

COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
NO. 2012-SC-000707-D

IRA BRANHAM, INDIVIDUALLY AND AS
ADMINISTRATOR OF THE ESTATE OF
PEGGY BRANHAM, DECEASED

MOVANT/APPELLANT

vs. ON APPEAL FROM THE KENTUCKY COURT OF APPEALS
CASE NO. 2010-CA-2292 & 2011-CA-0028
FAYETTE CIRCUIT COURT NO. 08-CI-1856

TROY C. ROCK, M.D., ET AL.

RESPONDENTS/APPELLEES

BRIEF FOR MOVANT/APPELLANT

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CERTIFICATE OF SERVICE

This is to certify that pursuant to CR 76.12 a true and correct copy of the Brief for Movant/Appellant has been served by mailing same to: Kentucky Court of Appeals, Samuel P. Givens, Jr., Clerk, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Pamela R. Goodwine, Judge, 4th Division, Fayette Circuit Court, 382 Robert F. Stephens Courthouse, 120 North Limestone Street, Lexington, Kentucky 40507; and Hon. Bradley A. Case, Dinsmore & Shohl, LLP, 101 South Fifth Street, Suite 2500, Louisville, Kentucky 40202 on this the 9th day of August, 2013.


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INTRODUCTION

This is a medical negligence case in which the Plaintiff, Ira Branham, appeals from a Judgment entered in favor of the Defendant physicians because of a number of errors related to the exclusion of evidence, failure to limit witnesses and errors in the application of the law pertaining to jury instructions and sovereign/governmental immunity. The Kentucky Court of Appeals rendered a “not to be published” Opinion affirming the Judgment of the trial court.

STATEMENT CONCERNING ORAL ARGUMENT

Movant/Appellant respectfully requests the Court to grant oral argument because this appeal addresses significant and somewhat unsettled questions in the law of the Commonwealth relating to evidentiary issues, sovereign/governmental immunity and jury instructions that need clarification and further consideration. Accordingly, oral argument might assist the Court in writing an Opinion which would be of great benefit to lawyers faced with similar issues.

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STATEMENT OF THE CASE

At approximately 4:00 p.m. on April 24, 2007, Mrs. Peggy Branham (hereinafter "Peggy") was involved in a single vehicle collision as an unrestrained passenger in a pick-up truck driven by her husband, Ira Branham (hereinafter "Branham"). (Record, p. 839). The airbags deployed and Peggy hit her head on the windshield, lost consciousness and had to be extricated from the vehicle by Fire and EMS personnel. (Joint Trial Ex. 1). Peggy was transported via Montgomery County EMS to Mary Chiles Hospital in Mount Sterling and was initially treated by Regina Forster, M.D. at approximately 4:50 p.m. (Joint Trial Ex. 1). Based upon the mechanism of injury, Dr. Forster ordered Peggy to undergo a CT scan of her head and neck. (Joint Trial Ex. 1). Laboratory tests were also ordered. (Joint Trial Ex. 1). The CT scan which was interpreted by A. David Westerfield, M.D. showed a moderate to large pleural effusion in Peggy's left lung apex. (Joint Trial Ex. 1). A pleural effusion is a collection of fluid that could be blood. After receiving this report along with abnormal laboratory results and abnormal blood pressure readings following the administration of IV fluids, Dr. Forster contacted the University of Kentucky Medical Center (hereinafter "UKMC") and spoke with Dr. Shane O'Keeffe. (Joint Trial Ex. 1). Dr. O'Keeffe accepted Peggy on behalf of UKMC as a "trauma transfer." (Joint Trial Ex. 1).

Peggy was flown by a Lifenet helicopter from Mary Chiles Hospital to UKMC, leaving at 7:00 p.m. and arriving at UKMC at 7:41 p.m. (Joint Trial Ex. 3). She did not arrive in the emergency room until twenty minutes later at 8:01 p.m. (Joint Trial Ex. 2). Upon admission, Peggy was noted to have leg and hip pain which ranked a five out of ten on the pain scale. (Joint Trial Ex. 2). Peggy was treated by the attending emergency

room physician that night, Troy Rock, M.D. (hereinafter "Rock"), and a resident, Larry Britt, M.D. (hereinafter "Britt"). Although laboratory work was reordered, neither Rock nor Britt ordered a CT scan of Peggy's chest. (Joint Trial Ex. 2). Instead, they ordered that a chest x-ray be taken. (Joint Trial Ex. 2). The x-ray was ordered at 8:20 p.m., but not taken until 9:22 p.m. (Joint Trial Ex. 2).

The radiology resident on duty, Jason Keszler, D.O. (hereinafter "Keszler"), reported the chest x-ray at 11:00 p.m. as follows:

"blunting to the left costophrenic angle which may be secondary to pleural effusion or scarring. There is an approximate 3.5 cm mass-like density in the left lower lobe which is worrisome for neoplasm. CT of the chest is recommended for further evaluation." (Joint Trial Ex. 2).

The attending radiologist, Calixto Pulmano, M.D. (hereinafter "Pulmano"), during his over-read of Peggy's x-ray the next day, added that there was a "left lower lobe atelectasis with left lower lobe collapse." (Joint Trial Ex. 2). Although Britt and Rock had knowledge that Peggy was transferred as a trauma surgery expect, had been involved in a motor vehicle collision with mild head injury, and had a suggestion of internal trauma and bleeding as evidenced by their respective notes, no CT scan was conducted of Peggy's chest while she was at UKMC, nor was a trauma surgery consult ordered. (Joint Trial Ex. 2). Both Rock and Britt had knowledge that a pleural effusion was found on the CT at Mary Chiles. (Joint Trial Ex. 2). Furthermore, the laboratory results received by Britt and Rock were suggestive of internal trauma. During Peggy's treatment while at UKMC, Branham, who had arrived separately from Peggy, pleaded with Rock and Britt to keep her at the hospital overnight.

A decision was made that Peggy "was most likely cleared" from a "trauma standpoint," and she was subsequently discharged from the emergency room at 10:35

p.m. (Joint Trial Ex. 2). She was told to follow up with her primary care physician within a week regarding the discovery of possible lung cancer (even though Peggy was a non-smoker), based upon Keszler's read of the x-ray, and diabetes (even though Peggy had never been diagnosed with diabetes). (Joint Trial Ex. 2).

On April 26, 2007, approximately thirty-six hours following her discharge from UKMC, Peggy passed away at home. (Plaintiff's Trial Ex. 1). The testimony at trial revealed that Peggy had suffered great pain from the time she left UKMC until her death. In order to determine the cause of her untimely and avoidable death, the Kentucky Medical Examiner, John C. Hunsaker, III, M.D., conducted an autopsy. Dr. Hunsaker concluded that Peggy passed away because she experienced a transection of her descending aortic arch which was caused by blunt force trauma to her chest which was sustained in the automobile collision. (Plaintiff's Trial Ex. 1).

Mr. Branham, as the Administrator of Peggy Branham's Estate, and individually, filed suit in Fayette Circuit Court for medical negligence and wrongful death against Rock, Britt, Keszler, Pulmano, UKMC, University Hospital at the Albert B. Chandler Medical Center, Inc. (hereinafter "Hospital Corporation")¹ and others. (Record, pp. 12-22). By the time of trial, the only remaining defendants were the four physicians mentioned above. UKMC and Hospital Corporation were dismissed on sovereign immunity grounds. (Record, pp. 1294-1295).

Initially, Branham identified three expert witnesses: Dr. Eric Larson, a board certified emergency medicine physician and assistant professor at the Medical University of South Carolina; Dr. Peter Julien, a board certified radiologist and director of thoracic

¹ Hospital Corporation filed Articles of Dissolution with the Kentucky Secretary of State on August 28, 2008, subsequent to the filing of this action.

imaging at Cedars Sinai Medical Center in Beverly Hills, California; and, Dr. James Calland, a board certified trauma surgeon and associate professor at the University of Virginia. (Record, pp. 147-184). Dr. Calland had a conflict with the second trial date set in this case, so Branham ultimately substituted in Dr. Richard Freeman, a board certified cardiothoracic surgeon from Indianapolis, Indiana. (Record, p. 1291) Branham identified one expert to testify regarding the standards of care for emergency room medicine (Dr. Larson), one expert for radiology (Dr. Julien), and one expert to testify regarding the cause of Peggy's death and how her injury would have been treated had it been properly diagnosed (Dr. Freeman). (Record, pp. 147-184, 755-770).

Rock, Britt, Keszler and Pulmano ultimately identified five medical expert witnesses: Dr. O. John Ma, an emergency room expert; Dr. Bruce Janiak, an emergency room expert; Dr. Michael Foley, a radiology expert; Dr. Dennis Whaley, a radiology expert; and Dr. Addison May, a trauma surgery expert. (Record, pp. 381-546). In essence, they disclosed two standard of care experts for each standard of care expert disclosed by Branham even though there were no antagonistic interests between the physicians, and the experts possessed similar qualifications and nearly identical opinions. Branham objected to the multiple experts disclosed by the defendant physicians, but the trial court permitted the defendants to use all five.

While the case proceeded in standard fashion for a medical negligence action, discovery revealed evidence that Rock and Britt both lacked knowledge of the requisite standards of care. Specifically, Rock had entered into an Agreed Order with the Kentucky Board of Medical Licensure as a result of deviations or departures from the standards of care with regard to multiple patients. (Record, pp. 924, 1124-1130). In the

Agreed Order, Rock stipulated and acknowledged that his **“diagnosis, treatment, records and overall care were below the minimum standards of care”** and that his prescribing patterns **“indicate Gross Ignorance of the precautions and prohibitions necessary to insure the safety of patients and the community.”** (Record, p. 1126) (emphasis added). A copy of Rock's deposition testimony regarding his disciplinary issue is attached at Appendix 3. This Agreed Order was entered into in May 2005, was in place at the time he treated Peggy, and did not expire until May 13, 2007. (Record, pp. 1124-1130). A copy of the Agreed Order is attached at Appendix 4. Britt failed his board examinations during medical school on two occasions, which required him to be held back a year, leaving him to complete medical school in five years as opposed to the customary four. (Record, p. 595). A copy of Britt's deposition testimony regarding this is attached at Appendix 5. While Branham asserted that this evidence was relevant and highly probative, the trial court granted Rock and Britt's Motion In Limine excluding mention of it. (Record, p. 1291).

On November 9, 2010, this matter proceeded to trial in the Fayette Circuit Court against the remaining four defendant physicians. After six days of trial, the jury returned a verdict in favor of the physician defendants. (Record, pp. 1509-1518). The final judgment was entered by the Court on November 29, 2010. (Record, pp. 1521-1525).

On November 20, 2010, Branham filed a Notice of Appeal in the Fayette Circuit Court. The action proceeded in the Court of Appeals with the parties filing the appropriate briefs in a timely fashion. On November 22, 2011, the Court of Appeals issued notice denying Branham's request for an oral argument. On October 5, 2012, the

Court of Appeals rendered a twenty-three (23) page “not to be published” opinion. In its opinion, the Court of Appeals affirmed the judgment of the Fayette Circuit Court.

On November 2, 2012, Branham filed a Motion for Discretionary Review with this Court. On June 12, 2013, this Court issued an order granting Discretionary Review.

ARGUMENT

ISSUES PRESENTED ON APPEAL

There are five issues presented in this appeal as follows: I) the Court of Appeals erred when it determined that the trial court properly excluded evidence of Rock’s admitted departures from required standards of care and the disciplinary action taken against him as a result of these departures; II) the Court of Appeals erred when it determined that the trial court properly excluded evidence that Britt twice failed his medical board examination; III) UKMC and Hospital Corporation are not entitled to sovereign immunity; IV) the instructions presented to the jury were incorrect; and, V) the Court of Appeals erred when it determined that the trial court acted within its discretion in refusing to limit the number of expert witnesses permitted at the trial of this matter on behalf of Rock, Britt, Keszler and Pulmano.

The issues presented in sections I, II and V of this appeal arise from the various Motions in Limine filed and ruled upon by the trial court and the Court of Appeals determinations with regard to those rulings. With regard to issue I, Rock filed a Motion in Limine prior to trial to exclude evidence of his prior departures from the required standards of care and of his disciplinary issues. (Record, pp. 914-929). Branham filed a Response objecting to the Motion and advising the trial court of his intention to question Rock about his admitted prior deviations of, or departures from, the required standards of care and his

disciplinary issues. In his Response, Branham also advised of his intention to question one of Rock's expert witnesses, Dr. O. John Ma, about his opinion of Rock's licensure and disciplinary issues. (Record, pp. 1028-1051). The trial court, however, granted the Motion in Limine by written order entered on August 3, 2010. (Record, pp. 1288-1292). A copy of this Order is attached at Appendix 6. The Court of Appeals, relying upon Morrow v. Stivers, 836 S.W.2d 424 (Ky. App. 1992), concluded that the trial court acted properly. Similarly, issue II stems from a Motion in Limine filed by Britt to exclude evidence that he twice failed his medical school board examination. (Record, pp. 914-929). As he did with Rock, Branham filed a Response objecting to this Motion (Record, pp. 1028-1051); however, the trial court granted the Motion in the same written order in which it granted Rock's Motion. As with Rock's disciplinary issues, the Court of Appeals found that it was proper for the trial court to exclude evidence of Britt's examination failures. Issue V arises from Branham's Motion in Limine to limit the defense to one expert in each of the areas of radiology and emergency medicine. (Record, pp. 902-913). The defense filed a Response and objected (Record, pp. 964-972), and the trial court denied Branham's motion. The Court of Appeals concluded that the trial court was in the superior position to make a determination regarding the number of experts permitted to testify at trial and deferred to its judgment.

The filing of the Motions in Limine set forth above and/or the Responses and objections filed by Branham preserved these issues for appeal in accordance with KRE 103(d) which states, "A motion in limine resolved by order of record is sufficient to preserve error for appellate review." Further, while not required, Branham made an offer of proof (in accordance with KRE 103(a)(2)) to the court during the trial of this action advising of the

basic substance of the excluded testimony of Rock and Britt. (Trial Video 11/16/10 at 1:33:34 p.m.).

Issue III is preserved as Branham filed a timely Response to the Motion to Dismiss made by UKMC and Hospital Corporation. (Record, pp. 225-307). A hearing was also held on January 27, 2010, where Branham contested the Motion to Dismiss; however, the trial court entered an order dismissing UKMC and Hospital Corporation on August 13, 2010. (Record, pp. 1294-1296).

With regard to issue IV, Branham tendered Plaintiff's Proposed Jury Instructions to the trial court. (Record, pp. 1330-1348). During subsequent argument before the trial court, Branham expressed that the use of any instruction that did not comport with those tendered by him amounted to an error. In argument, Branham outlined specific reasons why his instructions were appropriate and why those proposed by defendants were not. After consideration, the trial court opted to prepare its own set of Jury Instructions. The trial court's instructions differed significantly from those proposed by Branham. Upon being presented to counsel for review, Branham again objected. (Trial Video 11/16/10 at 5:47:30 p.m.; 11/17/10 at 12:34:22 p.m.). As CR 51(3) states, "No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction, or unless he makes objection before the court instructs the jury..." See also Ellison v. R & B Contracting, Inc., 32 S.W.3d 66 (Ky. 2000). Since Branham both filed Plaintiff's Proposed Jury Instructions and objected to the Jury Instructions given and/or the giving of any instruction inconsistent to that which he tendered, this issue was properly preserved. Applying a *de novo* review standard, the Court

of Appeals concluded that the instructions given by the trial court were appropriate under the law.

Branham further preserved each of these issues for consideration by this Court when he argued them at the Court of Appeals and specifically included and addressed them within his Motion for Discretionary Review.

STANDARD OF REVIEW

As correctly noted by the Court of Appeals, there are multiple standards of review to be considered in this appeal.

Branham's challenge to the evidentiary rulings of the trial court set forth in sections I, II and V should be resolved utilizing the abuse of discretion standard. Ten Broeck Dupont, Inc. v. Brooks, 283 S.W.3d 705 (Ky. 2009); and Tumey v. Richardson, 437 S.W.2d 201 (Ky. 1969).

Branham's challenge to the sovereign immunity defense raised by UKMC arises from a question of law decided by the trial court. As such, it is to be reviewed under a *de novo* standard. Floyd County Board of Education v. Ratliff, 955 S.W.2d 921 (Ky. 1997).

The propriety of the trial court's jury instructions must be considered by the Court of Appeals and this Court under a *de novo* standard of review. Hamilton v. CSX Transportation, Inc., 208 S.W.3d 272 (Ky. App. 2006). The "[i]nstructions must be based upon the evidence and they must properly and intelligibly state the law." Howard v. Commonwealth, 618 S.W.2d 177, 178 (Ky. 1981).

SUMMARY OF ARGUMENT

Branham was denied a fair and proper jury trial as a result of various errors at the trial court level, and the Court of Appeals acted in error when it affirmed the rulings and judgment of the trial court. First, the trial court improperly excluded evidence that had substantial probative value and demonstrated a lack of knowledge by Rock as to the applicable standards of care. This exclusion further deprived Branham of the right to challenge Rock's credibility through cross-examination. Second, the trial court improperly excluded evidence that had substantial probative value and demonstrated a lack of knowledge by Britt as to the applicable standards of care. Third, the trial court erred in dismissing UKMC and Hospital Corporation on sovereign and/or governmental immunity grounds. Fourth, the jury instructions submitted by the trial court failed to comport to applicable law based upon the facts of the case. Fifth, the trial court erred in failing to limit the number of expert witnesses permitted at the trial of this matter on behalf of Rock, Britt, Keszler and Pulmano.

I. EVIDENCE OF ROCK'S ADMITTED DEPARTURES FROM THE REQUIRED STANDARDS OF CARE AND PRIOR DISCIPLINARY ACTION AGAINST ROCK WAS IMPROPERLY EXCLUDED BY THE TRIAL COURT AND THE OPINION OF THE COURT OF APPEALS IS CONTRARY TO APPLICABLE LAW

When Rock treated Peggy Branham on April 24, 2007, he was working as the attending physician at a teaching hospital. He was also under the terms and conditions of an Agreed Order he entered into with the Kentucky Board of Medical Licensure in which he admitted that he had provided care to patients that was below the minimum standards of care required and that he had demonstrated gross ignorance of patient safety precautions. Rock entered into this Agreed Order after it was determined that he provided care to at least three

individuals that did not meet the applicable minimum standard for an emergency room physician.

Specifically, a consultant emergency room physician retained by the Kentucky Board of Medical Licensure determined that Rock's **"diagnosis, treatment, records and overall care were below the minimum standards of care,"** and that his **"prescribing patterns...indicate Gross Ignorance of the precautions and prohibitions necessary to insure the safety of patients and the community."** (Record, p. 1126) (emphasis added).

The trial court abused its discretion when it denied Branham the opportunity to introduce evidence of Rock's admitted departures from the required standards of care and disciplinary proceeding for three reasons. First, since Rock was identified as an expert witness in this action, evidence of the disciplinary proceeding against him goes directly to his credibility and knowledge as an expert witness. Second, the proceeding and findings against Rock, and his admitted departures from the required standards of care, go to his requisite medical knowledge and his knowledge regarding the applicable standards of care for an emergency medicine physician. Third, the use of inconsistencies between Rock's deposition testimony and his licensure file should have been permissible for impeachment purposes.

**A. ROCK'S ADMITTED DEPARTURES FROM THE
REQUIRED STANDARDS OF CARE AND THE
EVIDENCE OF DISCIPLINARY ACTION TAKEN
AGAINST ROCK GOES TO HIS CREDIBILITY AND
KNOWLEDGE AS AN EXPERT WITNESS**

Rock was identified as an expert witness in Defendants' CR 26.02(4)(a) Expert Witness Disclosure. In the disclosure it was noted that Rock would testify "that he and other healthcare providers at UKMC met or exceeded the standard of care in their treatment of

Ms. Branham during her visit to the UKMC emergency department on April 24, 2007." (Record, p. 1185). Further, in his trial testimony Rock discussed his credentials in detail, including his board certification. (Trial Video 11/16/10 at 4:29:30 p.m.). He testified that he was a faculty member at UKMC and a lecturer and educator. (Trial Video 11/16/10 at 4:28:54 p.m.). He testified that he had treated thousands of motor vehicle collision patients. (Trial Video 11/16/10 at 4:29:30 p.m.). He explained the signs and symptoms of aortic injury. (Trial Video 11/16/10 at 4:35:30 p.m.). He explained that he, as an attending physician and UKMC faculty, supervised Britt and that he provided expert assistance or additional expertise that a resident could not have. (Trial Video 11/16/10 at 4:38:17 p.m.). **Then, he discussed at length the treatment he provided Peggy and why he and Britt did what they did and why they felt it appropriate.** (Trial Video 11/16/10 beginning at approximately 4:41:00 p.m.). **Rock testified that a CT Scan was not indicated, and he would have ordered one had it been indicated.** (Trial Video 11/16/10 at 5:00:30 p.m.).

It is well established precedent in this Commonwealth that a party is entitled to cross-examine an expert witness on any subject that reflects on the expert's credibility. See Tuttle v. Perry, 82 S.W.3d 920 (Ky. 2002). This principle is expressed in Underhill v. Stephenson, 756 S.W.2d 459, 460-461 (Ky. 1988), when the Court stated that "the trial judge committed reversible error by refusing the cross-examination of the medical witness concerning a malpractice case which was pending against him. The Underhills had a right to cross-examine the medical expert on all matters relating to every issue." Further, as noted in Tuttle, "[a]ccording to Professor Lawson, 'the law of evidence tilts heavily toward admission over exclusion, for there is an inclusionary thrust in the law that is powerful and

unmistakable.'" Tuttle, at 157 (internal citation omitted). See also Springer v. Commonwealth, 998 S.W.2d 439 (Ky. 1999).

As an expert witness, knowledge of applicable standards of care is squarely at issue and impact the credibility of the witness. In a medical negligence case, a party must be permitted to inquire into any prior departures from the required standards of care and any disciplinary proceedings or the facts surrounding such proceedings where the expert witness' knowledge about the standard of care in his field has been called into question.

While there are no Kentucky cases directly on point, the unpublished opinion by this Court in Hodes v. Ireland, 2009 Ky. Unpub. LEXIS 87 (Ky. 2009), has a similar set of facts and clearly supports Branham's position. See a copy of Hodes v. Ireland cited in accordance with CR 76.28(4)(c) and attached hereto at Appendix 7.

In Hodes, the plaintiff's expert witness testified that he was licensed to practice and had never had any restrictions on his medical license. The trial court then permitted the cross-examination of the expert about disciplinary charges against his medical license. Hodes, at 1. Relying on Morrow, the Court of Appeals reversed and opined that the cross-examination concerned a collateral matter that was irrelevant. Hodes, at 2. This Court reversed the Court of Appeals noting that Morrow was factually distinct because the dental expert in that case had been suspended for allegedly passing hepatitis to patients which did not have anything to do with his knowledge of medicine, care rendered to patients or issues of truthfulness. Hodes, at 2. As this Court noted in Hodes, the "cross-examination was grounded upon witness credibility and interpretations of what constitutes the 'practice of medicine' and licensure 'restrictions.'" Hodes, at 2. Thus, the cross-examination was permissible and the evidence of, and surrounding, the expert's licensure suspension was

permitted because it tested witness credibility, particularly on the issue of standard of care and character for untruthfulness. Hodes, at 2.

It must be further noted that the rationale expressed in Hodes was recently applied by the United States District Court for the Western District of Kentucky in Ferris v. Tennessee Log Homes, Inc., 2010 U.S. Dist. LEXIS 26272 (W.D. Ky. 2010). See a copy of Ferris v. Tennessee Log Homes, Inc. cited in accordance with CR 76.28(4)(c) and attached hereto at Appendix 8.

In Ferris, the Defendant sought to exclude evidence of two agreed orders entered into by one of its real estate appraiser expert witnesses and the board governing appraisers. Ferris, at 1. The agreed orders arose from the expert's violation of professional standards in the valuation of pieces of property. Ferris, at 1-2. The Court stated that "the plaintiffs' cross-examination regarding Halcomb's [expert] prior disciplinary proceedings would be probative of Halcomb's competency." Ferris, at 3. The same rationale clearly applies in this instance.

In its opinion, the Court of Appeals relied upon Morrow and Reece v. Nationwide Mut. Ins. Co., 217 S.W.3d 226 (Ky. 2007) in asserting that there was not a substantial nexus between the proffered testimony about Rock's prior departures from the required standards of care and disciplinary action and the issue of his negligence. Specifically, in supporting its opinion the Court of Appeals stated, "Dr. Rock's improper practice of writing prescriptions without first establishing a doctor/patient relationship 'has no bearing on his knowledge or ability to testify on the matters at hand,' i.e., whether he deviated from the applicable standard of care by failing to diagnose Peggy's aortic injury, thereby causing Peggy's death."

This reliance on Morrow and Reece is misplaced. In Morrow, the proffered testimony was deemed irrelevant because the dental expert, Dr. Harris, had been suspended for allegedly passing hepatitis to patients. Morrow, at 429. This circumstance did not have anything to do with his knowledge of medicine, care rendered to patients or issues of truthfulness. Further, the Court noted in Morrow that Dr. Harris' license had been suspended at least five years prior to the trial in which his testimony was offered, and his license was valid and without restriction at the time of trial. Id. In Reece, the expert witness was a treating physician whose license was valid and without restriction at the time he treated the claimant. Reece, at 228. He did not offer testimony as an expert on standards of care in the practice of medicine and it was not until after his treatment of Reece and discovery deposition that his license was suspended. Id.

The factual scenario in the instant case is vastly different from those that the Court of Appeals and this Court confronted in Morrow and Reece. In Morrow and Reece the physician/dentist was not subject to disciplinary action at the time of treatment or service as an expert. Conversely, in this case, when Rock treated Peggy on April 24, 2007, he was working as the attending physician at a teaching hospital and was under the terms and conditions of an Agreed Order he entered into with the Kentucky Board of Medical Licensure after an independent emergency room physician determined that his "diagnosis, treatment, records and overall care were below the minimum standards of care." A determination that Rock admitted and stipulated to. These factual distinctions make the Court of Appeals reliance on Morrow and Reece inappropriate.

Additionally, on June 10, 2011, the Court of Appeals issued an opinion in The Estate of Judith Burton v. Trover Clinic Found., Inc., 2011 Ky. App. LEXIS 94 (Ky. App. 2011).

See a copy of The Estate of Judith Burton cited in accordance with CR 76.28(4)(c) and attached hereto at Appendix 9. While the opinion of the Court of Appeals was designated "To Be Published," the case has been appealed to this Court and Discretionary Review has been granted. While the opinion is not final and not binding authority, the rationale expressed by the Court of Appeals warrants discussion.

The Estate of Judith Burton began in April 2004 when Burton (who was still alive at the time, but was later replaced by her Executor) filed suit against The Trover Clinic Foundation, Inc. and Dr. Philip C. Trover. Id. at 3. In her Complaint, Burton alleged that Dr. Trover, a radiologist, had misread or failed to properly read three chest CT scans in late 2003 and early 2004. Id. at 3-4. As a result of Dr. Trover's failure to properly read the scans, Burton's lung cancer went undiagnosed and was no longer treatable by the time it was ultimately identified. Id. at 2-3. Burton further alleged that throughout the course of Dr. Trover's employment with the Trover Clinic Foundation, Inc., he had a dangerous habit of reading radiological films at a rate far in excess of the average workload for a private practice. Id. at 3-4.

At or before trial, Burton sought the admission of evidence (through cross-examination) that Dr. Trover's medical license had been suspended (after he treated Burton) following the filing of a grievance against him by another patient for his misread of a CT scan. Id. at 23-24. The trial court denied Burton's attempts to introduce such evidence and the circumstances surrounding Dr. Trover's suspension, determining that Dr. Trover's licensure suspension was a collateral matter. Following a trial on the merits of the case, a jury ultimately found in favor of the Trover Clinic Foundation, Inc. and Dr. Trover. Burton appealed and a cross-appeal was filed.

On appeal, Burton argued that the trial court erred when it denied her attempt to introduce evidence of Dr. Trover's disciplinary issues because he was named as an expert witness in his disclosures and the suspension of his medical license was relevant to his qualifications and was critical to the jury in assessing the weight given to his opinions. Id. at 23-25. Burton further argued that such evidence was not collateral because Dr. Trover's suspension was "intricately linked to his performance, behavior and testimony that he was capable of reading radiological films, and that he never deviated from acceptable medical standards." Id.

In considering the issue, the Court of Appeals reviewed Morrow and Reece, and determined that two salient facts are relevant when deciding on the admissibility of evidence regarding a Defendant or expert witness' disciplinary or licensure issues. They are: 1) does the suspension have a relation i.e. is it relevant to the proffered testimony (for example, knowledge of standard of care at issue in The Estate of Burton versus the passing of hepatitis to patients at issue in Morrow); and, 2) was the license suspension too remote in time to the facts that are the subject of the testimony. Id. at 19.

Applying these principals to the facts in The Estate of Burton, the Court of Appeals held that "...[T]he suspension of Dr. Trover's medical license, although post-treatment of Burton, was not a collateral matter. Accordingly, the trial court exceeded its discretion in limiting the cross-examination of Dr. Trover on this issue. **In that this evidence could have a substantial impact on the validity of the testimony of Dr. Trover, we are of the opinion that its exclusion was reversible error.**" The Estate of Judith Burton, at 20 (Emphasis added).

If the factors considered in The Estate of Judith Burton are applied in the instant action, an identical conclusion must be drawn. First, when Rock treated Peggy on April 24, 2007, he was actually working under the terms and conditions of the Agreed Order he entered into with the Kentucky Board of Medical Licensure. He would continue to be governed by the terms of the Agreed Order until May 13, 2007. This clearly satisfies a requirement that the licensure issues not be too remote. Second, Rock's admitted departures from the required standards of care and disciplinary issues clearly have a relation to the proffered testimony to be offered in this case regarding his knowledge, or lack of knowledge, of the appropriate standards of care. As specifically set forth in the Agreed Order, a consultant emergency room physician retained by the Kentucky Board of Medical Licensure determined that Dr. Rock's **"diagnosis, treatment, records and overall care were below the minimum standards of care,"** and that his actions giving rise to the Agreed Order **"...indicate Gross Ignorance of the precautions and prohibitions necessary to insure the safety of patients and the community."** (Emphasis added).

Lastly, in this case the Court of Appeals made a couple of conclusions that require discussion. First, as set forth above, the Court of Appeals noted that "Dr. Rock's improper practice of writing prescriptions without first establishing a doctor/patient relationship 'has no bearing on his knowledge or ability to testify on the matters at hand,' i.e., whether he deviated from the applicable standard of care by failing to diagnose Peggy's aortic injury, thereby causing Peggy's death." Second, the Court of Appeals noted that "The Agreed Order with the KBML does not tend to establish that Dr. Rock did not know the applicable standard of care pertinent to writing prescriptions, but simply that he had violated that standard of care. Moreover, it is something of a stretch to suggest the

standard of care relevant to writing prescriptions is the same as the standard of care relevant to a patient's emergency medical treatment. The subject of Dr. Rock's prior disciplinary action simply has no bearing on the case at hand."

With all due respect, these conclusions by the Court of Appeals make no sense. An emergency medicine physician is required to be knowledgeable about a variety of emergency conditions. This includes knowing the applicable standards of care for addressing many types of emergency conditions, such as: aortic injury; heart attack; pulmonary embolus; various fractures; stroke; drug overdose; abdominal injury; etc. It also includes knowing appropriate prescription procedures for narcotics and controlled substances as those are prescribed in the emergency room every day. If an emergency physician demonstrates a lack of knowledge regarding the standards of care in any area within the scope of his practice it is relevant to his competency and credibility as an expert. To assert otherwise is illogical.

Further, in interpreting Rock's Agreed Order with the KBML, the Court of Appeals seems to create a distinction between whether Rock lacked knowledge of the appropriate standards of care or whether he just violated the standard of care. The indication seems to be that if Rock simply violated the standards of care that would not be probative of his competence or ability to testify as an expert witness. This attempted distinction is troubling. Regardless of whether Rock lacked knowledge of the standard of care or knowingly departed from the standard of care, the conclusion must be the same. The simple fact that Rock did not adhere to the standard of care for whatever reason goes directly to his credibility as an expert witness and competency as an expert emergency physician. In fact, if he knowingly departed from standards of care, as the Court of

Appeals seems to insinuate, that would not only go to his competency and credibility but would potentially be admissible for other purposes as well.

In light of the authority set forth above, it is clear that the trial court abused its discretion in excluding evidence of Rock's admitted departures from required standards of care and disciplinary action and that the Court of Appeals erred in affirming the judgment of the trial court.

**B. THE EVIDENCE OF DISCIPLINARY ACTION
TAKEN AGAINST ROCK AS A DEFENDANT GOES
TO HIS MEDICAL KNOWLEDGE AND
KNOWLEDGE REGARDING THE APPLICABLE
STANDARD OF CARE**

While there does not appear to be a Kentucky case directly on point, the Supreme Court of South Dakota in a lengthy and well-reasoned opinion concluded that it was an abuse of discretion for a trial court to exclude evidence of a defendant physician's admitted departures from required standards of care and disciplinary issues. See Mousseau v. Schwartz, 756 N.W.2d 345 (S.D. 2008). A copy of this opinion is attached hereto at Appendix 10.

In Mousseau, Dr. Schwartz, a practicing neurosurgeon, was sued for negligence in failing to properly treat Mousseau. The trial court granted a Motion in Limine filed by Schwartz excluding evidence that he had entered into a "Stipulation On Agreed Disposition and Order of Probation" with the state licensing agency for physicians. Mousseau, at 349. The licensure agency's investigation and the Stipulation arose from allegations that Dr. Schwartz had deviated from the accepted standards of care in a number of different instances in treating multiple patients. Id. at 349. At a subsequent trial, the jury returned a

verdict in favor of Schwartz. Id. at 349. Mousseau appealed alleging that the trial court improperly excluded evidence of the investigation and Stipulation.

In finding that the trial court committed an abuse of discretion, the Supreme Court reasoned that the Stipulation was evidence of the medical and neurosurgical knowledge possessed by Schwartz and of his knowledge (or lack thereof) of the required standard of care. Mousseau, at 351. After a review of applicable case law from a number of jurisdictions, the Court concluded:

We read the pertinent sections of these opinions together to mean that a deficit in the degree of knowledge and skill possessed by a practitioner from that ordinarily possessed by other practitioners in the field *is not alone sufficient* for the fact finder to conclude that the applicable standard of care has not been met. However, *that deficit is relevant to that determination* in that it goes to the question of whether the practitioner had and used the skill and care which other practitioners in the field commonly possess and use. Mousseau, at 353 (emphasis in original).

And it was further stated that:

Dr. Schwartz should be held to possess the degree of knowledge and skill ordinarily commensurate with such credentials. We conclude that Mousseau should have been able to introduce the Stipulation on this basis, because it was relevant to the jury's determination of whether Dr. Schwartz possessed ordinary knowledge and skill and whether he has and used the skill and care ordinarily possessed and used by other neurosurgeons under like circumstances. Mousseau, at 353-354.

Further, it should be noted that Dr. Schwartz attempted to avoid introduction of the above evidence by claiming that he was only called as a fact witness and not an expert. The Court rebuffed his claim and noted that Dr. Schwartz testified regarding the care and treatment he provided to Mousseau at various stages. The Court noted that physicians have a specialized level of knowledge and while he may not have directly testified that he followed the appropriate standard of care, his testimony did amount to what he believed was

proper practice. Mousseau, at 357-358. Any testimony by a physician regarding the practice they follow is presumed to be proper practice and based upon the standard of care. Id. at 357-358. Thus, if a physician is testifying regarding the care they provided it can be assumed to be proper and therefore is an expert opinion that he or she followed the applicable standard of care. In this case, as in Mousseau, Rock testified at length regarding the care he provided, explained the reasoning behind his opinions and conclusions and explained a number of complex medical issues. As such, Rock cannot avoid introduction of disciplinary action by claiming to be a fact witness only.

Similarly, Rock's disciplinary issues arose from his failure to meet accepted standards of care in treating and/or prescribing medications, a set of facts that Rock stipulated to. In fact, Rock's conduct was so egregious that a consultant emergency room physician retained by the Kentucky Board of Medical Licensure described him as showing "Gross Ignorance of the precautions and prohibitions necessary to insure the safety of patients and the community." (Record, p. 1126). Further, Rock's own expert witness, Dr. O. John Ma, agreed in his discovery deposition that the conduct demonstrated by Rock leading to his licensure issue calls into question his knowledge of, and ability to abide by, the standard of care. Specifically, when asked about his opinion regarding a physician's failure to chart or make a record to support the prescription of amphetamines to a person, Dr. Ma testified, "[t]hat's **really unprofessional and really unethical...**" (Ma depo. at p. 56, ln. 19) (emphasis added).

Simply, the lack of requisite knowledge demonstrated by Rock is extremely relevant in determining whether he comprehended and abided by the standard of care in this case. As such, the trial court abused its discretion by not permitting Branham to introduce

evidence of Rock's prior admitted departures from required standards of care and disciplinary issues during his case-in-chief or cross-examination, and the Court of Appeals erred in affirming the decision of the trial court.

C. ROCK'S TESTIMONY IN HIS DISCOVERY DEPOSITION IS INCONSISTENT WITH THE AGREED ORDER HE ENTERED INTO WITH THE KENTUCKY BOARD OF MEDICAL LICENSURE

As cited previously in the record and not in dispute, Rock testified in his discovery deposition as follows:

Q. Did you have any problems, anything that was brought before a peer review board, licensure issues?

A. I had a problem with the Licensure Board in '05 relating to basically a patient/business partner deceiving me.

Q. Explain what happened to you.

A. Well, to make a long story very short, I had a business partner entrust me with medical information, and asked me to write him a prescription, which was a controlled substance. He also asked me to set up a follow-up for him to, with people that would be appropriate for him to follow-up, which I did. And over a short period of time, I got him a follow-up, I got everything he wanted me to do, and in the meantime I found out that he was basically using these medications inappropriately. So I stopped it, cut him off, cut off all ties with him, but in the meantime -- I am not sure who reported it to the Board. I think it was a pharmacist, they were concerned about the prescription. So when the board found out, we did the interview, and I got placed on an agreed order for a couple of years. There was no restrictions on my license. I followed that agreed order to the letter, and in '07 it expired. (Record, p. 924).

However, as noted above, Rock's file and the Agreed Order from the Kentucky Board of Medical Licensure (KBML) reveals a much different situation. While Rock testified in his deposition that his licensure issue resulted from "a patient/business partner deceiving me," he stipulated with KBML that he had written prescriptions for controlled

substances to three (3) separate individuals without establishing a physician/patient relationship. While Rock testified that he wrote a prescription that led to his licensure issues, he stipulated that he had in fact written seventeen (17) prescriptions for controlled substances to two (2) of the individuals and that he wrote additional prescriptions to the third person. While Rock testified that there "was no restrictions on my license," there were in fact seven different restrictions placed on him. Furthermore, while Rock testified that "I followed that agreed order to the letter," he was in fact fined for failing to abide by the terms of the Agreed Order. (Record, p. 1122). Rock even violated the Agreed Order despite his express agreement "that if he should violate any term or condition of the Agreed Order, the licensee's practice will constitute an immediate danger to the public health, safety, or welfare, as provided in KRS 311.592 and 13B.125." (Record, p. 1129).

As this Court is well aware, the purpose of a trial is to search for the truth. Physicians are highly thought of within the community and it can easily be argued that a physician's testimony is viewed with a higher level of value and belief than that of a lay person. In this case, Rock's truthfulness is particularly important. As such, and in accordance with KRE 608, evidence that demonstrates Rock's character for untruthfulness is highly probative and Branham should have been permitted to call attention to this trait through cross-examination.

II. EVIDENCE OF BRITT'S FAILURE TO PASS HIS MEDICAL BOARD EXAMINATION ON TWO OCCASSIONS WAS IMPROPERLY EXCLUDED AND THE COURT OF APPEALS OPINION IS CONTRARY TO APPLICABLE LAW

Like Rock, Britt was identified as an expert witness in Defendants' CR 26.02(4)(a) Expert Witness Disclosure. (Record, p. 1185). Further, in his trial testimony Britt discussed his credentials in detail, including his board certification. (Trial Video 11/16/10 at 2:53:00 p.m.). He testified that he was trained to provide care to trauma patients and was trained to work under the ATLS protocols which provide a standard for how to treat trauma patients. (Trial Video 11/16/10 at 2:58:54 p.m.). He explained the signs and symptoms of aortic injury. Then, he discussed at length the treatment he provided Peggy and why he and Rock did what they did and why they felt it appropriate.

Similar to Rock's licensure issues, Britt's credibility and knowledge of the standard of care were squarely at issue in the trial of this action. The rationale expressed by the Kentucky Supreme Court in Hodes mandates that a party must be permitted to challenge the credibility of an expert witness with available information that could show lack of knowledge of the standard of care. Britt's examination failures are relevant to his knowledge of the standard of care and to the credibility of his opinions on the standard of care. The trial court's failure to permit Branham such a challenge in this instance amounts to an abuse of discretion and the Court of Appeals' Opinion affirming the trial court is contrary to applicable law.

III. UKMC AND HOSPITAL CORPORATION SHOULD NOT BE ENTITLED TO SOVEREIGN IMMUNITY, OR ALTERNATIVELY, SHOULD HAVE AT LEAST BEEN IDENTIFIED AS REAL PARTIES IN INTEREST AT THE TRIAL OF THIS ACTION

A. IT IS TIME FOR THIS COURT TO OVERTURN WITHERS

Under current law, UKMC and Hospital Corporation are state agencies entitled to governmental immunity. It is time for this Court to re-evaluate whether sovereign and/or governmental immunity applies to UKMC and Hospital Corporation and to conclusively remove the cloak of immunity from these two entities.²

The doctrine of sovereign immunity is an "ancient doctrine," see City of Russellville v. Greer, 440 S.W.2d 269, 272 (Ky. 1968) (Montgomery, C.J., concurring), which arbitrarily shields certain governmental agencies from liability. Its origin is ancient but outmoded. "Archaically we said the king can do no wrong." Louisville Prof'l Fire Fighters, Local 345 v. Burke, 75 L.R.R.M. (BNA) 2001, 64 Lab.Cas. P 52,412 (Jeff. Cir. Ct. 1970). "'The king can do no wrong' arose out of the feudal dogma of divine right of kings and their infallibility. The authority of the king was considered absolute." Foley Constr. Co. v. Ward, 375 S.W.2d 392, 393 (Ky. 1963). "'Governmental 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) (emphasis added).

In modern times, Kentucky has seen great inconsistency in the application of this doctrine when it comes to dealing with governmental or quasi-governmental entities. In

² While this argument was raised at the Court of Appeals, it was not addressed in the opinion because the Court noted that Branham's claims against UKMC and Hospital Corporation were based upon vicarious liability and since the Court found no grounds to reverse against Rock, Britt, Keszler and/or Pulmano, they deemed it unnecessary to address Branham's sovereign immunity argument

Kentucky Ctr. for the Arts Corp. v. Berns, 801 S.W.2d 327 (Ky. 1991), the Court enunciated a guiding principle and two-part test to determine whether a given entity with roots in the state government falls within the common law protection of sovereign immunity. According to Berns, the reach of state sovereign immunity is “only to those agencies under the direction and control of the central State government *and* are supported by monies which are disbursed by authority of the Commissioner of Finance out of the State treasury.” Id. at 331 (quoting Louisville & Jefferson Co. Metropolitan Sewer Dist. v. Simpson, 730 S.W.2d 939 (Ky. 1987) (emphasis in original)).

In Berns, the Kentucky Supreme Court found that the Kentucky Center for the Arts Corporation was not entitled to sovereign immunity, even though the corporation was created by statute and funded, in part, by tax dollars. Id. at 330. As noted, “[c]ertainly not every business can be immunized simply because it is established by act of the General Assembly, and this corporation performs substantially the same functions as any private business engaged in the entertainment business.” Id. at 331. The Court reasoned that there was no compelling reason to deprive a person of the right to maintain a common law action simply because the person attends an orchestral performance at the Kentucky Center, when that right would have existed for a patron of the same performance held at a private theater nearby. “If we were to allow such reasoning, there would be no limitation on the scope of sovereign immunity.” Id.

The Court further pointed out that the Kentucky Center was not under the “direction and control” of the central state government, because it is governed by a board of directors who are appointed for fixed terms with removal only for cause, and act

autonomously. Id. In addition, the Kentucky Center raises a significant portion of its revenue, though not all, from ticket sales and rental of its performance venues.

This is analogous to the instant facts with regard to UKMC and Hospital Corporation. UKMC and Hospital Corporation operate autonomously under the Board of Trustees of the University of Kentucky, not under the "central state government." The Board of Trustees of the University of Kentucky has broad powers equal to those expressed in Berns, see KRS 164.160 *et seq.*, and may be removed only for cause, KRS 164.131(1)(c). UKMC and Hospital Corporation raise significant portions of their revenues through charges for the provision of healthcare services, and perhaps from other sources besides the state treasury. In fact, it is unclear what, if any, portion of UKMC's or Hospital Corporation's operating expenses are derived directly or indirectly from the state treasury and "paid by the Commissioner of Finance" as required for immunity to attach. It is believed that the vast majority of the revenue generated by UKMC and Hospital Corporation is from the provision of healthcare services in competition with privately owned hospitals around the Commonwealth.

While the "Berns test" has been called into question in recent cases, the Supreme Court recently reaffirmed that the principles set forth in Berns are still applicable. As noted in a discussion on Berns in Comair, Inc. v. Lexington-Fayette Urban County Airport Corp., 295 S.W.3d 91 (Ky. 2009), "the basic concept behind the two-prongs--whether the entity in question is an agency (or alter ego) of a clearly immune entity (like the state or a county) rather than one for purely local, proprietary functions--is still useful." Id. at 99. Further, it was noted that Berns "should instead [of applying a concrete test] be treated as a guiding principle..." Id. at 99. Whether it is viewed as a

test or simply an application of guiding principles, Berns requires two factors to exist before sovereign immunity will attach: 1) control by the central state government, and 2) monies disbursed out of the central state treasury by the Commissioner of Finance.

Comair, Inc., arose from the highly publicized crash of Comair Flight 5191 at the Bluegrass Airport on August 27, 2006. As part of the massive litigation that ensued following the crash, Comair, Inc. filed a third-party complaint naming the Lexington-Fayette County Airport Board, the Lexington-Fayette Urban County Airport Corporation and the Board's members as defendants. Comair, Inc. at 92-93. On August 2, 2007, the Fayette Circuit Court dismissed the third-party complaint on the basis that the third-party defendants enjoyed immunity. Id. at 93-94. In its analysis, this Court noted that while it has always been clear that the Commonwealth itself is immune from suit the issue becomes more complicated and less than clear when dealing with governmental and quasi-governmental entities and departments below the level of the Commonwealth. Id. at 94. After a detailed analysis of the issue, this Court reasoned that in order to qualify for immunity the entity in question must be an agency of a clearly protected immune entity **and** perform a function integral to state government.

Under the principles and tests expressed in Berns and Comair, Inc., UKMC and Hospital Corporation do not qualify for sovereign or governmental immunity for a number of reasons. First, UKMC and Hospital Corporation are distinct entities from the University at-large, and may (in fact, almost certainly do) derive their operating income almost wholly from the provision of services on the open market and in competition with private entities. Second, while UKMC takes part in educating medical students and residents, so do almost all major private hospitals. In fact, UKMC competes with private

hospitals for residents. Third, Hospital Corporation is a separate entity from the University as evidenced by its corporate identity registered with the Secretary of State.

In determining that UKMC and Hospital Corporation are immune, the trial court most likely primarily relied upon Withers v. University of Kentucky, 939 S.W.2d 340 (Ky. 1997), but that reliance is misplaced. The Appellee and Defendant in Withers was solely the University of Kentucky, not UKMC or Hospital Corporation. Neither UKMC nor Hospital Corporation were parties to the Withers case. Thus, the Supreme Court never had an opportunity to apply the principles expressed in Berns or the Berns test to those entities and rule as to whether they each fall outside the protection afforded by sovereign or governmental immunity.

In fact, the primary issue before the court in the Withers case was whether or not the University of Kentucky had impliedly waived the protection of sovereign immunity through the act of purchasing liability insurance. The decision concentrates on that issue, and that is where the court focuses its analysis. The discussion regarding Berns was simply an ancillary and tangential issue which was not necessary for the court's ruling on the primary issue in Withers. Because of that, the court spent little time considering the Berns analysis or guiding principles.

It makes no sense to now consider Withers as conclusive on the issue of whether the UKMC and Hospital Corporation are entitled to sovereign immunity protection where the existence of such protection was neither a major nor necessary issue in that case. The Withers court simply set the issue aside, boldly declaring that "[t]here is no doubt that the University of Kentucky satisfies these requirements," Id. at 344, without conducting any analysis on those "requirements." The court was merely using that ruling as a device to

move on to the issue it was concerned with, waiver of sovereign immunity through the purchase of liability insurance.

B. ALTERNATIVELY, EVEN IF UKMC AND HOSPITAL CORPORATION ARE PROTECTED BY THE DOCTRINES OF SOVEREIGN AND/OR GOVERNMENTAL IMMUNITY, SUCH PROTECTION SHOULD BE REMOVED OR LIMITED BECAUSE THEY ARE REAL PARTIES IN INTEREST

The Supreme Court's statement regarding the scope of governmental immunity defines not only the protection that governmental immunity provides, but also that which it does not provide. Even if this Court determines that the direct imposition of tort liability is precluded, UKMC and Hospital Corporation are not protected from vicarious liability for the negligent acts of their employees and agents. See Patterson v. Blair, 172 S.W.3d 361 (Ky. 2005). They are also not protected from liability incurred by contracts into which they enter with employees and agents. In recognition of the limits of governmental immunity, the University of Kentucky has established the UKMC Medical Malpractice Compensation Fund, pursuant to KRS § 164.941, for the purpose of "payment of claims for liability arising in favor of any patient from treatment performed or furnished, or treatment that should have been performed or furnished by the university or its agents." KRS § 164.941(3). The statute also provides that:

The university shall be solely responsible for the investigation and servicing of all claims made against it arising out of medical malpractice and all costs, expenses and fees incurred in the investigation, servicing and defense of all such claims shall be borne and paid by the university.

KRS § 164.941(7). Therefore, despite the protection of governmental immunity, UKMC and Hospital Corporation are the entities that defend claims of negligence against their employees and agents, are responsible for paying settlements and satisfying judgments

resulting from those claims, and ultimately benefit from a verdict in favor of their defendant-employees at trials of those claims. In all claims of negligence against their employees and agents, UKMC and Hospital Corporation are real parties in interest.

CR 17.01 provides, in pertinent part, “Every action shall be prosecuted in the name of the real party in interest.... Nothing herein, however, shall abrogate or take away an individual’s right to sue.” A real party in interest is one entitled to the benefits of an action upon the successful termination thereof. Stuart v. Richardson, 407 S.W.2d 716, 717 (Ky. 1966).

The Supreme Court expanded on this definition in Harris v. Jackson, 192 S.W.3d 297 (Ky. 2006), where it stated that “[a] real party in interest then, is a person, or entity, which wins, or loses, dependent upon the resolution of the questions.” Id. at 303. A party that **“has the duty to defend, and pay the defense’s costs, as well as the right to settle as it considers appropriate”** is a real party in interest. Id. at 304 (emphasis added).

The leading case in this area is Earle v. Cobb, 156 S.W.3d 257 (Ky. 2004). In Earle, the Supreme Court held that where an insurance carrier had a contractual relationship with a party that resulted in the insurance carrier being primarily liable for any jury verdict, or where the carrier participated at trial, the insurance carrier was a real party in interest. Id. at 259. Further, the Court held that because the insurance carrier was a real party in interest, it must be a named defendant so that its identity is disclosed to the jury. Id. at 259, 261.

A. CONTRACTUAL LIABILITY

The real party in interest in Earle was a UIM carrier that, pursuant to the procedure set forth in Coots v. Allstate Ins. Co., 853 S.W.2d 895 (Ky. 1993), had preserved its subrogation rights by substitution of its payment for that of the liability insurance carrier. At that point, based on the carrier's contractual relationship with the plaintiff in that case, the carrier had the right to approve any settlement, was responsible for the payment of any settlement or the satisfaction of any jury verdict, and would be the party that benefitted in the event of a defense verdict at trial. The carrier was the "entity, which wins, or loses, dependent upon the resolution of the questions." Harris, 192 S.W.2d at 303.

The same is true of UKMC and Hospital Corporation in this case. Based on their statutory obligation to the defendant-doctors in this case, UKMC and Hospital Corporation held final approval with regard to all settlement negotiations in this case. Had the parties settled, UKMC and Hospital Corporation would have paid the settlement from the Medical Malpractice Compensation Fund. Had a jury verdict been rendered in favor of Branham, UKMC and Hospital Corporation would similarly have paid the settlement from the Medical Malpractice Compensation Fund. UKMC and Hospital Corporation were the entities that benefitted from the defense verdict that resulted from the trial of this matter. As the Court said in Harris, and as was true in Earle, UKMC and Hospital Corporation were the "entit[ies], which win, or lose, dependent upon the resolution of the questions." They had "the duty to defend, and pay the defense's costs, as well as the right to settle as it[they] consider[ed] appropriate." Harris, 192 S.W.2d at 304; KRS 164.194(3), (7). They were real parties in interest and should have been

required to participate as named defendants so as to fully inform the jury of the real parties in interest to the action.

Concealing the identity of UKMC and Hospital Corporation as real parties in interest perpetuates the “charades and legal fictions” that the Supreme Court criticized in Earle. 156 S.W.3d at 261. UKMC and Hospital Corporation were primarily liable for any payment related to the claims in this case. The defendant-doctors had no financial liability. “When only the tortfeasor is identified, a fictitious presence appears at trial instead of the bona fide party. Moreover, when that practice is followed, one [party] is presented as the solely and exclusively liable party.” Id. As Justice Graves succinctly stated in his concurring opinion in Earle, “it would be a fraud upon the jury not to let them know the entire truth.” 156 S.W.3d at 262.

The Earle Court’s real party in interest analysis has been extended beyond UM/UIM insurance. In Williamson v. Schneider, 205 S.W.3d 224 (Ky. App. 2006), the Court of Appeals applied the Earle holding to a medical malpractice case involving a medical facility and its employee-doctor. In that case, the trial court granted a motion *in limine* requesting that the facility not be identified at trial because there was no allegation of its independent liability. Id. at 226.

The Court of Appeals analogized the facts in Williamson to the facts in Earle and held that the employer-employee relationship between the medical facility and its employee-doctor is “akin to the underinsured motorist carrier-tortfeasor relationship in Earle. Both relationships are ‘direct-contractual relationships....’” Williamson, 205 S.W.3d at 229, quoting Earle, 156 S.W.2d at 259. The Williamson Court further analyzed the similarities between Earle and the case before the Court, noting that both cases

involved a direct action against the tortfeasor based on negligence and claims against the second defendant based on its contractual undertaking. 205 S.W.3d at 229.

We conclude, as the Supreme Court did in Earle, that failure to name a contractually liable defendant at trial leaves the jury to “speculate about the exact role of the [defendant] in the lawsuit, perpetuating the “charades in trials.”” “Precedent, parity, and fairness demand that this Court put an end to charades and legal fictions....”

Id., quoting Earle, 156 S.W.3d at 261. Those are exactly the claims that were made by Branham against the defendant-doctors, UKMC and Hospital Corporation in this case. UKMC and Hospital Corporation were statutorily liable in the same manner as an employer would be that has entered into a contract to indemnify its employees. Therefore, UKMC and Hospital Corporation should have been named as defendants at trial.

In Williamson, as in Earle, the medical facility was the “entity, which wins, or loses, dependent upon the resolution of the questions.” Based on the facility’s contractual relationship with its employee-doctor in that case, the facility had the right to approve any settlement, was responsible for the payment of any settlement or the satisfaction of any jury verdict, and would be the party that benefitted in the event of a defense verdict at trial. Therefore, the facility was the real party in interest and had to be identified. The same is true of UKMC and Hospital Corporation and the defendant-doctors in this case. Because UKMC and Hospital Corporation stood to “win or lose” based on the resolution of the claims against the defendant-doctors, they were real parties in interest and should have been identified at trial so as to fully inform the jury of the real parties in interest to the action.

B. ACTIVE PARTICIPATION AT TRIAL

As to Earle's second trigger for when a real party in interest must be identified, UKMC and Hospital Corporation also actively participated in the trial, as counsel for UKMC and Hospital Corporation was also counsel for the defendant-doctors. See Williamson v. Schneider, 205 S.W.3d 224, 228 (Ky. App. 2006) (holding that where the real party in interest has the same counsel as the tortfeasor, that counsel's participation on behalf of the tortfeasor is active participation on behalf of the real party in interest); See also Mattingly v. Stinson, 281 S.W.3d 796, 799 (Ky. 2009) (J. Scott, concurring) (clarifying that Earle held that there are two separate triggers for identification of the real party in interest and that contractual liability *and* active participation at trial are not required).

III. THE INSTRUCTIONS PRESENTED TO THE JURY WERE INCORRECT

The Court of Appeals erred when it found no merit in Branham's argument regarding the propriety of the jury instructions given in this case. The jury instructions in this case should have been patterned after those given in Deutsch v. Shein, 597 S.W.2d 141 (Ky. 1980). These were the instructions submitted by Branham, but were not those ultimately selected by the trial court. Specifically, Branham's proposed interrogatories to the jury asked "Do you believe from the evidence that [insert physician] failed to observe this duty and that such failure was a substantial factor in the failure to diagnose Peggy Branham's aortic injury?" The trial court instead instructed the jury "Do you believe from the evidence that [insert physician] failed to comply with this duty and that such failure was a substantial factor in causing Peggy Branham's death."

In Deutsch, the plaintiff, experiencing various symptoms, was examined by her physician. Id. at 142. The physician conducted significant x-rays and other tests, but did not test the plaintiff for pregnancy. Id. After the passage of some time and experiencing no relief, she again saw her physician, who again failed to test her for pregnancy. Id. Almost a month later, she was examined by her OB/GYN, who diagnosed her as ten weeks pregnant. Id. Based upon the fact that x-rays and other radiographic tests could injure a fetus and upon her OB/GYN's advice, and after consultation with a priest who gave her conflicting advice, the plaintiff underwent an abortion to terminate her pregnancy. Id. at 142-143. At trial, a jury found the original physician negligent in failing to order a pregnancy test prior to submitting the plaintiff to x-rays and other tests that were potentially dangerous to a fetus, but found the physician's failure to order a pregnancy test was not a substantial factor in causing the plaintiff's emotional distress associated with the abortion. Id. at 143. On appeal, the Kentucky Supreme Court reversed and held "reasonable minds cannot differ on the conclusion that the negligence of Dr. Shein was a substantial factor in causing the irradiation of Mrs. Deutsch during an early period of her pregnancy, for which she sought further medical advice and services and, therefore, in causing her at least some trauma." Id. Explaining the substantial factor analysis and its impact on jury instructions, the Supreme Court stated **"Our use of the substantial factor test in fashioning instructions in prior cases shows the test applies to the event which results in the injury, not the injury itself" and "The injury need only flow directly from the event."** Id. at 145 (emphasis added). Thus, if an injury is the reasonably foreseeable result of a negligent act or omission, the instructions should focus on the event (negligent act or omission), not the ultimate

outcome. In this case that event (negligent act or omission) is the failure to diagnose Peggy's aortic injury, not her death.

Branham recognizes that this Court has issued an opinion that may at first glance seem conflicting in Miller v. Marymount Medical Center, 125 S.W.3d 274 (Ky. 2004). However, Miller is factually dissimilar from the case at hand. In Miller, a mother, Mrs. Miller, began to experience a variety of medical issues shortly after giving birth. Ultimately, she developed Adult Respiratory Distress Syndrome which caused her to suffer both respiratory arrest and brain cell damage that resulted in an irreversible coma. Miller, at 275-277. The experts for both the Plaintiff and Defendants agreed upon this. Id. at 276. The experts disagreed, however, as to whether the respiratory arrest caused the brain cell damage. Id. at 276. In rejecting Appellant's argument that a Deutch instruction should have been utilized, the Supreme Court noted "Appellants' proposed interrogatory would have erased Dr. Ehrie's testimony that the respiratory arrest did not cause Mrs. Miller's coma." Id. at 286. This distinction is significant because there is no dispute in the case at hand that Peggy had an aortic injury at the time she was treated by Rock, Britt, Kezslar and Pulmano and that the failure to diagnose it ultimately led to her death.

V. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO LIMIT THE NUMBER OF DEFENDANTS' EXPERT WITNESSES TO ONE PER SPECIALTY, OR ALTERNATIVELY, IN FAILING TO PERMIT PLAINTIFF TO CALL REBUTTAL EXPERT WITNESSES

The trial court abused its discretion in failing to limit the Defendants' to the same number of experts as called by Branham, or alternatively, in not permitting Branham to call rebuttal expert witnesses. Rock, Britt, Keszler and Pulmano identified two expert witnesses in each of the areas of radiology and emergency medicine. Branham, who was

required to file his expert witness disclosure first, identified one each. The CR 26 disclosures and testimony of the expert physicians identified on behalf of the above physicians in the field of emergency medicine were factually similar. The same is true for the expert witnesses in the field of radiology. The testimony of two experts, saying the same thing in each area, was a needless presentation of cumulative evidence, a waste of the Court's time and an affront to the notion of judicial economy. In addition, the presentation of two experts, offering the same testimony in each area was prejudicial to Branham in that it improperly implied to the jury that more physicians shared the opinions of the experts retained by Rock, Britt, Keszler and Pulmano than agreed with Branham's experts.

The Court has discretion to limit the number of expert witnesses presented by any party. F. B. Insurance Co. v. Jones, 864 S.W.2d 926 (Ky. App. 1993), held that even though relevant, evidence may be excluded if its prohibitive value is substantially outweighed by considerations of waste of time or needless presentation of cumulative evidence. See also Ford Motor Company v. Zipper, 502 S.W.2d 74, 78 (Ky. 1973). The trial court should have exercised such discretion in this case, and such failure amounted to an abuse of discretion.

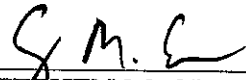
CONCLUSION

For the foregoing reasons, the Movant/Appellant, Ira Branham, Individually and as Administrator of the Estate of Peggy Branham, deceased, respectfully requests this Court reverse the Opinion of the Kentucky Court of Appeals and the Judgment of the Fayette Circuit Court and remand the case for consistent proceedings therein, including re-trial on the merits.

Respectfully Submitted,

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APPENDIX

- Appendix 1: Judgment. (Record, pp. 1521-1525).
- Appendix 2: Court of Appeals Opinion.
- Appendix 3: Deposition testimony of Rock. (Record, pp. 923-925).
- Appendix 4: Agreed Order from Kentucky Board of Medical Licensure. (Record, pp. 1124-1130).
- Appendix 5: Deposition testimony of Britt. (Record, pp. 594-595).
- Appendix 6: Order entered August 3, 2010. (Record, pp. 1288-1292).
- Appendix 7: A copy of the unpublished opinion Hodes v. Ireland, 2009 Ky. Unpub. LEXIS 87 (Ky. 2009).
- Appendix 8: A copy of the unpublished opinion Ferris v. Tennessee Log Homes, Inc., 2010 U.S. Dist. LEXIS 26272 (W.D. Ky. 2010).
- Appendix 9: A copy of The Estate of Judith Burton v. Trover Clinic Found., Inc., 2011 Ky. App. LEXIS 94 (Ky. App. 2011).
- Appendix 10: A copy of Mousseau v. Schwartz, 756 N.W.2d 345 (S.D. 2008).