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

REPLY BRIEF FOR MOVANT/APPELLANT

Respectfully submitted,

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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 24th day of October, 2013.

CORY M. ERDMANN

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

The purpose of this Reply Brief is to clarify issues and respond to portions of the Brief for Appellees.

SUMMARY OF REPLY

This Reply addresses portions of two arguments raised in the Brief for Appellees. First, Rock's assertion that evidence of his prior disciplinary action was properly excluded is flawed and based upon a fundamental misunderstanding of the nature of medical negligence actions. Second, UKMC and Hospital Corporation are clearly real parties in interest that should have been identified at the trial of this action.

I. THE TRIAL COURT IMROPERLY EXCLUDED EVIDENCE OF ROCK'S PRIOR DISCIPLINARY ACTION

No matter how Rock attempts to frame the issues in this case, one key point exists. Rock was identified as an expert witness in Defendants' CR 26.02(4)(a) Expert Witness Disclosure. (Record, p. 1185). This alone makes the trial court's exclusion of Rock's licensure issues improper. See Kemper v. Gordon, 272 S.W.3d 146 (Ky. 2008). As this Court stated in Kemper:

> **This Court has held that a party is entitled to cross-examine an expert on any subject that reflects on the expert's credibility**. See Tuttle v. Perry, 82 S.W.3d 920, 923-924 (Ky. 2002). **Further, we have rejected the claim that the credibility of an expert is collateral.** See Miller v. Marymount Med. Ctr., 125 S.W.3d 274, 281-282 (Ky. 2004). **After all, the credibility of a witness's relevant testimony is always at issue**. See Sanborn v. Commonwealth, 754 S.W.2d 534, 545 (Ky. 1988), overruled on other grounds by Hudson v. Commonwealth, 202 S.W.3d 17 (Ky. 2006). (Emphasis Added).

There is no fact that could be more critical to the credibility of an expert witness than whether that expert has been the subject of disciplinary action for engaging in conduct that

his own professional licensing agency determined to be "**below the minimum standards of care,**" and that "**...indicate Gross Ignorance of the precautions and prohibitions necessary to insure the safety of patients and the community.**" (Record, p. 1126) (emphasis added).

Further, Rock's entire argument attempts confuse the issues at hand by asserting that Branham wants to introduce evidence of Rock's licensure issues in violation of KRE 404(b). KRE 404(b) merely prohibits the use of prior bad acts to show subsequent action in conformity therewith. While this argument may be tenable if Branham were seeking to introduce evidence surrounding the multiple prior medical negligence lawsuits filed against Rock, it has no merit here.

Simply, Rock's misguided argument fails to recognize the unique nature of medical or professional negligence cases. In professional negligence cases the defendant has been charged with a duty that requires him or her to meet a standard of care as set forth by their profession. In doing so, they must be knowledgeable as to what that standard of care requires. Demonstrating a lack of this required knowledge is not propensity evidence or evidence of prior bad acts, but rather goes to the credibility of the witness and to his training, education and experience within the profession and knowledge of the applicable standard of care. To believe otherwise simply makes no sense.

In this case, 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. 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 this testimony and the credibility of Rock's testimony that Branham should have been permitted to challenge by offering evidence of Rock's licensure issues.

Further, as the Supreme Court of South Dakota noted in Mousseau v. Schwartz, 756 N.W.2d 345 (S.D. 2008), an attempt to avoid introduction of licensure issues by a defendant physician based upon the claim he is merely a fact witness is without merit. A copy of Mousseau v. Schwartz, 756 N.W.2d 345 (S.D. 2008) is attached at Appendix 1. As the Mousseau Court noted, physicians have a specialized level of knowledge and while a defendant physician 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.

Lastly, it must be noted that contrary to Rock's assertion, his deposition testimony regarding his licensure issue was untruthful. As he testified:

> 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).

This was in stark contrast to the Agreed Order from the Kentucky Board of Medical Licensure (KBML) that revealed a much different situation - A situation where Rock had written prescriptions for controlled substances to three (3) separate individuals without establishing a physician/patient relationship; had in fact written seventeen (17) prescriptions for controlled substances to two (2) individuals; had seven different restrictions placed on him; and, had been fined for failing to abide by the terms of the Agreed Order. (Record, p. 1122).

II. UKMC AND HOSPITAL CORPORATION ARE REAL PARTIES IN INTEREST AND MUST BE NAMED DEFENDANTS IDENTIFIED AT TRIAL

As noted in the Brief for Appellant, even if 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.

Recent precedent from this Court provides additional support for the assertion that UKMC and Hospital Corporation are the real parties in interest in medical negligence

actions filed against physicians working at UKMC. In Commonwealth of Kentucky v. Kentucky Retirement Systems, 2010-SC-00809-DG, this Court opined that, "We do not have a government that is beyond scrutiny. If sovereign immunity can be used to prevent the state, through its agencies, from being required to act in accordance with the law, then lawlessness results. This review is qualitatively different from requiring the state to pay out the people's resources as damages from state injury to a plaintiff. This is the very act of governing, which the people have a right to scrutinize. Thus to say that the state is entirely immune is an overbroad statement." A copy of Commonwealth of Kentucky v. Kentucky Retirement Systems, 2010-SC-00809-DG, is attached at Appendix 2. With this opinion, this Court seems to recognize that naming the state agency when it is a real party in interest is essential to the transparency of government. Sovereign immunity does not exist to protect the state from being disclosed as an interested party, it only protects the state from being subjected to a damage award.

When applied to the instant facts it is clear that identification of UKMC and Hospital Corporation as real parties in interest do not harm the state but serve to provide transparency to both governmental and judicial process. While the state is still permitted to claim protection under the doctrine of sovereign immunity, the identification of the state agencies involved at trial, UKMC and Hospital Corporation, would allow the jury to be fully informed as to who the real parties in interest are and would put an end to the charade of legal fiction criticized by the Court of Appeals and this Court in Williamson v. Schneider, 205 S.W.3d 224 (Ky. App. 2006) and Earle v. Cobb, 156 S.W.3d 257 (Ky. 2004).

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: A copy of Mousseau v. Schwartz, 756 N.W.2d 345 (S.D. 2008).

Appendix 2: A copy of Commonwealth of Kentucky v. Kentucky Retirement Systems, 2010-SC-00809-DG.