COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 2022-CA-0828-MR

ANTHONY BRADLEY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF MITZI WESTOVER — APPELLANTS

VS. ON APPEAL FROM JEFFERSON CIRCUIT COURT
CIVIL ACTION NO. 18-CI-004436

LOUISVILLE MEGA CAVERN, LLC — APPELLEE

BRIEF FOR THE APPELLEE LOUISVILLE MEGA CAVERN, LLC

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing Brief for Appellee, Louisville Mega Cavern, LLC, has been served upon the following, on this the 21st day of December, 2022: five copies were served by hand delivery on **Hon. Kate Morgan**, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY, 40601; and true copies were served by first-class US mail on: **Hon. Annie O'Connell**, Judge, Jefferson Circuit Court, Division Two, 700 W. Jefferson Street, Louisville, KY 40202; **Hon. Brenton D. Stanley**, Morgan & Morgan, 2037 Lakeside Dr., Louisville, KY 40205; **Hon. Jason Swinney**, Morgan & Morgan, 420 W. Liberty St., Ste. 260, Louisville, KY 40202; **Hon. Molly B. Stanley**, Stanley Law Louisville, PLLC, 2200 Dundee Road, Louisville, KY 40205; **Hon. Kevin C. Burke and Hon. Jamie K. Neal**, Burke Neal PLLC, 2200 Dundee Road, Suite C, Louisville, KY 40205. The undersigned also certifies that the record on appeal has been not been withdrawn from the circuit court.

Maxwell D. Smith

STATEMENT CONCERNING ORAL ARGUMENT

Louisville Mega Cavern, LLC respectfully requests oral argument as this case given the number of alleged errors asserted by Appellants and the voluminous record. The parties, through oral argument, can best address any questions and hone the issues to finer points.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

This matter arises out of an incident that occurred on August 19, 2017 at Louisville Mega Cavern (hereinafter "LMC") in Louisville, Jefferson County, Kentucky. Mitzi Westover, her husband, Anthony Bradley, and her niece, Hannah Folk, purchased tickets and participated in an aerial adventure ropes course, Mega Quest, at LMC. While participating, Ms. Westover fell from an element on the course, started to have trouble breathing, and became unresponsive. She died several days later at the hospital due to hypertensive and atherosclerotic diseases. (LMC's Trial Exhibit 3, Autopsy and Medical Examiner Report).

Prior to taking part in any activity at LMC, all participants are required to read, understand, and execute a Participant Agreement. Ms. Westover initialed the agreement representing that she read, fully understood, and agreed to the Participant Agreement's terms. (Plaintiff's Trial Exhibit 1). Specifically regarding Mega Quest, the Participant Agreement describes the course as follows:

> The Mega Quest aerial challenge course is self-guided and includes short ziplines, sky bridges and walkways, (some inclined), located high in the cavern and some consisting of planking supported by steel cables and cable handrails. Mega Quest Participants are responsible for making all Equipment Transfers on their own after watching a training video, the careful viewing of which is extremely important, and receiving instructions and training from tour guides using special equipment. The age limit for the Mega Quest challenge course is five years old. Participants must be able to reach a height of 50 inches with the palm of the hand with an outstretched arm while standing flatfooted on the floor, and weigh less than 310 pounds.

(*Id.*). The Participant Agreement goes on to identify inherent risks in Mega Cavern activities and states:

> The physical risks range from small scrapes and bruises to bites and stings, broken bones, sprains, neurological damage, and in extraordinary cases, even death. These risks, and others, are inherent to the activities -- that is, they cannot be eliminated without changing the essential nature, educational and other values of the experience. In all cases, these inherent risks, and other risks which may not be inherent, whether or not described above must be accepted by those who choose to participate.

(*Id.*). The Participant Agreement also addresses medical and safety concerns:

> Medical and Safety Concerns. The activities are designed for Participants of average mobility and strength who are in reasonably good health. Underlying medical problems including, for example, obesity, high blood pressure, cardiac and coronary artery disease, pulmonary problems, pregnancy, arthritis, tendonitis, other joint and muscular-skeletal problems, or other medical, physical, psychological and psychiatric problems, may impair the safety and wellbeing of Participants on the course. All such conditions may increase the inherent risks of the experience and cause Participants to be a danger to themselves or others and Participants therefore must carefully consider those risks before choosing to participate, and they must fully inform the Provider or its staff of any issues, in writing, prior to using the Facilities. Provider reserves the right to exclude anyone from participating because of medical, safety, or other reasons it deems appropriate. Participant … (1) represents that each Participant or Minor Participant is physically able to participate in the activities without being a danger to themselves or to others; (2) acknowledges that participation is purely voluntary, and done so in spite of the risks; (3) is not pregnant, nor under the influence of alcohol, illegal drugs, or impairing legal drugs…

(*Id.*). The Participant Agreement also contains an agritourism immunity provision explicitly providing that there is no liability for any injury or death of a participant resulting exclusively from the inherent risks of the agritourism activity and in the absence of negligence. Lastly, the signer of the Agreement "release[s] and agree[s] to hold harmless and indemnify" LMC and agrees:

> ... not to sue [LMC] for any liability for causes of action, claims and demands of any kind and nature whatsoever, including personal injury and death... that may arise out of or relate in any way to [the signer's] participation in [LMC's attractions].

(*Id.*). Again, all participants are required to read, understand, and execute the Participant Agreement prior to taking part in any activity at LMC.

Upon arriving at LMC, Appellants checked-in at the front desk and then were equipped with full-body harnesses, helmets, gloves, and Smart Belay lanyards; they attended a safety briefing and practiced transferring with the Smart Belays prior to entering the course. (Appellants' Trial Exhibit 8, surveillance footage at 05:17:09 PM – 05:45:15; Video Record (VR) 06/17/2021 at 4:15:35 - 04:19:09, testimony of Elijah Bauer). At about 5:58 p.m., Ms. Westover started an element of the course that consisted of two horizontal ladders that were suspended from overhead wire ropes. (Appellants' Trial Exhibit 8 at 05:58:00). A minute later, the monitor on the course, Garrett Lee, observed Ms. Westover fall; her right leg went between two rungs on the first ladder. (VR 06/16/2021 at 03:43:20 – 03:44:23, testimony of Garrett Lee; Appellants' Trial Exhibit 5). Mr. Lee went over to her to check on her. (VR 06/16/2021 at 03:45:40 – 03:46:13). When it was apparent that she would not be able to get back up on her own, he climbed up to assist her, and she was able to stand back up. (*Id.* at 03:47:01 – 03:47:45),

Once Ms. Westover had been assisted, Mr. Lee went to another platform and Ms. Westover continued to make her way through the course as he coached her to cross. (*Id.* 03:48:03 - 03:48:28). While attempting to traverse the second ladder, she fell again. (*Id.* at 03:53:38 – 03:53:59). This time, Mr. Lee quickly recognized that she would not be able to get back up, and he could not lift her back up by himself as he had used all of his strength

to help her previously. (*Id.* at 03:56:57 – 03:57:10). He then called for the line lower kit over the radio. (*Id.* at 03:58:40-59; Appellants' Trial Exhibit 8 at 06:04:37 – 06:04:48 (showing Kim Coleman using radio)). Supervisor, Chase Cannon, responded to help and Amanda Huchingson, Assistant Manager, brought the line lower kit. (VR 06/16/2021 at 04:02:56 – 04:03:12; Appellants' Trial Exhibit 8 at 06:05:20 - 06:08:05). During the rescue attempt, Ms. Westover was unable to remain calm and was panicking and thrashing about in her harness. (VR 06/16/2021 03:59:30; 04:37:00 – 04:38:33). As she was lowered to the ground, she became unconscious and unresponsive. (VR 06/16/2021 at 04:03:15 – 04:03:30). Ms. Westover was successfully lowered to the ground. (Appellants' Trial Exhibit 8 at 06:09:33). From the first call on the radio for the line lower kit until Ms. Westover was safely on the ground, approximately five to eight minutes had elapsed. (Record Volume (R. Vol.) 41 at 6025, Heath depo p. 189; Appellants' Trial Exhibit 8 at 06:04:37 - 06:09:33). Ms. Huchingson radioed for the management to call EMS. (VR 6/17/2021 at 02:42:10 – 02:42:42). At 6:11 p.m. a call was placed to 911, and Fire and EMS were on site at 6:20 p.m. (R. Vol. 41 at 6025, Heath depo at pp.189 – 92). EMS tended to Ms. Westover and transported her to Norton Audubon Hospital. Ms. Westover died at the hospital on August 22, 2017. According to the autopsy and medical examiner's report, Ms. Westover died due to hypertensive and atherosclerotic diseases. (R Vol. 16 at 2199 – 2291).

Appellants, Anthony Bradley, individually and as Administrator of the Estate of Mitzi Westover, brought suit against Louisville Mega Cavern and Louisville Underground on July 31, 2018 asserting claims of personal injury, wrongful death, and punitive

damages.[1] (R. Vol. 1 at 1-11). Appellant alleged LMC failed to keep the "Mega Quest" obstacle course safe, failed to properly train and supervise its employees, and failed to comply with statutes, ordinances, and/or regulations. (*Id.*). Appellants sought compensatory and punitive damages. (*Id.*). The parties proceeded with extensive discovery over the course of several years.

On March 17, 2021, both Appellants and LMC filed motions for summary judgment. (R. Vol 11 at 1389 – 1401 and 1402 - 1416). Appellants argued that there was no evidence which supported an allocation of fault to Ms. Westover and sought judgment that, as a matter of law, her fault was not a cause of her injury, and therefore, liability could not be apportioned to her. (*Id.* at 1402 – 1416). LMC presented several arguments in support of its dispositive motion. First, LMC argued that it was immune against suit for Ms. Westover's accident because the activities it offers, including the Mega Quest ropes course, are registered agritourism activities that are immune from actions for injury or death resulting from inherent risks of the activity. (*Id.* at 1389 – 1401). Further, Ms. Westover waived any potential negligence claim by signing the Participant Agreement. (*Id.*). Finally, LMC argued that there was no clear and convincing evidence of record to support an award of punitive damages. (*Id.*). Both motions were fully briefed and submitted to the court for rulings. Both motions were denied. (R. Vol. 32 at 4802 – 4806 and Vol. 37 at 5483 – 5488).

In denying Appellants' motion, the circuit court ruled that given the proof of Ms. Westover's medical history, supported by medical expert proof, of which she was aware as well as her execution of the Participant Agreement, it would not be impossible for LMC

[1] Louisville Underground was dismissed from the action via Agreed Order prior to trial. (R. Vol. 37 5492 – 5494).

to prove that she did not use ordinary care in undertaking the ropes course. (*Id.* at 4802 – 4806). Ms. Westover was a 56-year-old woman with a past medical history with several underlying problems identified in the Participant Agreement, including but not limited to hypertensive cardiovascular disease, right vertebral artery dissection and pseudoaneurysm consistent with fibromuscular dysplasia with right cerebellar and occipital infarcts (strokes), chronic encephalopathy with a probable primary neurodegenerative disorder (mitochondrial disorder) with cognitive dysfunction (difficulty thinking), speech disorder, ataxia (difficulty walking) with falls, including one on February 24, 2014 with laceration of her spleen, memory loss, seizure disorder, migraine with chronic daily headaches, obesity, hyperlipidemia, chronic kidney disease, smoking cigarettes for approximately 30 years stopping approximately 5 years before her death, cervical spondylosis with chronic severe suboccipital pain, chronic fatigue, mild chronic obstructive pulmonary disease, hysterectomy, oophorectomy, knee surgery, and disability since 2006. (R. Vol. at 2268 – 2274, Dr. Davis Report; VR 06/22/2021 01:32:40 – 01:35:21, testimony of Dr. Davis). The autopsy report concluded that Ms. Westover died of hypertensive and atherosclerotic diseases. (LMC's Trial Exhibit 3, Autopsy and Medical Examiner Report). Dr. Smock testified before the jury that Ms. Westover's death was not the result of suspension trauma or positional asphyxia. (VR 06/22/2021 at 09:25:48 – 09:26:06, 09:32:20 – 09:33:15). The circumstances of the incident were not consistent with death caused by suspension trauma, but were consistent with her past medical history. (*Id.* at 09:30:48 – 09:32:12). Dr. Davis opined before the jury that Ms. Westover's likely mechanism of death was sudden cardiac death. (*Id.* at 01:35:58 – 01:36:48). Dr. Davis further testified that he did not see any evidence that suspension trauma, within a medical degree of probability that more likely

than not, caused or contributed to Ms. Westover's death. (*Id.* at 01:46:22 – 01:46:41). In sum, Ms. Westover suffered from numerous co-morbidities which placed her at increased risk of injury and/or death involving in her participation on the ropes course and made it dangerous for her to do so. (*Id.* at 09:15:34 – 09:15:48, 09:46:14 – 09:52:59, testimony of Dr. Smock).

In denying LMC's motion, the court ruled: (1) LMC was not entitled to agritourism immunity as there was evidence that Ms. Westover's death was not an inherent risk of the activity but a result of LMC's negligence; (2) there were genuine issues of fact remaining on the issue of willful or wanton negligence, and therefore, LMC was not entitled to judgment based upon the Participant Agreement; (3) it was for a jury to assess whether punitive damages should be awarded. (R. Vol. 37 at 5483 – 5488). The case proceeded to trial.

Trial was held June 15, 2021 through June 23, 2021 at Jefferson Circuit Court. (VR 06/15/2021 – 06/23/2021) It was Appellants' theory of the case that Ms. Westover's death was caused by suspension trauma and LMC's failure to appropriately respond to the situation. It was LMC's position that Ms. Westover ignored the inherent risks of the course in light of her pre-existing medical conditions, her death was caused by a sudden cardiac event, and that LMC did everything that was required of it under Kentucky law with regard to its response to the event and operation of its facility. The jury heard evidence and testimony from numerous witnesses, including the owner of LMC, employees of LMC, witnesses to the incident, and medical experts over the course of seven days. After deliberating for four hours, the jury found that the conduct of LMC was not a substantial factor in causing Ms. Westover's tragic death. (R. Vol. 39 at 5843 – 5860).

Appellants subsequently filed a motion for a new trial asserting errors with regard to the following: (1) admission of the Participant Agreement as evidence; (2) introduction of evidence that Ms. Westover had hydrocodone in her urine; (3) the court's ruling denying Appellants' request to read testimony of LMC's CR 30.02(6) designee into evidence; (4) precluding Appellants from cross-examining witnesses regarding Occupational Health and Safety Administration (OSHA) regulations; and (5) the court's rejection of Appellants proposed jury instructions. (R. Vol. 41 at 6107 – 6131). The matter was fully briefed and submitted to the court. The court denied the motion. (R. Vol. 42 at 6197 – 6201). This appeal followed. (R. Vol. 42 at 6203 – 6207). Additional facts will be discussed as they become relevant.

ARGUMENT

1. The circuit court did not err in admitting the Participant Agreement as evidence

Appellants first assert that trial court erred by admitting the pre-injury liability release (the Participant Agreement) as evidence. Appellants generally contend that because the Participation Agreement was unenforceable as a matter of law, it is therefore irrelevant and its admission as evidence was error.

"[A]buse of discretion is the proper standard of review of a trial court's evidentiary rulings." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). The test for abuse of discretion is "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* at 581 (citation omitted).[2]

Appellant argued in their motion *in limine*, as they do in their brief, that the unenforceability of the Participation Agreement deems it irrelevant, and therefore, it should have been excluded as evidence. The argument asserts several points that allegedly render the agreement irrelevant because of unenforceability, such as, it contains a release from liability provision, which are generally disfavored; unequal bargaining power between the signor and the drafter; allegedly ambiguous language; the agreement violates public policy and is unconscionable. However, as stated, these arguments go to enforceability of the release provision, not the admissibility of the Participant Agreement because of its relevance to the underlying facts. A motion *in limine* is not the proper motion to decide the enforceability of the Participant Agreement. *See* MOTION IN LIMINE, Black's Law

[2] We also note at the outset that Appellants' alleged errors as set forth in their brief were argued in their Motion for a New Trial. The standard of review for a new trial is also whether the trial court abused its discretion. *McVey v. Berman*, 836 S.W.2d 445 (Ky. App. 1992).

Dictionary (11th ed. 2019) ("A pretrial request that certain inadmissible evidence not be referred to or offered at trial."). Indeed, the circuit court declined to enforce the release provision of the agreement (as well as the agritourism immunity provision) with which Appellants take issue. The circuit court ruled, in denying LMC's motion for summary judgment, that there were material issues of fact with regard to the Participant Agreement:

> In the face of willful or wanton negligence, the Participation Agreement signed by Ms. Westover would not hold. Therefore, the Court finds that there are material issues of fact remaining on this issue and that summary judgment must be denied.

(R. Vol. 37 5483 – 5488). The court essentially ruled that it was not going to enforce the waiver and release provisions of the Participation Agreement as it did not preclude Appellants' suit from proceeding under these facts because there were questions of fact regarding the negligence alleged. Nevertheless, it was still Appellants' burden to prove the actions of LMC caused Ms. Westover's death.

Moreover, the denial of LMC's and Appellants' motions for summary judgment support the relevancy of the Participant Agreement. Appellants moved the court for summary judgment arguing that Ms. Westover was not negligent and that, as a result, there should be no comparative fault instruction at trial. (R. Vol. 11 at 1402 - 1416). The court denied the motion referring to LMC's proof of Ms. Westover's medical history as well as her signature on the Participation Agreement as evidence creating material facts on the issue of whether she herself exercised ordinary care. (R. Vol. 32 at 4804 – 4806). "'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." Kentucky Rule of Evidence (KRE) 401.

It is undisputed that Mrs. Westover signed the Participant Agreement as is required by all individuals seeking to take part in the activities offered at LMC. In doing so, she agreed that she was physically able to participate without being a danger to herself or to others on the course. (Appellants' Trial Exhibit 1). She represented with her signature that she did not have any medical conditions that would be of concern, including those that may cause an increased risk in participating in the activity. (*Id.*). She further agreed that she was not under the influence of prescription or other illicit drugs; however, her toxicology report stated otherwise. (LMC's Trial Exhibit 1). The Participant Agreement is also relevant evidence as it informs of the procedures at LMC (the agreement was to be read, understood and signed by all participants prior to any activity), as well as Ms. Westover's acknowledgment of the associated inherent risks of participating in the Mega Quest ropes course. Kentucky Rule of Evidence (KRE) 401, 402. The evidence in this case demonstrates that Ms. Westover was aware of her numerous medical conditions, and despite these conditions, she voluntarily chose to participate in a demanding aerial adventure course with associated inherent risks.

Appellants' assertion that the circuit court "acknowledged the problems with admitting the Participation Agreement" by stating the following is taken out of context:

> The Court finds that the language in the Participant Agreement – the majority of the language in the participant agreement, first of all, states law that at this stage really is – is not relevant. It goes to – it potentially would confuse the jury and speak to the ultimate issue of liability in this case.

(Appellants' brief at p. 4). The above was stated in response to Appellants' Counsel's request to redact language in the Participant Agreement referring to the agritourism immunity under KRS 247.809, which the Court declined apply to LMC. (R. Vol. 37 5483

– 5488). The court granted the request for the redactions as it pertained to the immunity provision, except for the portion which provided "you are assuming the risk of participating in this activity …." (VR 6/16/2021 at 09:28:33 – 09:38:05).

Appellants further assert that it was prejudicial error to admit the Participant Agreement. In support, Appellants refer to *Matador Prod. Co. v. Weatherford Artificial Lift Systems, Inc.*, 450 S.W.3d 580 (Tex. App. 2014) and *Blue Valley Co-op. v. Nat'l Farmers Org.*, 600 N.W.2d 786 (Neb. 1999) which allegedly held that admission of unenforceable liability waivers was reversible error. However, these matters are easily distinguishable from the issues present in this action.

First, *Matador Prod. Co.* was a *contract dispute* between a hydraulic fracturing contractor and an oil and gas driller, and the court held that the exculpatory terms and conditions were not conspicuous as necessary for the fair notice requirement for indemnity to apply pursuant to Texas law. *Matador Prod. Co.*, 450 S.W.3d at 594. Next, the court in *Blue Valley* held that a blanket waiver clause in a warehouse agreement was unenforceable pursuant to Nebraska statute, § 7–204. *Blue Valley*, 600 N.W.2d at 793 (the legislative intent behind the statute is to "provide the sole mechanism by which a warehouse keeper could contractually diminish exposure to liability or limit damages for negligence in an agreement to store a customer's goods."). The court held that a warehouse contract may reasonably limit a warehouse keeper's damages by setting forth a specific liability per article, item, or unit of weight, but may not disclaim or waive liability entirely under § 7–204. The facts of consequence in both *Matador Prod. Co.* and *Blue Valley* were whether an enforceable written or oral contract existed between the parties, whether the enforceable provisions of such a contract were breached and by whom, and resulting damages. The

instant matter is not a contractual dispute, and the release and immunity provisions of the Participant Agreement were not at issue. The circuit court declined to enforce the release and immunity provisions in the Participant Agreement as a matter of law and let the case proceed on its facts to the jury.

Additionally, while the Participant Agreement was presented to the jury as evidence, the jury was not directed to the release provision, and the immunity language was redacted at Appellants' request. It is undisputed that the enforceability of the agreement, including the applicability of the release provision, was not argued to the jury as a part of LMC's defense. What was highlighted to the jury were Ms. Westover's duties under its terms, the medical and safety concerns provisions as well as the inherent risks associated with the activity as applied to Ms. Westover and her pre-existing medical conditions. (VR 06/16/2021 at 10:18:05 – 10:20:31 and VR 06/23/2021 10:24:40 – 10:29:54). The Participant Agreement was not provided to the jury for it to decide whether Ms. Westover was precluded from pursuing her claims. Obviously, "all relevant evidence is prejudicial to the party against whom it is offered." Robert G. Lawson, Kentucky Evidence Law Handbook, § 2.10(4)(b) at 89 (4th ed. 2003). However, evidence that is unduly prejudicial "may cause a jury to base its decision on something other than the established propositions in the case." *Id.* (quoting *Carter v. Hewitt*, 617 F.2d 961, 972 (3d Cir. 1980)). At issue in this matter was ultimately what caused the death of Ms. Westover. It was the Appellants' theory that LMC's negligence resulting in suspension trauma was the cause of her death; the defense maintained that her death was caused by her pre-existing medical conditions resulting in hypertensive and atherosclerotic cardiovascular disease, as opposed to suspension trauma, and put on medical proof in support of same. Accordingly,

the jury was not tasked with interpreting the terms of the Participant Agreement as Appellants contend.

Appellants' also assert that "[a]t least one other court has declined to enforce a substantially similar version of LMC's pre-injury release." (Appellants' brief at p.17). Appellants refer to Jefferson Circuit Court Civil Action No. 17-CI-5126 styled *Jeff Backmeyer v. Louisville Mega Cavern, LLC*, and the Division One court's order denying LMC's motion for summary judgment. In that matter, Mr. Backmeyer sustained injuries at the LMC's underground bike park and filed suit. LMC's filed a motion for summary judgment based upon the Participant Agreement provisions. The court acknowledged that the agreement met all of the criteria for enforceability under *Hargis v. Baize*, 168 S.W.3d 36, 47 (Ky. 2005), but declined to enforce it under the facts of that case and as a matter of public policy. Notably, the court also stated "Backmeyer will still carry the burden of proving any omission or act of the LMC caused his claimed injuries, but the Court does not find the case can be resolved as a matter of law." (R. Vol. 41 at 6087-95). While similar in the fact that the court in *Backmeyer* also declined to preclude the Plaintiffs from pursuing their claims based upon the Participant Agreement, the underlying facts pertaining to causation in this matter are plainly distinct. Also, the *Backmeyer* court's order does not address relevancy or admissibility of the Participant Agreement as evidence in any way to its facts that is meaningful to this Court's review. As there are sound legal principles in support of the circuit court's evidentiary rulings regarding the Participant Agreement, no abuse of discretion can be found. Therefore, we ask this Court to affirm the court's rulings on this issue.

2. The circuit court did not abuse its discretion in denying Appellants' proposed jury instruction

Appellants next assert that the circuit court erred in failing to give a proper duty instruction. On appellate review, "the substantive content of the jury instructions will be reviewed *de novo*." *Sargent v. Shaffer*, 467 S.W.3d 198, 204 (Ky. 2015), as corrected (Aug. 26, 2015), and overruled on other grounds by *Univ. Med. Ctr., Inc. v. Shwab*, 628 S.W.3d 112 (Ky. 2021). If the applicable law given through the instruction is incorrect, the error is presumed to be prejudicial. *Harp v. Commonwealth*, 266 S.W.3d 813, 818 (Ky. 2008). Yet, it is within a trial court's discretion to deny a requested instruction, and its decision will not be reversed absent an abuse of that discretion. *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226, 229 (Ky. 2005) (citation omitted). Here, there was no error.

Kentucky law mandates the use of "bare bones" jury instructions in all civil cases. *See Lumpkins v. City of Louisville*, 157 S.W.3d 601 (Ky. 2005). "[J]ury instructions should refrain from elaborating on an abundance of detail, but still strike the proper balance in providing enough information to a jury to make it fully aware of the respective legal duties of the parties." *Wilkey*, 173 S.W.3d at 229 (citation omitted). "Indeed, "bare bones" instructions serve the courts and juries well because they pare down unfamiliar and often complicated issues in a manner that jurors, who are often not familiar with legal principles, can understand." *Id.*

Appellants insisted that the circuit court utilize its proposed long-winded and confusing jury instruction as set forth in their brief. (R. Vol. 39 at 5818-30). In their instruction, Appellants rely upon and include language from *Shelton v. Kentucky Easter Seals, Inc.*, 413 S.W.3d 901 (Ky. 2013) pertaining to the discovery of dangerous conditions on the land, and the landowner's duty to either eliminate or warn of them in determining

issues pertaining to the Court's ruling on the motion summary judgment at issue. Appellants contend that because Ms. Westover was a business invitee of LMC, she was owed a specific duty to be warned of unreasonably dangerous conditions on the premises, as set forth in *Shelton*, and this should have been included in the jury instructions.

The instruction provided to the jury was as follows:

INSTRUCTION NO. 1

> Louisville Mega Cavern, LLC had a duty to exercise ordinary care for the safety of its patrons.
>
> "**Ordinary care**," as applied to Louisville Mega Cavern, LLC means such care as you would expect an ordinarily prudent company engage[d] in the same type of business to exercise under similar circumstances.

Please proceed to Question No. 1.

QUESTION NO. 1

> Are you satisfied from the evidence presented that Louisville Mega Cavern, LLC (a) failed to exercise "ordinary care" in the operation of the Mega Quest course and (b) that such failure was a substantial factor in causing injury to Mitzi Westover?

(R. Vol. 42 at 6166-6171; R. Vol. 39 at 5843-55). The jury answered "No" to the foregoing, and Judgment was entered for LMC. (*Id.*).

In further support of their argument, Appellants cite to *Smith v. Smith*, 563 S.W.3d 14 (Ky. 2018), a slip and fall case, for the proposition that an ordinary care instruction was erroneous because it did not properly instruct the jury on the land possessor's duty owed to the Plaintiff. In *Smith*, the Plaintiff slipped and fell on a recently mopped deck at her daughter's house. The intent behind and purpose of the mother's visit to her daughter's

home were in dispute. Plaintiff filed a complaint against her daughter and the case proceeded to trial. At trial, Plaintiff testified that she could tell the floor was wet, but did not know of the floor's slick, soapy condition. Another witness testified that the soap was visible. Defendant moved for a directed verdict at both the close of Plaintiff's case and at the close of trial, on grounds that Plaintiff was a licensee, and uncontroverted evidence showed that the danger was not hidden, thus preventing Defendant from being liable. Both motions were denied. The trial court also rejected Defendant's jury instruction regarding Plaintiff's status as a licensee, choosing instead to give a general "ordinary care" instruction to the jury, as the trial court mistakenly determined that Kentucky no longer followed the traditional premises liability distinctions of invitee, licensee, and trespasser. The Supreme Court reversed stating:

> [T]he substantive content of the instruction was a misstatement of law and, as such, was presumptively prejudicial. Furthermore, the error was not harmless, because the instruction effectively removed the step of establishing the scope of the duty owed to [Plaintiff] as either a licensee or invitee, and whether, based on her classification, [Defendant] breached her duty of "reasonable care under the circumstances."

Id. at 18 (citation omitted). For the following reasons, *Smith* and *Shelton* are distinguishable from the matter at hand, and the elaboration requested by Appellants was not required. The language of the instruction was a correct statement of the law relative to the duty owed by a business owner to invitees. *Scuddy Coal. Co. v. Couch*, 274 S.W.2d 388, 390 (Ky. 1954).

As recognized in *Shelton*, "Kentucky law remains steadfast in its adherence to the traditional notion that duty is associated with the status of the injured party as an invitee, licensee, or trespasser[,]" although our Supreme Court has expressed interest on eliminating the process of assigning a plaintiff a particular status when determining the

scope of a duty owed. *Shelton*, 413 S.W.3d at 909 n.28. An invitee is generally defined as one who "enters upon the premises at the express or implied invitation of the owner or occupant on behalf of mutual interest to them both, or in connection with the business of the owner or occupant." *Id.* (citation omitted).

Generally, property owners owe a duty to invitees "to use ordinary care and diligence to keep the premises in a safe condition ...." *Chesapeake & O. Ry. Co. v. Wilder*, 72 S.W. 353, 354 (Ky. 1903). The Court in *Wilder* further described this duty, in the case of dangerous premises, as one to give "visitors sufficient warning of the danger to enable them, by the use of ordinary care, to avoid it." *Id.*; *see also Shelton*, 413 S.W.3d at 908-10 ("First and foremost, a land possessor is subject to the general duty of reasonable care[,]" but also the more specific duty associated with the landowner-invitee relationship, including a duty to an invitee to discover unreasonably dangerous conditions on the land and either eliminate or warn of them.)

Our Supreme Court has recognized that "the duty to keep the premises in a reasonably safe condition encompasses the additional specific duties." *Wilkey*, 173 S.W.3d at 230. In *Rogers v. Kasdan*, 612 S.W.2d 133, 135 (Ky. 1981), the Supreme Court considered jury instructions in a negligence case that contained several specific duties in addition to the general duty to exercise ordinary care. The Court rejected such an approach because the additional duties were not necessary to the dispositive question of whether the defendant had breached the duty of ordinary care. *Id.* at 136. "[I]nstructions should not make a rigid list of ways in which a defendant must act in order to meet his duty." *Id.* The Court further noted that the proposed instructions also exceeded the "bare bones" approach.

Id. The instruction in *Rogers* suggested by the Court as well as the instruction in *Wilkey* deemed sufficient mirror the language utilized in this matter.

Additionally, under these facts, Appellants have not asserted that Ms. Westover's death was caused by an unreasonably dangerous condition of the premises. In *Smith*, the plaintiff slipped and fell on a wet deck, 563 S.W.3d 14 (Ky. 2018); in *Shelton*, 413 S.W.3d 901 (Ky. 2013), the plaintiff fell after becoming entangled in cords beside a patient's hospital bed. In the instant matter, it has been Appellants' theory of liability that Ms. Westover's death resulted from suspension trauma-induced cardiac arrest caused by her body harness as she attempted to complete the Mega Quest ropes course as well as the alleged negligence of LMC employees in responding to her situation. Ms. Westover's death was arguably not caused by a condition on the property, but by her activity on the property. Thus, *Smith* and *Shelton* are not dispositive herein because LMC's potential liability cannot necessarily be characterized as a traditional premises issue.

In *Hardin v. Harris*, the Supreme Court recognized the need for a distinction among guests to a property outside the three classes provided at common law. 507 S.W.2d 172, 174 (Ky. 1974). In that case, the Court recognized and distinguished an injury sustained from a dangerous condition on a property from an injury sustained from a dangerous activity taking place on a property. *Id.* "Where the latter occurs, the relevant inquiry is whether the property owner exercised reasonable care toward a guest known to be present on the premises where a dangerous activity is taking place." *Bramlett v. Ryan*, 635 S.W.3d 831, 838 (Ky. 2021), reh'g denied (Dec. 16, 2021) (citing *Hardin*, 507 S.W.2d at 175-76). Further, the Supreme Court recently affirmed the decision in *Hardin* "that a property owner owes a reasonable duty of care to guests invited to his property to participate in an

activity."[3] *Bramlett*, 635 S.W.3d at 839 ("The determination of the existence of a duty is still a legal question for the court to determine. But the court need only consider 1) if the property owner invited or ratified the presence of the guest on the premises, and 2) if the guest was injured or harmed in the course of or as a result of an activity taking place on the premises. If both requirements are met, the property owner owes a duty of reasonable care to the guest as a matter of law."). "The rule set out in *Hardin* is merely an extension of this longstanding common-law application of a duty of ordinary care prescribed when harm is foreseeable." *Id.*

Herein, Appellants and Ms. Westover were undisputedly on the premises to participate in the Mega Quest ropes course. Ms. Westover's alleged injuries and ultimate death were not caused by a condition of the property, such as what occurred in *Smith* and a slippery surface or in *Shelton* with the cords beside the hospital bed. Upon application of the above standards, ordinary negligence principles apply and the text of the jury instruction provided accurately reflected Kentucky law. The controlling issue is not which set of proposed instructions best stated the law, but rather whether the delivered instructions misstated the law. *Wilkey*, 173 S.W.3d at 230 (citation omitted). The instructions did not misstate Kentucky law, and the trial court did not abuse its discretion in failing to grant Appellants' request to substitute their own proposed jury instructions. *See Rojo, Inc., v. Drifmeyer*, 357 S.W.2d 33, 35 (Ky. 1962)("The owner or occupant of the

[3] The Hardin Court's reference to "activities conducted on the premises" has been broadly interpreted by both the Supreme Court and the Court of Appeals to encompass a wide range of possible circumstances, including children swimming in a pool, *Grimes v. Hettinger*, 566 S.W.2d 769 (Ky. 1978), adults swimming in a pool, *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996), riding ATVs, *Mathis v. Lohden*, No. 2007-CA-00824-MR, 2008 WL 399814 (Ky. App. Feb. 15, 2008), driving people in a car, *Helton v. Montgomery*, 595 S.W.2d 257 (Ky. App. 1980) and most recently, touring stables at Churchill Downs, *Roby v. Churchill Downs, Inc.*, No. 2021-CA-0766-MR, 2022 WL 3721719 (Ky. App. Aug. 26, 2022), modified (Oct. 28, 2022).

premises owes a duty to an invitee to use ordinary care to have the premises in a reasonably safe condition."). As there was no error, the circuit court must be affirmed on this issue.

3. The circuit court did not abuse its discretion in admitting evidence of hydrocodone in Ms. Westover's urine

Appellants contend that the circuit court's admission of evidence of hydrocodone in Ms. Westover's urine as indicated in her toxicology report was unduly prejudicial. Appellants' position is that the hydrocodone was not effecting her central nervous system, and therefore, is irrelevant. They contend that the only purpose of the introduction of this evidence was to brand Ms. Westover as a user of drugs, and it was improper to indicate that Ms. Westover was taking hydrocodone without a prescription. However, there were other narcotics found in her system at the time of her death. Ms. Westover did have a prescription for oxycodone, which was found in her blood, and such evidence was relevant, admissible and presented to the jury. It was also undisputed that a recent prescription for hydrocodone for Ms. Westover could not be located. This fact was acknowledged by medical experts for both Appellants and LMC. (R. Vol. 22 at 3020-21 and VR 06/18/2021 at 02:19:00 – 02:19:14).

As noted previously, the standard of review of a trial court's evidentiary rulings is an abuse of discretion. *Tumey v. Richardson*, 437 S.W.2d 201, 205 (Ky. 1969).

The evidence of hydrocodone (along with the other narcotics appearing as positive on the toxicology report) is relevant because when Ms. Westover signed the Participant Agreement, she represented that she was not under the influence of impairing legal drugs. (*See* Appellants' Trial Exhibit 1). Dr. Smock explained that oxycodone is an impairing substance, not necessarily meaning that someone who takes it is impaired, but that the drug is an impairing substance. (VR 06/22/2021 at 09:19:10 – 09:19:45). Furthermore, not only

was she under the influence of impairing legal drugs while attempting the Mega Quest ropes course contrary to what she represented, she also was *taking a combination of medications* for her underlying medical conditions that are known to cause psychomotor impairment, hypotension, and central nervous system and respiratory depression. (R. Vol. 16 at 2280 – 2291, Dr. Smock Report at p.11)(emphasis added). Accordingly, Appellants' statement that the "expert witnesses agreed that there was no evidence that hydrocodone was having any effect on Ms. Westover at the time of the incident" is not accurate. (Appellants' brief at p. 26). Both Appellants and LMC retained medical experts to address the toxicology report and Ms. Westover's cause of death for the jury.[4] Appellants' arguments pertaining to the circuit court's alleged error of admitting evidence of hydrocodone as found in the toxicology report go to the weight of the evidence and the jury's task of assessing the credibility of the expert witnesses. *Fairrow v. Commonwealth*, 175 S.W.3d 601, 609 (Ky. 2005) ("judgment as to the credibility of witnesses and the weight of the evidence are left exclusively to the jury.").

In ruling that the toxicology report, including the positive hydrocodone result, was relevant and admissible, the circuit court noted that Appellants could address the issues with the hydrocodone through rigorous cross-examination of Appellees' experts. Dr. Davis acknowledged in his deposition that just because he did not see a current prescription for hydrocodone for Ms. Westover at the time of her death does not mean that it was not prescribed. (R. Vol. 22 at 3020-21). Additionally, Appellants put on testimony through their own experts in support of their contention that hydrocodone was not having any effect

[4] Appellants continue to misconstrue the report and testimony of Dr. Davis and ignore the purpose of his retention as an expert witness. In this matter, he was retained as a forensic pathologist to opine on the cause of death of Ms. Westover. Arguments premised on Dr. Davis as a toxicologist are misplaced. Dr. Smock was LMC's expert regarding Ms. Westover's impairment.

on Ms. Westover at the time of her death, and further offered the possibility that the hydrocodone in her urine could have also been the result of contamination of her oxycodone through the manufacturing process to counter the evidence of the absence of a prescription. (VR 06/18/2021 at 02:19:15 – 02:21:38 and 03:48:44 – 03:49:15).

In sum, the admission of the hydrocodone in Ms. Westover's toxicology report was not unduly prejudicial. Evidence is "unfairly" or "unduly" prejudicial if it "may cause a jury to base its decision on something other than the established propositions in the case." *Webb v. Com.*, 387 S.W.3d 319, 328 (Ky. 2012) (citations omitted). The toxicology report, including the hydrocodone result, is relevant and has probative value regarding Ms. Westover's comparative fault as well as the determination of her cause of her death. Appellants' argument with regard to the hydrocodone evidence goes to its weight and not admissibility. Both sides presented expert testimony as to the contents of the toxicology report. From this evidence, the jury could evaluate the results and determine what weight to give to the evidence. Accordingly, there was no error.

4. The circuit court did not abuse its discretion in imposing reasonable limits on Appellants' ability to cross-examine witnesses about OSHA standards

It is Appellants' contention that the circuit court erred in limiting their ability to cross-examine LMC employees regarding OSHA standards and literature to rebut the alleged implication from prior testimony that LMC followed Kentucky law and industry standards pertaining to the incident involving Ms. Westover. Trial courts have broad discretion to impose reasonable limits on the ability to cross-examine witnesses. *Newcomb v. Commonwealth*, 410 S.W.3d 63, 85 (Ky. 2013). Here, there was no error.

It must first be noted that LMC was in compliance with the laws and regulations of Kentucky at the time the incident occurred. As of August 19, 2017, the State of Kentucky

had not adopted regulations applicable to a facility such as LMC. In 2016, the Kentucky General Assembly enacted a law requiring the Kentucky Department of Agriculture (KDA) to promulgate administrative regulations for zip lines and other aerial recreational devices that are used for commercial or educational purposes, 302 KAR 17:010 titled **Requirements for operating and inspecting aerial recreational devices and facilities**. The regulation was made effective on December 7, 2017. Tour operators were required to become compliant by July 15, 2018.

Additionally, the Association for Challenge Course Technology (ACCT) is a standards authoring body focusing on aerial adventure courses and challenge courses. Unless explicitly adopted by this Commonwealth, the standards set by these bodies are non-compulsory. As previously stated, Kentucky did not adopt any regulations until 302 KAR 17:010 was made effective on December 7, 2017 and operations were not required to become compliant with the new regulation until July 15, 2018. Thus, LMC had no legal duty to comply with any or all of the ACCT standards when the incident with Ms. Westover occurred despite Appellants' assertions. Any efforts to comply were purely voluntary.[5]

The OSHA document Appellants sought to introduce was titled: Protecting Zip-Line Workers. (attached to Appellants' brief at Appendix tab 13, R. Vol. 15 at 2036-41). It lists items of what employers are required to do lessen the risk of injuries to employees in this particular type of workplace and the hazards associated therewith. Appellants sought to question LMC CR 30.02 representative, Jeremiah Heath, regarding the language, appearing similarly to a footnote, directing employers and workers to "consult ANSI/PRCA American National Standard (ANS) 1.0-.3-2014, "Rope Challenge Course

[5] LMC was a member of ACCT and had been working at the time of the subject incident bring its facility in compliance with these standards although such was not required under the law of Kentucky.

Operation & Training Standards" and "ANSI/ACCT 03-2016 Challenge Course/Zip Line Tours Standards" when selecting, evaluating and using zip-line specific safety systems." (*Id.*; *see also* VR 06/17/2021 05:02:35 - 05:10:57).

"A witness may be cross-examined on any matter relevant to any issue in the case[.]" KRE 611. Relevant evidence is "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." KRE 401. "Evidence which is not relevant is not admissible." KRE 402.

LMC employees' knowledge of OSHA standards regarding the protection of zip-line *workers* is simply not relevant or applicable to these facts. OSHA standards are directed to employers and are meant to protect employees, not customers or participants. Further, the document refers to actions that ***employers must take***, which could easily mislead the jury as to how such standards apply (or do not apply) in the instant matter, especially in light of the above explanation of absence of Kentucky laws and regulations applying to aerial recreational facilities at the time. Clearly, the document is not evidence of what standard or industry practice was at the relevant time for the reasons set forth above. The claimants in this case were not zip lining and were plainly not employees of LMC. The document was not directed to protect participants such as Ms. Westover. The evidence would only serve to confuse or mislead the jury as the issues herein do not involve an employer's selection, evaluation or use of zip-line specific safety systems in efforts to protect workers from injuries.

Appellants generalize and conflate the requirements listed in the OSHA document as well as reference to the ACCT standards in an attempt to demonstrate LMC breached a

legal duty owed to Ms. Westover. However, neither OSHA nor the ACCT standards supply the applicable standard of care as Ms. Westover was not an employee of LMC designed to be protected by measures listed in the OSHA publication and ACCT standards do not have the force and effect of the law under these facts. Appellants cannot demonstrate the circuit court abused its discretion in excluding this evidence in cross-examination of Mr. Heath.

5. The circuit court did not abuse its discretion in excluding the reading of certain portions of LMC's CR 30.02 representative's deposition transcript

Appellants' final argument is that the circuit court erred by excluding the reading of certain portions of the deposition transcript of LMC CR 30.02 corporate representative, Jeremiah Heath, to the jury at the conclusion of the Appellants' presentation of evidence. Mr. Heath served as the General Manager at LMC at the time of the incident involving Ms. Westover although he was not present at LMC when the incident occurred. (VR 06/17/2021 04:53:20 – 04:53:35 and 05:13:30 – 05:13:41). Appellants requested to read two portions of Mr. Heath's deposition into the record, p. 198, lines 19 to 23 and p. 199, lines 4 to 25. VR 6/22/2021 at 08:26:45 – 08:37:40; *see also* Appellants' Appendix Tab 14 (R. Vol. 12 at 1524). Mr. Heath was called as a witness by the Appellants and testified live at the trial on June 17, 2021 and June 18, 2021.

Defense counsel objected to the reading of Mr. Heath's deposition transcript at trial because Appellants previously had Mr. Heath on the witness stand and had his deposition transcript prior to any trial testimony taking place. Appellants had the opportunity to question Mr. Heath or refresh his recollection with his deposition transcript while he was on the stand, and they chose not to do so. (VR 06/22/2021 08:26:45 - 08:29:35). "The admissibility of testimony in a deposition introduced as evidence upon the trial of the action

is governed by the general rules of evidence." *Cox v. City of Louisville*, 439 S.W.2d 51, 55 (Ky. 1969).

Specifically with regard to the first portion of the testimony sought to be read, Appellants contend it is evidence of LMC's fault because Mr. Heath allegedly told LMC employees that they were not allowed to perform CPR. (Appellants' Appendix Tab 14 (R. Vol. 12 at 1524). This is a mischaracterization of the testimony because the two line excerpt implicates that Mr. Heath told LMC employees that they were not allowed to perform CPR on Ms. Westover; however, as stated Mr. Heath was not present at LMC at the time of the incident involving Ms. Westover. The line of questioning in the deposition was referring to ACCT standards (which do not have the force and effect of the law, but with which LMC was voluntarily making efforts to comply) and that LMC was lacking compliance with those for not having employees certified in CPR training. Employees who were not certified were instructed not to perform CPR for this reason. To allow this to simply be read to the jury without more would certainly be highly prejudicial to the Defendant.

With regard to the second portion of the testimony sought to be read by the Appellants to the jury, the circuit court observed that it had previously sustained an objection by defense counsel about the substance of the testimony. (VR 06/22/2021 at 08:28:10; R. Vol. 17 at 2411-18). Because of this, the court declined to have it read into the record to the jury at this stage and without the witness present for any cross-examination. (*Id.*). Despite this, the following exchange occurred during Mr. Heath's trial testimony:

> Counsel: Mr. Heath, in your experience as a swim coach, life guard, did you ever, uh, have to call 911 for somebody that needed CPR?

Mr. Heath: Um, I actually, I no, I did not.

Counsel: Did you ever see CPR performed on somebody?

Mr. Heath: Live CPR? No, sir.

Counsel: That's not what you told me in your deposition, is it?

Mr. Heath: I do not remember.

Counsel: Remember you telling me when I took your deposition that at a swim meet sometime some nurses had to perform CPR on somebody?

Mr. Heath: The only one I remember is some nurses taking care of a girl. They did not have to do CPR on her.

Counsel: Ok. But you know, as well as anyone, the importance of CPR training?

Mr. Heath: Yes, sir.

(VR 06/18/2021 09:34:30 – 09:35:40). The above testimony at trial was specifically objected to by defense counsel on the record prior to trial. (R. Vol. 17 at 2411-18).

Appellants argued to the court that they should have been permitted to read certain portions of the deposition transcript into evidence based upon CR 32.01(b) that "deposition testimony of a 'person designated under Rule 30.02(6) … may be used by an adverse party for any purpose.'" CR 32.01(b). Generally, CR 32.01 authorized Appellants to use the Mr. Heath's deposition, but it could and should have been used during examination of Mr. Heath himself. In fact, during Mr. Heath's trial testimony, Appellants' Counsel referred several times to Mr. Heath's deposition, including, but not limited to the above exchange. Allowing Appellants to use the deposition in the manner sought would have prejudiced

LMC as its counsel would have lacked the opportunity to clarify the testimony through cross-examination. Such deposition testimony, according to Appellants, "was on a major point in the litigation" however, when Appellants had the opportunity to question Mr. Heath on the stand regarding the specific portions of his transcript, they did not do so.

Furthermore, the legal authority cited by Appellants in support of their argument is distinguishable from the matter herein. In *Lambert v. Franklin Real Est. Co.*, 37 S.W.3d 770, 778 (Ky. App. 2000), *at the outset of their case in chief*, appellants' trial counsel sought to read portions of the deposition testimony of three witnesses. (Emphasis added). The trial court denied the request and mistakenly ruled that "the grounds down in [CR 32.01(c)] have to be met before you can do that." *Id.* at 778. The appellate court observed that CR 32.01(b) and CR 32.01(c) are independent grounds for invoking the rule, and the case was remanded; however, it was still for the trial court to determine if the witnesses qualified as persons designated under Rule 30.02(6) or 31.02(2) to which CR 32.01(b) applies. Absent from *Lambert* is any issue relating to the fact that Appellants had previously had the opportunity to question the witness on the stand regarding the deposition testimony.

In *Graves by & Through Graves v. Jones*, No. 2019-CA-0880-MR, 2021 WL 1431851, at *8 (Ky. App. Apr. 16, 2021),[6] appellants attempted to use the deposition transcript of a Defendant (a medical doctor) during the cross-examination of an expert witness relying upon CR 32.01(b) essentially to impeach the Defendant. An objection was made, the trial court sustained the objection and excluded the evidence. The appellate court affirmed the trial court's ruling observing that the rule, CR 32.01, generally authorized the

[6] A full and complete copy of this opinion in attached hereto in accordance with CR 76.28(4)(c). *See* Appendix A.

use of depositions, but not specifically in the manner sought (in *Graves*, during cross-examination of a non-party, expert witness), and further, as the testimony was being offered to impeach the Defendant whose transcript was being used, the appropriate use of that deposition was during the examination of that Defendant. *Id.* Otherwise, as the court observed, "use of the deposition in this manner would have prejudiced [the Defendant] as his counsel would have lacked the opportunity, unless leave was granted, to rehabilitate him." *Id.* The reasoning in *Graves* is equally applicable in this matter. The opportunity to utilize the deposition transcript of Mr. Heath was while he was on the stand, notwithstanding the objections sustained by the court at his trial testimony. Accordingly, the circuit court's ruling was based upon sound legal principles, and therefore, must be affirmed.

CONCLUSION

For the above reasons, LMC respectfully requests this Court affirm the rulings of the Jefferson Circuit Court.

Respectfully Submitted,

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NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

Justin GRAVES, a Minor BY AND THROUGH His Parents, and Next Friends, Jenyce GRAVES and Michael Graves, Appellant

v.

Landon A. JONES, M.D.; John-Michael McGaugh, D.O.; and University of Kentucky Medical Center (d/b/a UK Healthcare d/b/a University of Kentucky Hospital A.B. Chandler Medical Center d/b/a U.K. Medical Center), Appellees

NO. 2019-CA-0880-MR

APRIL 16, 2021; 10:00 A.M.

APPEAL FROM FAYETTE CIRCUIT COURT, HON. JOHN E. REYNOLDS, JUDGE, ACTION NO. 16-CI-02334

Attorneys and Law Firms

BRIEF FOR APPELLANT: William R. Garmer, Jerome P. Prather, Lexington, Kentucky.

BRIEF FOR APPELLEES: Edmund J. Benson, Stephen F. Soltis, Lexington, Kentucky.

BEFORE: ACREE, CALDWELL, AND LAMBERT, JUDGES.

OPINION

ACREE, JUDGE:

***1** Appellant, Justin Graves, by and through his parents, Jenyce and Michael Graves, appeal from a judgment on jury verdict entered in favor of Appellees Dr. Landon Jones and Dr. John-Michael McGaugh (collectively, "the doctors"). Graves further appeals the Fayette Circuit Court's October 5, 2016 order dismissing its complaint against Appellees University of Kentucky Medical Center ("UKMC") and University of Kentucky ("UK") (collectively "the UK Defendants") based on governmental immunity. After careful review, we affirm.

FACTS AND PROCEDURAL HISTORY

On June 28, 2015, Graves began complaining to his mother of a headache and loss of appetite. Graves' condition worsened. On July 1, 2015, he was treated by a private physician, Dr. William Revelette. Graves was diagnosed with a probable viral infection and sent home. In the subsequent days, Graves' health deteriorated. On July 3, 2015, he was treated by Dr. Jennifer Wilson. Dr. Wilson noted Graves showed symptoms suggestive of a bacterial infection. Upon her recommendation, Graves was immediately taken to the University of Kentucky Pediatric Emergency Department ("UK PED").

Dr. Jones was the attending physician at UK PED and Dr. McGaugh was a resident physician under his supervision when Graves arrived. Graves' mother informed registration that his chief complaint was a bacterial infection. Dr. Jones testified he remembered examining Graves during triage to ensure there was no emergency, which was part of normal triage. The examination lasted approximately 3-5 minutes. Graves was then transferred to an examination room, where he was treated further by Dr. McGaugh. The parties dispute the amount of time Dr. Jones spent examining Graves after triage.

Both Dr. Jones and Dr. McGaugh testified they found no signs of a bacterial infection. Rather, they concluded his symptoms were consistent with a viral infection. Graves was discharged approximately three hours after arriving at UK PED. He was prescribed Zofran and instructed to return if his condition worsened.

Graves' mother testified that the following day, his condition had worsened to the extent he was unable to dress himself and could barely talk. Graves was brought back to UK PED on July 5, 2015. A lumbar puncture and MRI was performed. The tests revealed Graves was suffering from a bacterial infection in his sinuses, which was later determined to be Streptococcus anginosus. Graves was scheduled to undergo emergency surgery the following day, however, by this point, he had already suffered multiple strokes resulting in severe injuries.

Graves filed a complaint, sounding in medical negligence, against Dr. Jones and Dr. McGaugh. It stated further claims against the UK Defendants. The UK Defendants moved to dismiss based on the doctrine of governmental immunity. The circuit court granted the motion. The doctors answered the complaint, denying all allegations of negligence. They also asserted the affirmative defense of comparative negligence, premised on Graves' parents delay in returning him to UK PED. The doctors testified in deposition supporting their allegation. [1]

***2** Approximately one month before the original trial date, [2] the doctors moved to amend their answer, seeking to withdraw the comparative negligence defense. They argued the depositions of their own expert witnesses revealed the delay in returning Graves to UK PED had no effect on his injury and, therefore, the defense was no longer viable. Graves opposed the motion. Upon hearing both sides, the circuit court granted the motion. It also excluded the parties from introducing testimony placing fault on Graves' parents, specifically the pre-trial statements made by the doctors, because the withdrawal of the comparative negligence defense rendered it irrelevant. Subsequently, the doctors filed supplemental answers to interrogatories, noting that upon review of expert depositions, they did not believe Graves' parents contributed to his injury.

Trial was held from April 15, 2019 through April 25, 2019. The parties presented conflicting expert testimony as to whether the doctors' treatment of Graves met the appropriate standard of care and whether Graves' injuries could have been prevented. The jury found in favor of the doctors. This appeal followed.

On appeal, Graves alleges multiple points of error. He asserts the circuit court erred by: (1) allowing the doctors to amend their answer and by excluding the doctors pre-trial statements placing fault on his parents; (2) requiring counsel to conduct *voir dire* of the entire venire at once; (3) allowing his triage nurse, Jamie Davenport, to offer undisclosed expert testimony; (4) permitting the doctors to call an undisclosed witness, James Daniel Moore, M.D.; (5) permitting Roger Humphries, M.D. to give expert testimony; (6) prohibiting him from cross-examining Dr. Humphries with deposition testimony of other doctors; and (7) dismissing his complaint against the UK Defendants on grounds of governmental immunity. We will address each issue in turn.

ANALYSIS

The circuit court did not err by granting the doctors' motion to amend.

"[T]he decision to grant or deny leave to amend is ultimately left to the discretion of the trial court, which will not be disturbed absent an abuse of that discretion." *Nami Res. Co., L.L.C. v. Asher Land & Mineral, Ltd.*, 554 S.W.3d 323, 343 (Ky. 2018). Discretion is abused when found to be "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

CR [3] 15.01 details when a party may amend pleadings:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

CR 15.01. Because the doctors moved to amend their answer well after the timeframe allowing them to amend as a matter of right, the circuit court was required to grant leave so long as justice required. In determining whether "justice so requires," we consider several factors, including "timeliness, excuse for delay, and prejudice to the opposite party." *Lawrence v. Marks*, 355 S.W.2d 162, 164 (Ky. 1961). And, we recognize that "delay alone is insufficient reason to deny a motion to amend." *Adkins v. Kirby Contracting, LLC*, No. 2016-CA-001545-MR, 2019 WL 1870691, at *4 (Ky. App. Apr. 26, 2019), *review denied* (Ky. Oct. 24, 2019) (citation omitted).

Graves first asserts he was prejudiced by the amendment, because he exerted significant time and effort in exploring and

preparing to defend against comparative negligence. We have no cause to doubt counsel spent substantial time exploring this defense; however, this does not establish prejudice to Graves' case. Stated otherwise, the time counsel spent did not prejudice his client's efforts to establish the merits of his own case. Neither did his opponent's decision after investigation and discovery, to abandon a defense. Doing so removed an obstacle, allowing focus on establishing the alleged tortfeasors' negligence rather than disproving that of the parents.

***3** He next asserts "[i]t was unfair for [the doctors] to develop the entire case blaming [Graves' parents] for their son's injuries, and then withdraw the defense on the eve of trial when even their own experts did not support their claims." Graves notes the doctors filed their answer, asserting comparative negligence, in August 2016, but didn't seek to withdraw the defense until September 2018, one month before trial.

Although there is evidence suggesting the doctors could have removed their comparative negligence defense at an earlier stage of litigation, there is also evidence suggestive of an excuse for the delay. Discovery of expert witnesses was scheduled to be completed by August 7, 2018, slightly one month before the motion to amend. Although many of their experts rejected the defense prior to the end of discovery, the doctors retained the right to investigate the defense up until the closing. Regardless, we find any untimeliness in moving to amend did not amount to an abuse of discretion.

Graves relies on *Lawrence v. Marks*, 355 S.W.2d 162 (Ky. 1961) and *Hedges v. Neace*, 307 S.W.2d 564 (Ky. 1957) to support his position. In *Lawrence*, the defendant waited six months before moving to amend his complaint, raising the issue of capacity to sue. 355 S.W.3d at 163. That court held it was an abuse of discretion to allow the amendment, because the defendant deliberately waited until the statute of limitations had run before seeking leave to raise the defense, greatly prejudicing the plaintiff. *Id.* at 164. In *Hedges*, the defendant moved to amend his answer to introduce a new issue after trial had already commenced. 307 S.W.2d at 567. That court held it was not an abuse of discretion for the trial court to deny the motion to amend. *Id.* at 568.

Two distinctions can be drawn between the case at bar and the cases relied upon by Graves. First, in both cases, the moving parties sought to introduce a new issue. Here, the doctors did not attempt to introduce an issue, but to eliminate one. Second, the parties in *Lawrence* and *Hedges* were greatly prejudiced by the delay in moving to amend. As noted, Graves did not suffer any prejudice by either the amendment itself or the timing of the amendment. The circuit court did not abuse its discretion by granting the doctors leave to amend.

Next, Graves asserts the circuit court erred by not allowing him to impeach physicians with their prior deposition testimony suggestive of the parents' negligence in delaying Graves' return to the hospital. Specifically, he contends the "pretrial change in sworn testimony by [the doctors] is directly relevant to [their] credibility." Graves cites *King v. Commonwealth*, which notes "[w]itness credibility is always at issue and relevant evidence which affects credibility should not be excluded." 276 S.W.3d 270, 275 (Ky. 2009). He also relies on *Baker v. Kammerer*, "[t]he credibility of a witness' relevant testimony is always at issue and the trial court may not exclude evidence that impeaches credibility even though such testimony would be inadmissible to prove a substantive issue in the case." 187 S.W.3d 292, 295 (Ky. 2006) (citation omitted). We find these cases work against Graves.

King and *Baker* both stand for the proposition that witness credibility on relevant issues are always at issue. Here, once the comparative negligence defense was removed, the primary question remaining for the jury was whether the doctors deviated from the appropriate standard of care. Any statement placing fault on Graves' parents became irrelevant, as it had no tendency to prove or disprove a deviation from the standard of care. Based upon the authorities cited by Graves, the credibility of a witnesses' irrelevant testimony is not at issue.

***4** Relevant here is the collateral facts doctrine which states, "It is generally recognized that a witness may not be impeached with respect to a matter which is irrelevant and collateral to the issues in the action." *Simmons v. Small*, 986 S.W.2d 452, 455 (Ky. App. 1998) (citation omitted); *see Campbell v. Commonwealth*, No. 2006-SC-000931-MR, 2009 WL 737004, at *5 (Ky. Mar. 19, 2009). "A matter is considered collateral if 'the matter itself is not relevant in the litigation to establish a fact of consequence, *i.e.*, not relevant for a purpose other than mere contradiction of the in-court testimony of the witness.' " *Simmons*, 986 S.W.2d at 455 (quoting *United States v. Beauchamp*, 986 F.2d 1, 4 (1st

Cir. 1993)). This doctrine is consistent with the authorities relied upon by Graves.

We understand Graves' argument to be that the doctors were lying in deposition when they said the parents' delay in returning Graves to the hospital contributed to his injuries and, therefore, they were partly to blame. We cannot agree with this interpretation. The deposition testimony memorialized the opinions of the deponents when they had yet to read the opinions of their own expert witnesses, after which, their opinions changed. A change in opinion does not amount to a "lie" which questions a witness's truthfulness. We discern no abuse of discretion regarding this ruling by the circuit court.

The circuit court did not err by conducting voir dire of the entire venire at once.

Graves next argues he was prejudiced when the circuit court required the parties to conduct *voir dire* of the entire venire at once. Graves did not preserve this issue for appeal but requests palpable error review pursuant to CR 61.02. To warrant relief under CR 61.02, Graves must convince this Court his substantial rights were impacted by a decision of the circuit court that was so palpably erroneous that a manifest injustice was the result. *Fraley v. Rice-Fraley*, 313 S.W.3d 635, 641 (Ky. App. 2010); CR 61.02. Even then, "if, upon consideration of the whole case, a substantial possibility does not exist that the result would have been different, the error will be deemed nonprejudicial." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006) (quoting *Graves v. Commonwealth*, 17 S.W.3d 858, 864 (Ky. 2000)).

In this case, a venire of approximately 71 potential jurors was assembled. *Voir dire* was conducted of the entire group. Graves asserts the result was that:

> numerous potential jurors never spoke, and many jurors were seated so far from counsel that it was impossible to examine their body language and other reactions. In addition, because jurors who would be eventually struck for cause remained on the venire even after making statements that led to their eventual dismissal, Plaintiffs needlessly spent additional time during *voir dire* on these jurors. That time could have been spent exploring the biases of jurors who did not speak or rarely responded. The end result was that Plaintiffs were forced to exercise their peremptory strikes among potential jurors about whom they knew little.

It is Graves' contention that the circuit court should have followed the jury selection process of the Kentucky Rules of Criminal Procedure which require the clerk to "draw from the jury box sufficient names of the persons selected and summoned for jury service to compose a jury as required by law. If one or more of them is challenged, the clerk shall draw from the box as many more as are necessary to complete the jury." RCr [4] 9.30(1)(a).

***5** In civil cases, "[i]t is well established that the trial court has broad discretion in conducting voir dire." *Reece v. Nationwide Mut. Ins. Co.*, 217 S.W.3d 226, 232 (Ky. 2007). This being a civil case, the circuit court was not obligated to follow the criminal rules. Unquestionably, what Graves describes does not constitute palpable error leading to a manifest injustice.

Graves' reliance on the circumstances and legal analysis in a criminal case, *Oro-Jimenez v. Commonwealth*, 412 S.W.3d 174 (Ky. 2013), has no persuasive value in our review of this civil case. Furthermore, we believe there is no substantial likelihood that a different *voir dire* process would have changed the makeup of the jury which found in favor of Dr. Jones by a margin of 10 to 2, and in favor of Dr. McGaugh by a margin of 11 to 1. We find no manifest injustice.

The circuit court did not err by allowing Jamie Davenport to give testimony regarding the electronic medical record audit log.

A key factual dispute at trial was the amount of time spent by, and involvement of, Dr. Jones in treating Graves after triage. In support of their respective positions, both parties used the audit log produced by UKMC's medical record system, which timestamped when UKMC employees accessed Graves' medical record during his time at UK PED.

The audit log was introduced by the doctors during their cross-examination of Jamie Davenport. Davenport testified she was the triage nurse on duty when Graves initially visited UK PED. Since then, she was appointed Chair of the Evidence-Based Practice Counsel, which deals extensively with reviewing the electronic medical record system, including the audit log. To help the jury understand the audit log, Davenport first explained it. She further explained what each category in the audit log meant, *i.e.*, patient medical record number, date, time, and username.

Graves objected to Davenport's testimony. He relied on a pre-trial order which stated "treating physicians not named as experts will be limited in their testimony to factual findings as treating physicians. Testimony, and records custodians shall be limited to authentication of records." And, because Davenport was listed only as a fact witness in this case, Graves argued her testimony should be limited to her treatment of him. The circuit court overruled his objection, based on the doctors' representation they were only questioning Davenport on the entries made during triage.

Davenport testified regarding the times UK PED employees accessed Graves' medical record. Based on these entries, she testified Graves entered triage at some point between 4:02 and 4:11 p.m. She further noted that she accessed Graves' record at 4:14 p.m. and entered into the system information she gathered during triage. Next, she testified that Patricia Ward accessed Graves' record at approximately 4:27 p.m. Because Ward's duties include transferring patients from triage to their hospital bay, she concluded it was highly likely Graves was in triage from sometime between 4:02 and 4:27 p.m. She also testified, during this time, Dr. Jones accessed Graves' record on multiple occasions and entered an order. She did not testify as to the course of Dr. Jones's treatment or what he ordered.

On appeal, Graves asserts the circuit court erred by allowing Davenport to testify regarding the audit log. "[W]e review a trial court's evidentiary determinations for abuse of discretion[.]" *Mason v. Commonwealth*, 559 S.W.3d 337, 339 (Ky. 2018).

***6** The purpose of the pre-trial order upon which Graves relies was to prevent fact-witness physicians and other medical professionals from offering opinion testimony as though an expert witness. That is, they were prohibited from offering standard-of-care or causation opinion testimony. It did not limit the facts to which a fact witness could testify. KRE [5] 602 allows fact witnesses to testify about matters within their personal knowledge.

Here, Davenport testified that as Chair of the Evidence-Based Practice Counsel she regularly reviews UKMC's medical record system, including the audit log. Also, as a former UKMC nurse, using this software was part of her job duties. Therefore, she has personal knowledge about the audit trail and was able and authorized by the circuit court to convey her factual knowledge to the jury.

There is no suggestion that she expressed an opinion beyond her knowledge such as whether Dr. Jones conducted a thorough examination. Rather, she described a time frame, based on her entry and the entry of others, and testified to facts within and not beyond the scope of her knowledge. We find no abuse of discretion by the circuit court.

The circuit court did not err by permitting James Daniel Moore, M.D. to testify.

Several months before trial, on February 8, 2019, Graves returned to UK PED suffering from symptoms like those he experienced in July 2015. He was treated by Dr. James Daniel Moore. Dr. Moore's initial evaluation of Graves determined that he had a viral infection. He testified that he consulted with Dr. Jones, an attending physician that day, who recommended he review Graves' medical record. Upon review, Dr. Moore admitted Graves to the hospital. It turned out that Graves was again suffering from a bacterial infection like his initial infection. Graves filed a motion *in limine* to exclude medical records related to his February 2019 hospitalization as irrelevant. The circuit court denied the motion.

On April 22, 2019, the day prior to the doctors presenting their case-in-chief, they informed the court they intended to call Dr. Moore. Dr. Moore was not specifically listed on their witness list. However, their witness list did include a "catchall" provision that included "[a]ny and all medical providers not previously listed by" either party. Graves objected, and the doctors asserted Dr. Moore's testimony was rebuttal in nature. The circuit court ruled that his testimony was not rebuttal in nature but allowed Dr. Moore to testify about his medical care of Graves on February 8, 2019.

On appeal, Graves first argues the circuit court abused its discretion by allowing Dr. Moore to testify, substantially prejudicing his case. To support his position, Graves argues

he had no opportunity to prepare or address Dr. Moore's testimony because Graves' February 8, 2019 medical episode occurred after discovery had closed. He also asserts nothing in Graves' medical records relating to the February appointment indicated Dr. Moore spoke to Dr. Jones about Graves' treatment. In addition, he contends this testimony "presented [Dr. Jones] as a hero who kept [Graves] from being improperly discharged" and the testimony "bolstered [the doctors] position that [Graves] previous infection was not susceptible to diagnosis on July 3, 2015."

The underlying "[d]iscovery matters such as this that 'come within the discretion of the trial court ... do not amount to reversible error unless there is an abuse of discretion and substantial prejudice.' " *Dornbusch v. Miller*, No. 2011-CA-001354-MR, 2013 WL 4710327, at *6 (Ky. App. Aug. 30, 2013) (quoting *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450, 1466 (6th Cir. 1993)). We are not persuaded that Graves was prejudiced by the ruling.

*7 First, it was within the discretion of the circuit court to allow Dr. Moore to testify about his February treatment. We cannot doubt the testimony was relevant. Graves had knowledge of the hospitalization for over two months before trial and had the opportunity to review the hospitalization records. We cannot say he was prejudiced simply by the circuit court allowing the treating physician to testify about his care of Graves. This is especially so when Graves could have presented the February hospitalization records to his experts to form opinions as to Dr. Moore's treatment of Graves. Although the hospitalization records may not have put him on notice of the conversation between Dr. Moore and Dr. Jones, Dr. Jones testified as to this conversation during the trial. Therefore, any testimony by Dr. Moore that tended to depict Dr. Jones as a "hero" is merely cumulative.

Graves also asserts the doctors were operating in bad faith when they failed to disclose Dr. Moore as a witness. *See Peyton v. Commonwealth*, 253 S.W.3d 504, 512 (Ky. 2008). Specifically, he contends at a pre-trial hearing on March 7, 2019, the doctors argued for the exclusion of the February 2019 hospitalization records, which led him to believe Dr. Moore's treatment would not be an issue. But, at two subsequent pre-trial hearings, one twelve days before trial, they changed course and argued that the records should be admitted. Graves argues their failure to disclose Dr. Moore after the records were ruled admissible constituted bad faith. We disagree.

A mere change in trial strategy alone does not constitute bad faith. Nor does the fact that they failed to disclose the witness until the day before he testified. The doctors contend they decided to call Dr. Moore simply to rebut testimony of Graves' mother. Although the circuit court found the nature of the testimony was not rebuttal, Dr. Moore was still allowed to testify. We fail to see evidence supporting a conclusion that the doctors purposefully failed to notify Graves to gain an unfair advantage. Again, we discern no abuse of discretion by the circuit court.

The circuit court did not err by permitting Roger Humphries, M.D. to testify as to facts within his personal knowledge.

Dr. Humphries was an attending physician on July 5, 2015, when Graves returned to UK PED. He is the Chair of Emergency Medicine at UKMC. In addition to his clinical duties, he is responsible for overseeing the operations of all emergency physicians, resident physicians, and advance practice providers. He was listed only as a fact witness for the doctors.

An issue at trial was whether Dr. McGaugh, a resident physician, had the authority to order such procedures as CT scans, x-rays, lumbar punctures, IV antibiotics, IV fluids, etc. Dr. Humphries testified about the structure of the medical center, specifically how attending physicians supervise resident physicians and advance practice providers. He further testified that resident physicians do not have authority to order tests with significant consequences. Instead, it is the attending physicians who have such authority.

Graves objected. His basis, again, was the pre-trial order limiting treating physician's testimony to factual findings as a treating physician. The circuit court overruled the objection.

As noted above, the purpose of the pre-trial order was to eliminate the risk of fact-witness physicians from testifying as experts. That purpose was not run afoul here. Dr. Humphries, as a practicing clinician and Chair of Emergency Medicine at UK, oversees all attending and resident physicians. Therefore, he has personal knowledge regarding the structure and interactions of the doctors. He also has personal knowledge of resident physician authority to order tests. It was well within the circuit court's discretion to allow this testimony, regardless of the pre-trial order Graves relies upon. We find no abuse of discretion.

The circuit court did not err by prohibiting Graves from cross-examining Dr. Humphries with deposition testimony of Dr. McGaugh.

***8** During the cross-examination of Dr. Humphries, Graves attempted to introduce the following deposition testimony of Dr. McGaugh to impeach his testimony regarding resident physicians' authority to order certain tests:

> Q. And I understand you will say you could not [order an IV] because to put an order in would require a physician-
>
> A. No, I can put an order in because I am a physician. But I can't put an order in to admit a patient because I'm not in the admission capacity as the physician there. I can order lab work, I can order medications, things like that, IV fluids.
>
> Q. Could you have ordered an antibiotic for [Graves]?
>
> A. Yes.

The doctors objected. The circuit court sustained the objection.

Graves asserts it was reversable error to prohibit him from introducing the deposition. He relies on CR 32.01(b), which states, "The deposition of a party ... may be used by an adverse party for any purpose." Graves is correct that depositions may be used for any purpose; however, CR 32.01 does not stand for the proposition that it can be used against any witness. CR. 32.01 states:

> At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, ***may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof***, in accordance with any of the following provisions:
>
> (a) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of ***deponent as a witness***.
>
> (b) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30.02(6) or 31.01(2) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

CR. 32.01(a)-(b) (emphasis added).

Dr. Humphries is not a party to this action, nor is there any indication he was represented at the time of the deposition or put on notice. Generally, CR 32.01 authorized Graves to use the deposition, but it specifically did not authorize its use during the cross-examination of Dr. Humphries. If Dr. McGaugh's deposition was to be employed to impeach someone, it could and should have been used during examination of Dr. McGaugh himself. Allowing Graves to use the deposition in this manner would have prejudiced Dr. McGaugh as his counsel would have lacked the opportunity, unless leave was granted, to rehabilitate him.

Additionally, Graves alleges "[t]he deposition testimony of Dr. McGaugh, a party, was directly contradictory to the testimony of [Dr. Humphries]." This suggests its use as impeachment. However, impeachment requires presentation of inconsistent statements by the same witness. *See* KRE 801A. Graves cannot use the testimony of one witness to impeach that of another. The circuit court did not abuse its discretion.

The circuit court appropriately dismissed UK and UKMC based on government immunity.

Lastly, Graves appeals the dismissal of his complaint against the UK Defendants based on governmental immunity. A trial court's decision to grant governmental immunity is a pure question of law, which we review *de novo*. *Jacobi v. Holbert*, 553 S.W.3d 246, 252 (Ky. 2018).

***9** "[G]overnmental immunity is the public policy, derived from the traditional doctrine of sovereign immunity, that limits imposition of tort liability on a government agency." *Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001) (internal quotation marks and citations omitted). It is well established that "state universities of this Commonwealth, including the University of Kentucky, are state agencies that enjoy the benefits and protection of governmental immunity except where it has been explicitly waived by the legislature." *Furtula v. Univ. of Kentucky*, 438 S.W.3d 303, 305 (Ky. 2014); *see* KRS 49.070. There is no doubt UK is protected by governmental immunity. However, Graves primarily contends UKMC is not entitled to governmental immunity,

and, it appears they are asserting, this defeats UK's immunity. We disagree.

The seminal case of *Withers v. University of Kentucky*, 939 S.W.2d 340 (Ky. 1997) guides our decision. In *Withers*, the plaintiff brought a wrongful death claim against UK, based on the alleged negligence of its physicians. Our Supreme Court addressed in part, "whether the University of Kentucky is entitled to immunity from claims of medical negligence at its medical center[.]" *Id.* at 342. The court ruled it was. Although *Withers* didn't specifically state UKMC is entitled to immunity, this court has consistently held *Withers*' holding cloaks both UK and UKMC with immunity. *See Charash v. Johnson*, 43 S.W.3d 274, 276 (Ky. App. 2000) ("This issue has been settled by the Supreme Court, which held in *Withers* ... that UKMC enjoys sovereign immunity."); *Garrison v. Leahy-Auer*, 220 S.W.3d 693, 699 (Ky. App. 2006) ("UKMC is entitled to governmental immunity in this case based on our Supreme Court's holdings in *Yanero* and *Withers*, as the functions of the UKMC in question were governmental.").

Relying on *dicta* from our Supreme Court, Graves urges us to revisit the holding in *Withers*. *Branham v. Rock*, 449 S.W.3d 741, 752 (Ky. 2014) (noting there may come a time for our courts to revisit *Withers*). Graves correctly points out that since *Withers* was decided, our Supreme Court has "recast" the analysis for governmental immunity. Traditionally, courts applied the two-prong test articulated in *Kentucky Center for the Arts Corporation v. Berns* to determine whether an entity is protected by governmental immunity. 801 S.W.2d 327 (Ky. 1990), *abrogated by Comair, Inc. v. Lexington-Fayette Urban Cty. Airport Corp.*, 295 S.W.3d 91 (Ky. 2009). Under that test, the court had to determine whether the entity claiming immunity (1) acts under the "direction and control of the central state government"; and (2) is "supported by monies which are disbursed by authority of the Commissioner of Finance out of the State treasury." *Id.* at 331.

However, in *Comair*, our Supreme Court lessened the significance of the "*Berns*" test. It held, "[t]he more important aspect of *Berns* is the focus on whether the entity exercises a governmental function, which [*Berns*] explains means a 'function integral to state government.' " *Comair*, 295 S.W.3d at 99 (citation omitted).

Graves believes UKMC does not provide integral state functions, but rather proprietary functions, because it "sells a service in a competitive private marketplace, and hospitals exist without any affiliated public institution." We disagree. This very argument is not new. Others have claimed:

> the University of Kentucky Medical Center is nothing more than a hospital which is in full competition with and performs the same function as private hospitals. As such, they argue that in this respect, the University should be stripped of its immunity.
>
> The answer to this contention is simple. The operation of a hospital is essential to the teaching and research function of the medical school.

***10** *Yanero*, 65 S.W.3d at 521 (quoting *Withers*, 838 S.W.2d at 343).

Our Supreme Court echoed this principle in a decision rendered after *Comair*, noting in *Withers*, it held "notwithstanding the fact that the University of Kentucky Medical Center competes with private hospitals, its essential role in the teaching mission of the University of Kentucky College of Medicine rendered its activities governmental." *Breathitt Cty. Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009). If anything, "this 'refocused' approach only strengthens the decision in *Withers*[.]" *Pauly v. Chang*, 498 S.W.3d 394, 403 (Ky. App. 2015). We agree with the circuit court that UK and UKMC enjoy governmental immunity.

Relying on KRS 45A.245, Graves next asserts immunity was waived when Graves' parents signed a consent form. We disagree. KRS 45A.245(1) states, "Any person, firm or corporation, having a lawfully authorized written contract with the Commonwealth ... may bring an action against the Commonwealth ***on the contract***, including but not limited to actions either for breach of contracts or for enforcement of contracts or for both." (Emphasis added.) KRS 45A.245 does not waive immunity in respect to tort claims.

Finally, Graves asserts he was prejudiced due to the early dismissal of UK because he was unable to conduct discovery on his direct liability claims against the University. It is well established "immunity entitles its possessor to be free 'from the burdens of defending the action, not merely ... from liability.' " *Prater*, 292 S.W.3d at 886 (quoting *Rowan Cty. v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006)). This includes "protection against the cost of trial and the burdens

of broad-reaching discovery[.]" *Lexington-Fayette Urban Cty. Gov't v. Smolcic*, 142 S.W.3d 128, 135 (Ky. 2004) (internal quotation marks and citation omitted). Therefore, the circuit court properly dismissed the claims against UK and UKMC.

CONCLUSION

Based on the foregoing, we affirm the jury verdict judgment in favor of the doctors. We also affirm the Fayette Circuit Court's October 4, 2016 order dismissing UK and UKMC on grounds of governmental immunity.

ALL CONCUR.

All Citations

Not Reported in S.W. Rptr., 2021 WL 1431851

Footnotes

1 Dr. McGaugh testified in deposition, "I think I should start by saying that I don't think that what has happened to Justin Graves is anyone's fault. If the question is was there negligence involved in the case then I would say that the only negligence that I've seen is failure to follow discharge instructions by the parents after discharge from the emergency room." Dr. Jones testified, "His situation is terrible, but I do believe that a delay could have potentially made a worse outcome."

2 Trial was originally set in October, however, a mistrial was declared for failure to seat a jury.

3 Kentucky Rules of Civil Procedure.

4 Kentucky Rules of Criminal Procedure.

5 Kentucky Rules of Evidence.

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