abuse of discretion. *See Clephas v. Garlock, Inc*., 168 S.W.3d 389, 393 (Ky.App. 2004*); Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000); and *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). "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.* at 581, citing *English* at 945.

First and foremost, any evidence must first be admissible under Kentucky Rules of Evidence and then used, if at all, to support the finding of a "habit" pursuant to KRE 406. Where, as here, the evidence sought to be used to support the finding of a habit by the court is in the form of documentary evidence, then the documents themselves must be properly admissible[11] before they are offered to support the finding of the "habit." And, even if the documents are otherwise properly admissible into evidence and can be shown to be relevant and probative of a habit pursuant to KRE 406, then such documents must necessarily undergo the balancing test of KRE 403[12] before they are admitted. *See Bloxam v. Berg*, 230 S.W.3d 592, 595 (Ky.App. 2007) ("[E]ven if KRE 406 habit evidence had been available in this case, we are firmly convinced that it nevertheless should have been excluded under KRE 403"). As previously noted, after several hearings the

[11] Unlike testimony, documentary evidence must be authenticated.

[12] KRE 403 states "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

trial court declared the peer review documents, consisting of the Ad Hoc Committee minutes and the MEC minutes and reports, inadmissible because they were untrustworthy and unduly prejudicial.

Our review of the record shows that the reports were prepared by Rhonda Florida, the minutes were not verbatim, she did not record the meetings and, most importantly, the statements recorded in the minutes could not be attributed to any particular person. In reviewing KRE 803(6), one of the requirements of the exception requires the statements in the business records to have been made by a person with knowledge. The exception does not allow the admission of anonymous statements into evidence based on the facts *sub judice*. Moreover, any opinions in the reports must be testified to by an expert. KRE 803(6)(B); Robert G. Lawson, *Kentucky Evidence Law Handbook,* § 8.65[9] (4th Ed. 2003)(Caselaw leaves little doubt that, for a medical opinion in medical records to be admissible, there must be a showing of expert qualification for the declarant). As to admissions against interest under KRE 801A, the admissions must be admitted against the declarant and, here, the declarant was not Dr. Trover. Thus, the trial court properly rejected the admission of the minutes into evidence, and we affirm on that issue.

Burton next argues that the MEC members should have been able to testify as to paragraph 7[13] of the MEC report, and that the trial court improperly

[13] Paragraph 7 of the MEC report states: "Recent surveys conducted by the American College of Radiology, as reported to the MEC by PR/ASAP, indicate that the average workload of a typical private practice, full-time equivalent radiologist is 12,800 per year. In contrast, Dr. Trover interprets over 30,000 radiological examinations per year. For the period of 2003 plus the first

disallowed such testimony. In support thereof, Burton relies on *Owensboro Mercy Health System v. Payne*, 24 S.W.3d 675 (Ky.App. 2000), for its position that the committee members should have been allowed to testify regarding the MEC report because the fact that they were not radiologists goes to the weight of their testimony and not to their competency to testify.

The qualification of a witness as an expert is within the sound discretion of the trial court. KRE 702. In *Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997), our Supreme Court held that 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 is proper for expert testimony and satisfies the requirements *of Daubert v. Merrell Dow Pharmaceuticals, Inc*. 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); (3) the subject matter satisfies the test of relevancy, subject to the balancing of probativeness against prejudice as required by KRE 403; and (4) the opinion will assist the trier of fact pursuant to KRE 702. *Stringer,* 956 S.W.2d at 891. Indeed, there are numerous reported cases where a physician has been held qualified to express an opinion on medical matters outside his area of expertise. *Owensboro Mercy Health System* at 677-678; *Combs v. Stortz*, 276 S.W.3d 282, 294 (Ky.App. 2009).

---

15 days of 2004, the total number of studies that Dr. Trover interpreted was 35,640. This was in addition to his interventional practice. The MEC does not believe that the time devoted by Dr. Trover in interpreting this number of studies was adequate to interpret them in a manner that is consistent with an appropriate level of attention to detail or to generate consistently reliable, high quality interpretations of these radiological examinations."

However, in *Kemper v. Gordon*, 272 S.W.3d 146 (Ky. 2008), our Kentucky Supreme Court was presented a similar argument to the case *sub judice.* In upholding the trial court's exclusion of Gordon's expert, the Court stated:

> Dr. Ehrie was of the opinion that had Lori returned to Dr. Kemper's office and been properly diagnosed, she would have survived. The circuit court concluded that since Dr. Ehrie was not a board certified oncologist, he did not qualify as an expert for the purpose of giving an opinion as to the likelihood of Lori's survival. Citing to *Owensboro Mercy Health Sys. v. Payne*, 24 S.W.3d 675, 677 (Ky.App.2000), the Gordons argue any lack of specialized training goes to weight, not admissibility. Further, they argue it is actual experience, skill, and knowledge which should be considered for admissibility, not the designation of a particular specialty. *See Collins v. Commonwealth*, 951 S.W.2d 569, 575 (Ky.1997). Thus, since Dr. Ehrie, as an internist, diagnoses and treats cancer patients in his practice, the Gordons claim it was reversible error to exclude his testimony.
>
> The Gordons seem to have over simplified the purpose of Dr. Ehrie's testimony. While he may have been qualified to determine if Lori's cancer should have been diagnosed sooner, and whether she would have been a candidate for treatment, this does not mean he was qualified to testify whether Lori would have survived. The decision to qualify a witness as an expert rests in the sound discretion of the trial court. *See Payne*, 24 S.W.3d at 677. Further, it is not qualification in the abstract, but whether the witness's qualifications provide the necessary foundation to respond to the specific question asked. *See Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir.1994). Given Dr. Ehrie's education and experience, and the specific question asked, we cannot say the Gordons have demonstrated a clear abuse of discretion in excluding this evidence.

Kemper at 154.

Applying *Kemper* to the case *sub judice* we, too, must conclude that the trial court did not abuse its discretion in determining that the MEC members were not qualified to express expert opinions pursuant to KRE 702 regarding radiology practices, procedures, the speed at which radiology films may be properly reviewed, and Dr. Trover's compliance with the radiology standard of care. Prior to making its determination, the trial court permitted all counsel to extensively voir dire the four MEC members outside the presence of the jury. During this voir dire, all four members testified that their conclusions in the MEC report were based on the outside report of Dr. Brodick, and that none of the physicians had independent knowledge of radiology practices or standards, although some of the physicians did read radiological films in relation to their specific field of expertise. Given the information gleaned from voir dire, we agree with Dr. Trover and TCF that the trial court did not err in excluding the MEC members' testimony because their opinions would be based on radiological practices and standards, the very expertise of which they had no independent knowledge.[14]

Burton next argues that she adequately pled a fraud claim; therefore, the trial court erred in granting summary judgment in Appellees' favor. The applicable standard of review on appeal of a summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that

[14] In its reply brief Burton argues that TCF mischaracterized its argument and that a proper characterization would be that the MEC members were not offered as experts but only as foundation witnesses. We find this argument disingenuous as evidenced by Burton's argument that the rule in Kentucky regarding expert witnesses is that any lack of specialized training goes only to the weight and not the competency of the expert testimony. *See* Appellant Brief of Burton, p. 21.

the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991).

Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.* However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992), citing *Steelvest, supra*. *See also O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006); and *Hallahan v. The Courier Journal,* 138 S.W.3d 699, 705 (Ky.App. 2004). Since summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky.App. 2001). With these standards in mind, we now turn to Burton's claimed error.

Burton claims fraud in the omission of the pertinent information concerning Dr. Trover's practice. Burton asserts that the fiduciary or confidential relationship between Burton and her medical providers, i.e., TCF and Dr. Trover, led to an obligation for disclosure concerning the reckless nature of Dr. Trover's practice. TCF counterargues that Burton's claim is not recognized as fraud in Kentucky, and that at most, the claim would be for lack of informed consent. Regardless of the arguments of the parties on this issue, Dr. Trover asserts, and Burton agrees, that Burton failed to revive the fraud claim against him; thus, the argument presented by Burton is not preserved for this Court's review. Accordingly, we decline to address this issue.

Burton next argues that the trial court committed prejudicial error by depriving Burton of the right to cross-examine an indentified expert as to his qualifications. In support thereof, Burton argues that Dr. Trover was a named expert and the suspension of his medical license was relevant to his qualifications and was critical in assessing the weight that should be given to his expert opinion. Conversely, TCF and Dr. Trover argue that the trial court properly limited cross-examination of Dr. Trover on a collateral matter. In reply, Burton argues that Dr. Trover's license suspension was not collateral because his suspension was intricately linked to his performance, behavior, and testimony that he was capable of reading radiological films, and that he never deviated from acceptable medical standards.

The general rule is that "[t]he presentation of evidence as well as the scope and duration of cross-examination rests in the sound discretion of the trial judge. This broad rule applies to both criminal and civil cases . . . ." *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997) (quoting *Moore v. Commonwealth*, 771 S.W.2d 34, 38 (Ky. 1988)). "A witness may be cross-examined on any matter relevant to any issue in the case." KRE 611(b). Further, as an expert, the admissibility of the testimony of Dr. Trover is partially governed by KRE 703. However, "a witness cannot be cross-examined on a collateral matter which is irrelevant to the issue at hand." *Morrow v. Stivers*, 836 S.W.2d 424, 429 (Ky.App. 1992), citing *Shirley v. Commonwealth*, Ky., 378 S.W.2d 816 (1964), and *Commonwealth v. Jackson*, Ky., 281 S.W.2d 891 (1955).

The case of *Morrow v. Stivers, supra,* is the seminal case on cross-examination of an expert regarding suspension of license. In *Morrow*, this Court determined that the suspension of the plaintiff's expert's license was a collateral matter and was properly excluded from evidence. In so holding, the Court stated:

> The crucial question then is whether the evidence excluded in this case is collateral. We think it is. The matter of having hepatitis and thus not practicing for a time does not reflect on his knowledge or ability to testify on the matters at hand, i.e., the causation of Stivers's condition and any deviation by Dr. Morrow from the standard of care. Further, the inflammatory effect, if the jury heard testimony such as that Dr. Harris may have had sex with his patients, although unproven, would outweigh any probative value it might have. There was no abuse of discretion in excluding this evidence.

Morrow at 429.

The reasoning in *Morrow* was affirmed in *Reece v. Nationwide Mut. Ins. Co.*, 217 S.W.3d 226 (Ky. 2007), wherein the Kentucky Supreme Court held:

> We agree with the Court of Appeals that the evidence of Dr. Thurman's medical license suspension was a collateral matter irrelevant to his treatment of Reece and to her claims for personal injury in this case. The salient facts are virtually the same as those in *Morrow,* 836 S.W.2d 424, and we see no reason why the holding in *Morrow* that the medical license suspension was a collateral matter would not apply here. In both cases the reason for license suspension had no relation to the case in which they were testifying and was likely to be highly inflammatory. In Dr. Thurman's case, his license was suspended long after he treated Reece, and was not suspended at the time he gave his deposition.

Reece at 232.

The salient facts in *Morrow*, affirmed in *Reece*, give rise to criteria for considering the admissibility of a licensure suspension. First, does the license suspension have a relation, i.e., is it relevant, to the proffered testimony? Second, was the license suspension too remote in time to the facts that are the subject of the testimony? We review Dr. Trover's license suspension in light of these criteria.

In this Court's review of the Kentucky Board of Medical Licensure (KBML) Amended Agreed Order entered May 9, 2007, we note that Paragraph 3 thereof references the grievance that initiated the complaint before the KBML in February 2004 as a misread CT scan. In issuing its order overseeing the practice of Dr. Trover, the KBML ordered Dr. Trover to submit 15 to 20 diagnostic radiological cases per week, inclusive of CT scans, to a designated radiologist for a reread and to submit a number of patient records, to be inclusive of CT scans, for a

consultant's annual review. Applied to the facts *sub judice*, the KBML report was both close in time to Burton's misread CT scans of late 2003 and early 2004 and relevant thereto.

In light of *Morrow* and *Reece,* we agree with Burton that the suspension of Dr. Trover's medical license, although post-treatment of Burton, was not a collateral matter. Accordingly, the trial court exceeded its discretion in limiting the cross-examination of Dr. Trover on this issue. In that this evidence could have a substantial impact on the validity of the testimony of Dr. Trover, we are of the opinion that its exclusion was reversible error.

Burton last argues that the court improperly prohibited it from cross-examining witness Kim Robinson. According to Burton, Robinson made a statement to the MEC that she would not recommend family members to use TFC for mammogram readings and this was reflected in their minutes. At trial, she contradicted this statement and also claimed that she did not remember what statement she gave the MEC. The trial court did not permit Burton to cross-examine Robinson on this discrepancy because the court concluded that the minutes were not trustworthy.

Burton claims that KRE 613 does not require that a source be trustworthy before a party may be impeached on a prior inconsistent statement, and that the trial court must have confused this matter with KRE 703, which deals with the basis of an expert's opinion. TCF counterargues that the trial court properly limited Burton's cross-examination of Robinson because the court had previously

found the minutes of the MEC inadmissible; and, as the statement Burton was claimed to have made as a prior inconsistent statement actually stated: "*they* (referring to three employees) would not encourage family members to have their mammograms here."[15] Similarly, Dr. Trover argues that before a prior inconsistent statement may be used to impeach a witness, that statement must be attributable to the witness.

The trial court held a hearing outside the presence of the jury to allow Burton to question Rhonda Florida, the MEC secretary who had taken the notes. This hearing revealed that Florida could not attribute the statement in question directly to Robinson. We agree with TCF and Dr. Trover that the trial court did not err in limiting Burton's cross-examination of Robinson as to the alleged prior inconsistent statement.

Our review of the evidence presented at the hearing and the answers provided by Robinson herself reveal that it is questionable if the minutes reflect that the statement was made by Robinson. As noted by a learned scholar, "[t]he characterization of the prior inconsistent statement as 'self' contradiction is accurate only in the sense that the inconsistent statement must be attributable to the witness to be impeached." 1 McCormick On Evid. § 34 (6th ed.) citing *Williamson v. Moore*, 221 F.3d 1177, 1183 (11th Cir. 2000)("These non-verbatim, non-adopted witness statements were not admissible at trial as impeachment evidence"); *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 168

[15] Emphasis added.

F.Supp.2d 57, 60 (S.D.N.Y. 2001)(The party seeking to introduce notes to establish a witness's inconsistent statement has the burden of proving that the notes reflect the witness's own words rather than the note-taker's characterization). *People v. Brown*, 726 N.Y.S.2d 1 (A.D. 2001)(Statements made by a defendant's prior counsel could be used to impeach the defendant), *aff'd*, 774 N.E.2d 186 (N.Y. 2002). Accordingly, we find no error.

We now turn to the arguments presented by TCF and Dr. Trover in their cross-appeal, namely, (1) that the trial court erred in admitting "habit evidence" in the form of testimony regarding Dr. Trover's workload and speed of film interpretation; and (2) that the trial court erred in failing to grant a change of venue.

First, TCF and Dr. Trover argue that the trial court erred in admitting "habit evidence" testimony regarding Dr. Trover's workload and speed with which he interpreted radiological film. In support thereof, TCF argues that the evidence presented should have been barred because it focused on Dr. Trover's reading of mammograms, which were not relevant to this case, and that the isolated examples of his conduct occurred years prior. TCF additionally argues that Dr. Trover's alleged habit of reading mammograms quickly had nothing to do with the reading of Burton's CT scans because these are two very different diagnostic tools that are read very differently. Moreover, TCF claims that these isolated incidents gave the jury little more than a glimpse into Dr. Trover's practice.

Dr. Trover argues that the testimony violated KRE 701[16] and KRE 602[17] because the witnesses did not have personal knowledge of Dr. Trover's workload and the average workload of other rural hospital radiologists. In addition, Dr. Trover argues that the testimony blurred the line between opinion and character

[16] KRE 701 states:
If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:
(a) Rationally based on the perception of the witness;
(b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and
(c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

[17] KRE 602 states:
A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of KRE 703, relating to opinion testimony by expert witnesses.

testimony which violated KRE 404[18]; and also violated KRE 401[19] because the evidence was not relevant. Since these arguments concern the admission of evidence, we review a trial court's ruling regarding the admission or exclusion of evidence for abuse of discretion. *See Clephas v. Garlock, Inc*., 168 S.W.3d 389, 393 (Ky.App.2004*); Goodyear Tire and Rubber Co.,* 11 S.W.3d at 577; and *Commonwealth v. English*, 993 S.W.2d at 945

---

[18] KRE 404 states:

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

> (1) Character of accused. Evidence of a pertinent trait of character or of general moral character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;
>
> (2) Character of victim generally. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, other than in a prosecution for criminal sexual conduct, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> (3) Character of witnesses. Evidence of the character of witnesses, as provided in KRE 607, KRE 608, and KRE 609.

(b) Other crimes, wrongs, or acts. 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.

(c) Notice requirement. In a criminal case, if the prosecution intends to introduce evidence pursuant to subdivision (b) of this rule as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence. Upon failure of the prosecution to give such notice the court may exclude the evidence offered under subdivision (b) or for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure.

[19] KRE 401 states: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

As previously discussed, KRE 406 permits admission of habit evidence to show that the conduct of a person on a particular occasion was in conformity with his or her habit. Given that KRE 406 is a recent addition to our Kentucky Rules of Evidence, we find illustrative *Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519 (11th Cir. 1985), and its learned discussion of KRE 406:

> Proof of habit is through indirect evidence offered to prove that the conduct of a person conformed with his routine practice…conflicting testimony goes to the weight of the evidence and not to its admissibility. The weight to be given to any testimony depends upon the particular circumstances….The difficulty in distinguishing inadmissible character evidence from admissible habit evidence is great. Often, the line between the two is unclear:
>
> Character and habit are close akin. Character is a generalized description of one's disposition, or one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. "Habit," in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, in family life, in handling automobiles, and in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or giving the hand signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic.

*Loughan v. Firestone Tire & Rubber Co.*at 1523-1524 (internal citations omitted).

In the case *sub judice,* the trial court permitted multiple witnesses to testify concerning Dr. Trover's usual practice of reading radiological films. Two

physicians testified that Dr. Trover's usual practice was to read films quickly. Four female employees testified about Dr. Trover's usual practice to read mammograms quickly and to Dr. Trover's own statements about his practice of doing so. We agree with the trial court that this evidence was sufficient to establish a habit of Dr. Trover to read radiological films quickly verses the generalized character trait of being a fast worker. We also agree with the trial court that the testimony concerning Dr. Trover's habit of reading mammogram films was relevant to the brevity with which he read radiological films and, thus, to the case *sub judice.* Further, any question as to the timeliness of the evidence presented in this case would bear on the weight to be given the evidence and not to its admissibility.

We likewise agree with the trial court that such evidence did not violate either KRE 701 or KRE 602. Pursuant to KRE 701, a witness may testify "in the form of . . . opinion[] or inference[]" if: 1) it is "[r]ationally based on the perception of the witness;" 2) "[h]elpful to a clear understanding of the witness' testimony or the determination of a fact in issue;" and 3) it is "[n]ot based on scientific, technical, or other specialized knowledge."[20] Testimony offered under KRE 701 is limited by KRE 602, which "further refines the scope of permissible lay opinion testimony, limiting it to matters of which the witness has personal

[20] In *Hampton v. Commonwealth*, the Kentucky Supreme Court explained that the adoption of KRE 701 "signaled this Court's intention to follow the modern trend clearly favoring the admission of such lay opinion evidence," which "reflects the philosophy of this Court, and most courts in this country, to view KRE 701 as more inclusionary than exclusionary." 133 S.W.3d 438, 440-41 (Ky. 2004) (quoting *Clifford v. Commonwealth*, 7 S.W.3d 371, 377 (Ky. 1999)).

knowledge." *Cuzick v. Commonwealth*, 276 S.W.3d 260, 265 (Ky. 2009); *see also Mills v. Commonwealth*, 996 S.W.2d 473, 488 (Ky. 1999) ("KRE 701 must be read in conjunction with KRE 602, which limits a lay witness's testimony to matters to which he has personal knowledge").

A trial court's admission of lay opinion testimony is a decision committed to its sound discretion and is thus reviewed for an abuse of discretion. *See, e.g., United States v. Pierce*, 136 F.3d 770, 773 (11th Cir.1998); *see also* Robert G. Lawson, *The Kentucky Evidence Law Handbook,* § 6.05[6] (4th ed. 2003) ("Judgments that have to be made in using KRE 701 are difficult (especially the helpfulness decision) and more susceptible to sound decisions at trial than on appeal")(internal quotations omitted). Given that all witnesses who testified had previously worked alongside Dr. Trover, we find this to be sufficient personal knowledge of Dr. Trover's habit of reading radiological films while he was employed with TCF. Accordingly, we find no error.

Lastly, TCF and Dr. Trover argue that the trial court erred in failing to grant a change of venue. TCF and Dr. Trover claim that the pretrial publicity rendered the Hopkins County jury pool tainted due to the incessant newspaper and television media coverage. In addition, TCF claims that Burton's counsel, in an effort to solicit additional business, created and encouraged mass negative media attention which specifically named Dr. Trover and TCF in an advertisement placed in the local newspaper. Dr. Trover and TCF presented the trial court with multiple accounts of the pretrial publicity and presented an affidavit of Dr. Robert Meadow

setting forth the results of a survey he conducted of 500 potential jurors. This survey revealed that 69% of the participants had heard or read something concerning the need to have the radiological films reread; 61% of those surveyed had a recollection of the need to have the films reread and faulted the doctor, the hospital, or both; and 49% of the participants were aware of the lawsuit. After being presented this information, the trial court denied the motion for a change of venue.

TCF and Dr. Trover argue that KRS 452.010 mandates that the trial court grant change of venue when it *appears* that a fair trial is elusive. However, a full reading of the statute shows that discretion is vested with the trial court in reaching this decision. KRS 452.010 states:

> (1) The parties to any civil action in a Circuit Court may, by consent, have an order in or out of court for its removal to any other Circuit Court.
>
> (2) A party to any civil action triable by a jury in a Circuit Court may have a change of venue when it appears that, because of the undue influence of his adversary or the odium that attends the party applying or his cause of action or defense, or because of the circumstances or nature of the case he cannot have a fair and impartial trial in the county.

KRS 452.010.

As such, in *Gould v. Charlton Co.,* 929 S.W.2d 734 (Ky. 1996),[21] the Kentucky Supreme Court reminded the bar that pervasive pretrial publicity alone

[21] While *Gould* addresses publicity during the course of a trial we find it illustrative in our discussion concerning a pretrial motion for change of venue.

does not mandate a change of venue; rather, it is the impact of the exposure that is in question:

> In *Montgomery* [*v. Commonwealth,* 819 S.W.2d 713 (Ky.1991),] it was not the exposure to information which disqualified the prospective jurors. There, all prospective jurors in a "small, rural county" had been exposed to "massive and pervasive" news media coverage and some even possessed information inadmissible at trial. Yet possession of this information did not per se disqualify them from jury service. It is the impact exposure to information has upon a person which is determinative, not the mere exposure itself.
>
> . . . .
>
> The trial court has broad discretion in assessing the impact of extra-judicial information in a variety of settings. Before trial, its decision to deny a motion for change of venue because of pre-trial publicity or other extra-judicial information will be honored unless there is a showing of actual prejudice or if prejudice can be clearly implied. *Montgomery* citing *Brewster v. Commonwealth*, Ky., 568 S.W.2d 232 (1978). During the jury selection process, the trial court is again invested with discretion to determine, based upon the totality of the circumstances, whether extra-judicial information has infringed upon a prospective juror's "mental attitude of appropriate indifference." *Montgomery* at 718.

Gould v. Charlton Co., 929 S.W.2d at 739.

While we do agree that pretrial publicity may have some effect, we believe that *Gould* is illustrative on this issue. In *Gould,* the Supreme Court found that a trial court's decision to deny a motion for change in venue will be honored absent a showing of actual prejudice or circumstances from which prejudice can be implied. And, while it may be true that people exposed to the publicity may develop an

opinion based on the information they have received, for a change in venue to be necessary then the information must have resulted in prejudice or give rise to circumstances from which prejudice can be implied. Given the information presented to the trial court concerning pretrial publicity, we do not agree with TCF and Dr. Trover that the trial court abused its discretion in denying their motion for a change of venue. As such, we find no error.

In light of the aforementioned, we find reversible error and remand for proceedings not inconsistent with this opinion.

CLAYTON, JUDGE, CONCURS.

ACREE, JUDGE, CONCURS WITH SEPARATE OPINION.

ACREE, JUDGE, CONCURRING: I concur in Judge Caperton's well-written opinion and write separately *only* to pose this question: Is our recognition of the tort of negligent credentialing premature? It is not an issue before us in this appeal and, depending on the outcome on remand, it may never arise even before the circuit court. I do not, however, question the reasoning underlying the decision to recognize the cause of action.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT/CROSS-APPELLEE:

John C. Whitfield
Madisonville, Kentucky

Roger N. Braden
Edgewood, Kentucky

BRIEFS AND ORAL ARGUMENT FOR APPELLEE/CROSS-APPELLANT, THE TROVER CLINIC FOUNDATION, INC.:

Bradley R. Hume
Louisville, Kentucky

Byron L. Hobgood
Madisonville, Kentucky

Donald K. Brown, Jr.
Katherine Kearns Vesley
Louisville, Kentucky

BRIEF FOR APPELLEE/CROSS-APPELLANT, PHILIP C. TROVER, M.D.:

Ronald G. Sheffer
Allison B. Grant
Louisville, Kentucky