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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000732-MR

JERRY WALKER AND NICOLE BELCHER AS
CO-ADMINISTRATORS OF THE ESTATE OF
KATHERINE WALKER
and
JERRY WALKER — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 10-CI-007835

METROPOLITAN UROLOGY, P.S.C.
and
C. JEFFREY GOODWIN, M.D.
and
BRADLEY B. BELL, M.D. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, JONES, AND THOMPSON, JUDGES.

JONES, JUDGE: Appellants, Jerry Walker and Nicole Belcher, as co-administrators of the estate of Mrs. Kitty Walker, appeal from a jury verdict of the

Jefferson Circuit Court, finding in favor of Appellees, Dr. Bell and Dr. Goodwin in this medical malpractice action. Appellants maintain that the verdict should be set aside based on several errors committed by the trial court. For the reasons set forth herein, we AFFIRM.

I. FACTUAL AND PROCEDURAL BACKGROUND

In October 2009, Mrs. Walker was diagnosed with cancer of the left kidney and ureter. Dr. Goodwin became involved in her care shortly after her diagnosis. Dr. Goodwin reviewed Mrs. Walker's test results, discussed her diagnosis, and recommended a nephroureterectomy (removal of the cancerous kidney and ureter). On December 1, 2009, Dr. Goodwin and his partner, Dr. Bell, performed the nephroureterectomy.[1]

During the surgery, Dr. Goodwin removed Mrs. Walker's left kidney laparoscopically and then made an open incision to remove her ureter. Because the ureter runs from the kidney to the bladder, Dr. Goodwin opened Mrs. Walker's bladder, removed the ureter, and closed the bladder. During the surgery, both Dr. Goodwin and Dr. Bell used a Bookwalter retractor to hold tissue back to expose the surgical site.

[1] The parties disagree about the role that Dr. Bell played in the surgery. Appellees contend that Dr. Bell's involvement in Mrs. Walker's care was extremely limited. Appellants assert that Dr. Goodwin and Dr. Bell played an equal role, working as a team, both adjusting the retractor about five times each during the December 1, 2009 surgery.

After the surgery, Mrs. Walker experienced a low urine output. Dr. Goodwin ordered several tests to assess whether there was a problem with her right kidney, right ureter, or bladder. He also asked a kidney specialist to evaluate her. Mrs. Walker's function continued to decline. When it had not improved by December 9, 2009, Dr. Goodwin recommended placement of a pehrostomy tube.[2] Mrs. Walker was transferred to Norton Suburban Hospital for that procedure and further diagnostic testing.

On December 10, 2009, a test showed that Mrs. Walker's right kidney was not dilated. However, a catheter could not be passed through her ureter into her bladder. Dr. Goodwin took Mrs. Walker to the operating room to place the catheter in her ureter. There, he found what he described in his operative note as "an obliterated right distal ureter just above the bladder approximately 2 to 2.5 cm from her right ureteric orifice."

The next morning, on December 11, 2009, Dr. Goodwin took Mrs. Walker back to surgery to further investigate. However, once in the operating room, he was unable to locate any viable ureter. Dr. Goodwin ultimately replaced the ureter with a section of the bowel, creating what is known as an "ileal ureter." At the end of the procedure, Dr. Goodwin dictated an operative note. His post-

[2] This is a tube that is placed into a patient's kidney to drain urine.

operative diagnosis was "necrotic right ureter, most likely from retractor injury during left-sided nephroureterectomy."

After her surgery, Mrs. Walker continued to see Dr. Goodwin for her urological care. She experienced frequent problems with obstruction of her ileal ureter. She then had a nephrostomy tube placed, allowing urine to flow directly from her right kidney into a bag. Because of her history of cancer in her urinary tract, Dr. Goodwin periodically evaluated her bladder for signs of cancer, including in April 2010 and June 2010. On those occasions, Dr. Goodwin did not detect any cancer in the bladder.

In November 2010, a CT scan revealed an abnormality in Mrs. Walker's bladder. Dr. Goodwin recommended a cystoscopy,[3] but Mrs. Walker did not show up for her scheduled appointment. Instead, she went to see another urologist, Dr. Eric Uhlenhuth. Over a month later, on December 10, 2010, Dr. Uhlenhuth performed a cystoscopy, which revealed bladder cancer. He removed the mass, but additional lesions were found several months later.

In May 2011, a lesion was discovered on Mrs. Walker's lung. In June 2011, additional lesions were discovered in her bladder. By January 2012, metastasis was evident in her lung and spine. Mrs. Walker underwent radiation

[3] Cystoscopy is a test that looks at the inner lining of the bladder and the tube from the bladder to the outside of the body (urethra). The cystoscope is a thin, lighted viewing tool that is put into the urethra and moved into the bladder.

and one round of chemotherapy before losing her battle with cancer on May 27, 2012.

Appellants believe that Mrs. Walker most likely would have survived if her bladder had been biopsied prior to her December 1, 2009 surgery. It is Appellants' opinion that the cancer most likely would have been discovered in 2009 and conservative treatment at that time most likely would have stopped progression of the cancer and Mrs. Walker's death.

The lawsuit was originally filed on November 8, 2010, by Mrs. Walker and her husband, Jerry Walker, against Dr. Goodwin, Dr. Bell, and their group, Metropolitan Urology, P.S.C. Appellants' complaint alleged that Appellees committed medical negligence, specifically asserting that Dr. Goodwin and/or Dr. Bell injured Mrs. Walker's right ureter and seeded her cancer on December 1, 2009, when they removed her left kidney and ureter. In addition to injuring the ureter during the December 1, 2009, surgery, Appellants argue that Dr. Goodwin and Dr. Bell negligently spread cancer that was, in their opinion, most likely present in her bladder when they removed the portion of the left ureter that was inside her bladder. As such, Appellants claim that the doctors negligently spread Mrs. Walker's cancer during her December 1, 2009, surgery.

The case proceeded to jury trial on March 25, 2014. The jury returned a verdict in favor of the codefendants on all of Appellants' claims and the trial court entered judgment on April 10, 2014.

On appeal, Appellants claim that the trial court committed reversible error by: (1) allowing Dr. Goodwin and Dr. Bell to exercise separate peremptory strikes; (2) imposing limitations on Appellants' counsel's cross-examination of Dr. Bell and one of Dr. Bell's experts; (3) failing to admonish counsel for Dr. Bell during his cross-examination of Appellants' expert Dr. Peter Bretan; (4) granting Dr. Goodwin's motion for directed verdict regarding Mrs. Walker's alleged destruction of earning capacity; (5) instructing the jury regarding Mrs. Walker's duty to exercise reasonable care for her own health and well-being; and (6) denying Appellants' motion for mistrial during the closing argument of counsel for Dr. Goodwin. Appellants further contend that the cumulative impact of the alleged errors requires reversal. We will address these arguments in turn.

II. ANALYSIS

A. Peremptory Challenges

The allocation of peremptory challenges is governed by Kentucky Rules of Civil Procedure ("CR") 47.03(1), which states in pertinent part that: "[I]n civil cases each opposing side shall have three peremptory challenges, but co-parties having antagonistic interests shall have three peremptory challenges each."

The trial court's determination that antagonistic interests existed between the two physicians for the purpose of allocating peremptory challenges is to be reviewed for an abuse of discretion. *Sommerkamp v. Linton*, 114 S.W.3d 811, 815 (Ky. 2003). Under this standard, we review "whether the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

In *Sommerkamp*, the Supreme Court of Kentucky identified three general factors a court should consider in ascertaining whether co-parties have antagonistic interests within the meaning of CR 47.03: "1) whether the co-parties are charged with separate acts of negligence; 2) whether they share a common theory of the case; and 3) whether they have filed cross-claims." *Sommerkamp,* 114 S.W.3d at 815. Additionally, the Court set forth other factors that may be considered, including: "whether the defendants are represented by separate counsel; whether the alleged acts of negligence occurred at different times; whether the defendants have individual theories of defense; and whether fault will be subject to apportionment." *Id.* at 815.

Applying the *Sommerkamp* factors to the record before it, the trial court concluded that Dr. Goodwin and Dr. Bell had sufficiently antagonistic interests to justify allotting them their own peremptory challenges. Appellants

argue the trial court erred: (1) in determining the codefendants had antagonistic interests because the codefendant doctors were identically aligned throughout the entirety of the litigation; and (2) in misapplying the antagonistic-interest analysis when it "heavily relied" on the inherent antagonism of an apportionment instruction which subsequently included Mrs. Walker as a party who could be apportioned. We find that the trial court properly applied the *Summerkamp* factors and therefore correctly found that Appellees had antagonistic interests for purposes of peremptory challenges.

First, Dr. Bell and Dr. Goodwin were each charged with independent acts of negligence. Each doctor played a different role in treating Mrs. Walker and their alleged negligence occurred at various points during that treatment. Dr. Goodwin's negligence, as alleged, occurred before, during, and/or after surgery, whereas Dr. Bell's alleged negligence could have occurred only during the December 1, 2009, surgery. Our Supreme Court has held that when defendants are charged with separate acts of negligence, their interests are "most always antagonistic," because either party may escape or reduce his liability by pointing the finger at his co-party. *Bayless v. Boywer*, 180 S.W.3d 439, 448 (Ky. 2005) (citing *Roberts v. Taylor*, 339 S.W.2d 653, 656 (Ky. 1960)).

Next, while Appellees' defense theories and expert witnesses, at times, intertwined and overlapped, their interests were not wholly aligned. As

such, they did not share a wholly common defense theory. Appellees argue and we agree, that "the requirement that parties be antagonistic does not preclude their being in agreement on some points of proof." *Bowman v. Perkins*, 135 S.W.3d 399, 401 (Ky. 2004). Dr. Bell and Dr. Goodwin agreed that Mrs. Walker's ureteral injury was not caused by a retractor. Thereafter, their theories diverged. Most importantly, to the overall defense of the case, Appellees disagreed as to the cause of Mrs. Walker's ureteral injury as well as the timing of her metastasis.

Next, although Appellees initially were represented by the same attorney, Mr. Darby, he withdrew after realizing "significant differences in terms of their roles and responsibilities, and allegations." Appellees were represented by separate counsel prior to and during trial and continue to retain separate counsel for this appeal.

Importantly, we agree with the trial court that under the apportionment doctrine, Dr. Bell and Dr. Goodwin each sought to escape or minimize liability by convincing the jury that the other was responsible for Mrs. Walker's injuries. In a case such as this "where two [medical actors] were alleged to have committed entirely separate acts of negligence," the inherently antagonistic framework of apportionment "alone provides sufficient justification for the trial court's decision[]" to award separate peremptory challenges. *Bayless v. Boyer*,180 S.W.3d 439, 448 (Ky. 2005).

Inherent in the Kentucky law of apportionment, Kentucky Revised Statutes ("KRS") 411.182, is that the interests of codefendants may be considered antagonistic. *Sommerkamp*, 114 S.W.3d at 816. The *Sommerkamp* Court noted that the apportionment system had resulted in each of the defendants using a strategy prior to trial to minimize the amount of fault and damages that the jury could ultimately assign to them. *Id.* at 816. Appellees argue, and we agree, that this is precisely what Dr. Bell did in this case from the initiation of litigation up to and including at trial.

We disagree with Appellants that the court automatically decided Appellees' interests were antagonistic based upon the apportionment instruction. Rather, the record reveals that the trial court paused to review *Summerkamp* and upon return, applied the factors laid out in the case and gave appropriate weight to the existence of the apportionment instruction as required by prior case law.

We also note that the trial court made its antagonistic-interest decision preceding the Appellees' presentation of proof. Thus, we find Appellants' arguments that point to trial strategy and other occurrences during trial not able to be considered. *See Sommerkamp*, 114 S.W.3d at 816. ("[I]nterests that are antagonistic . . . when the trial judge makes a determination regarding entitlement to separate preemptory challenges [] do not necessarily have to remain antagonistic

through the trial[.] There can be no certainty as to what the evidence will demonstrate or precisely what claims or defenses will be during trial.").

Specifically, under this rule, Appellants' argument that the apportionment instruction negated any antagonism between Appellees is unavailing. The fact that the trial court decided to include Mrs. Walker in the apportionment instructions several days later could not have been considered by the court in its decision to grant peremptory challenges prior to trial.

We find that the trial court correctly found, based upon separate allegations of negligence, different theories of the case, separate counsel, and existence of apportionment, that antagonism existed between Dr. Goodwin and Dr. Bell, and therefore, correctly permitted them to exercise separate peremptory challenges. Under these circumstances, we cannot conclude that the trial court abused its discretion in finding that some degree of antagonism existed to warrant separate peremptory challenges.

B. Cross-Examination

Next, Appellants argue that the trial court erred by imposing limitations on their cross-examination of Dr. Bell and his expert, Dr. Bullock. Before the limitations at issue arose, both physicians testified unequivocally that they believed it would be "impossible" for a Bookwalter retractor to have caused

the injury to Mrs. Walker's ureter.[4] Appellants' counsel then asked both Dr. Bell and Dr. Bullock to assume that the injury was caused by a retractor for subsequent questions.

On both occasions, defense counsel objected, arguing that it was improper for Appellants' counsel to ask the witnesses to answer questions based on what they believed to be an impossible predicate. The trial court sustained the objection on the grounds that each physician had already testified that it was impossible for a retractor to have caused the injury. Further, Appellants' counsel was permitted to cross-examine both defendant physicians and each expert at length regarding the basis for their opinions that it was impossible for a retractor to have caused the injury.

Appellees argue that there was no abuse of discretion in the trial court's decision to impose reasonable limitations on Appellants' counsel's cross-examination, while permitting him to thoroughly cross-examine both witnesses regarding the basis for their opinions that it would have been impossible for a retractor to have caused Mrs. Walker's injury. We agree.

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[4] Dr. Bell at Trial Disc 03/27/14, 2:30:54, Dr. Bullock at Trial Disc 3/31/14, 1:36:17 ("Under any facts, a single blade, it's impossible for a single blade to disturb the entire length of a ureter. That's an anatomic impossibility" 1:46:53 "It just – it's just not – it's just not physically possible for that blade to reach down there and grab that ureter") 2:23:19 ("… it is my opinion that it's no way possible that the entire ureter could be damaged by a retractor blade"), 2:23:43 ("it is very unlikely that the blade could have injured the ureter, but even if it had injured the ureter, I would say that it's no way possible that it could injure the entire, entirety of the ureter. It's just not possible."

This court reviews a trial court's evidentiary rulings for abuse of discretion. *Manus, Inc. v. Terry Maxedon Hauling, Inc.,* 191 S.W.3d 4, 8 (Ky. App. 2006). That test is whether the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Goodyear Tire & Rubber Co. v. Thompson,* 11 S.W.3d 575, 581 (Ky. 2000). "The presentation of evidence as well as the scope and duration of cross-examination rests in the sound discretion of the trial judge." *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997) (quoting *Moore v. Commonwealth*, 771 S.W.2d 34, 38 (Ky. 1988)).

The form and content of hypothetical questions to experts are left to the sound discretion of the court. Decisions regarding the form and content thereof will be affirmed unless there has been abuse of that broad discretion. *Daughtery v. Runner,* 581 S.W.2d 12, 20 (Ky. App. 1978). When an attorney asks a hypothetical question likely to be confusing to the jury, a court has the power to exclude such a question pursuant to Rule 403. *See 1 Kentucky Evidence Courtroom Manual* 705.01.

The trial court explained its ruling, stating that asking the experts to assume their opponent's theory would be misleading to the jury, that it was not a fair question, and because it went beyond simply asking how opinions changed based upon disputed factual questions, it went to the ultimate question and, hence, would not be helpful to the jury.

Further, Appellants were allowed to ask Dr. Goodwin about this hypothetical question, asking that if what he had written in his operative note had been factually correct, would that be a deviation from the standard of care. However after that line of questioning, they went on to ask Dr. Bell's experts about what Dr. Goodwin had already answered. Thus, asking the question, even if proper, would have been cumulative and not helpful to the jury.

We find no abuse of discretion in the trial court's decision to impose reasonable limitations on Appellants' counsel's cross-examination.

C. Closing Argument

Appellants argue that the trial court erred by denying Appellants' motion for mistrial during the closing argument of counsel for Dr. Goodwin. We review a trial court's denial of a motion for mistrial under an abuse of discretion standard. *Oghia v. Hollan*, 363 S.W.3d 30, 32 (Ky. App. 2012).

At trial, counsel for Dr. Goodwin, Mr. Brown, made the following statement during his closing argument: *"Who among us, who among us has at one time felt that they did something wrong only to later learn that they were mistaken?"* Based on his statement, Appellants' counsel moved for a mistrial on a "golden rule" violation.

The trial court sustained the objection, but denied the motion for mistrial. He then admonished the jury, stating "ladies and gentlemen of the jury,

let me give you an admonition that you are to disregard the last statement, you are going to disregard Mr. Brown's last statement and we are going to proceed."

A "golden rule" argument is one in which counsel asks the jurors to imagine themselves or someone they care about in the position of the plaintiff. *Caudill v. Commonwealth*, 120 S.W.3d 635, 675 (Ky. 2003), citing Black's Law Dictionary 700 (7th ed. West 1999). The difficult question in determining whether such argument warrants reversal is the probability of real prejudice, and in this respect, each case must be judged on its own unique facts. *Stanley v. Ellegood*, 382 S.W.2d 572, 575 (Ky. 1964).

Appellants argue that counsel specifically asked the jury to place themselves in Dr. Goodwin's position, therefore appealing to the passions and prejudice of the jury, and when combined with the restrictions placed on the Appellants regarding the same question, a reversal and retrial was warranted. Appellants' counsel argued that Mr. Brown's statement was a "golden rule" argument and could only be cured by a mistrial.[5]

Appellees argue that even if the statement by counsel was improper, it did not warrant a mistrial and any harm was cured by the trial court's admonition

[5] Plaintiff's counsel objected at trial, stating: "Now the problem is, your honor, how we cure the golden rule violation. I don't think that an admonition will cure that. I would move for a mistrial based upon his statement your honor. I think I have to preserve that for the record and tell the court that I don't think an admonition will cure the prejudice that he has not created."

to disregard the statement. A jury is presumed able to follow an admonition. *Johnson v. Commonwealth*, 104 S.W.3d 430, 441 (Ky. 2003).

An improper statement in closing argument must have a probability of real prejudice in order to warrant reversal. *Stanley*, 382 S.W.2d at 575. An improper argument merits reversal, "only when it is prejudicial and results in injustice or deprives a party of a fair and impartial trial." *Mason v. Stengell*, 441 S.W.2d 412, 416 (Ky. 1969) (citing *Town of Wingo v. Rhodes*, 234 Ky. 385 (Ky. 1930)). Closing arguments should be considered as a whole, keeping in mind the wide latitude to be afforded to counsel. *Miller v. Commonwealth*, 283 S.W.3d 690, 704 (Ky. 2009). Further, "[i]t is beyond question that the trial judge is in the best position to assess any actual prejudicial effect." *First & Farmers Bank of Somerset, Inc. v. Henderson*, 763 S.W.2d 137, 142 (Ky. Ct. App. 1988).

Additionally, Appellees insist that the statement made during closing arguments was a direct response to Appellants' questioning of Dr. Goodwin's credibility and his explanation for why he no longer believed that the retractor system caused Mrs. Walker's uretal injury. Appellees believe that after the attack on Dr. Goodwin's credibility that was central to Appellants' approach throughout the entire trial, Dr. Goodwin had every right to explain why he had written that in his report and why he changed his opinion after additional reflection. *See, e.g., Commonwealth v. Mitchell,* 165 S.W.3d 129, 132 (Ky. 2005)(even true "golden

rule" arguments may be made in response to arguments which open the door to them). In assessing Dr. Goodwin's explanation and weighing his credibility, the jurors were permitted to draw on their life experiences and common sense while deciding this case. *Little v. Commonwealth*, 422 S.W.3d 238 (Ky. 2013).

We agree with Appellees that this was an appeal to use common sense and life experiences in assessing the credibility of Dr. Goodwin's explanation and testimony; it was not an appeal to raw emotion, passion, or prejudice. We also disagree with Appellants' claim that an admonition was insufficient and that they were entitled to a mistrial following Appellees' closing statement. "[A] mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice. The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way." *Gould v. Charlton Co.*, 929 S.W.2d 734, 738 (Ky. 1996). It is well settled in Kentucky that "[w]hether removal of prejudice can be accomplished by a curative admonition or whether a mistrial is necessitated is a matter within the sound discretion of the trial court." *Id.* at 740. Finally, "[a] jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error." *Johnson v. Commonwealth*, 105 S.W.3d 430, 441 (Ky. 2003).

We find that a mistrial was not warranted and the trial court's admonition to the jury was sufficient, and further that error, if any, was harmless.

D. Directed Verdict

The trial court granted Dr. Goodwin's motion for directed verdict regarding Mrs. Walker's alleged destruction of earning capacity on the basis of no expert economist or life expectancy table being presented to the jury. Appellants argue that under Kentucky law, a plaintiff need not provide proof of life expectancy to recover damages for destruction of earning capacity. We find that even if the trial court erred in granting directed verdict, the error was harmless because the jury found for Appellees on the issue of liability.

We review an appeal of a directed verdict as follows:

> The standard of review for an appeal of a directed verdict is firmly entrenched in our law. A trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or there are no disputed issues of fact upon which reasonable minds could differ. Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts. A motion for directed verdict admits the truth of all evidence favorable to the party against whom the motion is made. Upon such motion, the court may not consider the credibility of evidence or the weight it should be given, this being a function reserved for the trier of fact. The trial court must favor the party against whom the motion is made, complete with all inferences reasonably drawn from the evidence. The trial court then must determine whether the evidence favorable to the party against whom the motion is made is of such substance that a verdict rendered thereon would be "palpably or

> flagrantly" against the evidence so as "to indicate that it was reached as a result of passion or prejudice." In such a case, a directed verdict should be given. Otherwise, the motion should be denied.
>
> It is well-argued and documented that a motion for a directed verdict raises only questions of law as to whether there is any evidence to support a verdict. While it is the jury's province to weigh evidence, the court will direct a verdict where there is no evidence of probative value to support the opposite result and the jury may not be permitted to reach a verdict based on mere speculation or conjecture.

Gibbs v. Wickersham, 133 S.W.3d 494, 495-96 (Ky. App. 2004)(internal citations omitted).

Appellees moved for a directed verdict at trial on Mrs. Walker's claims for future wages on the basis that Appellants failed to introduce evidence of Mrs. Walker's life expectancy. Appellees argue that a jury "may not be permitted to reach a verdict upon speculation or conjecture." *Wiser Oil Co. v. Conley*, 380 S.W.2d 217, 219 (Ky. App. 1964). Appellees argue that because Appellants did not introduce any evidence of Mrs. Walker's life expectancy, any verdict on that issue would have, therefore, been based entirely on speculation or conjecture.

While this court has previously permitted claims for future lost wages when there was no evidence presented concerning the plaintiff's life expectancy, Appellees argue that even if the trial court erred in granting the directed verdict,

the error was harmless because the jury found for Appellees on the issue of liability. We agree.

Kentucky Rules of Civil Procedure 61.01 instructs that no error in any ruling is ground for setting aside a verdict unless the refusal to set it aside would be inconsistent with substantial justice. CR 61.01. The Court will not reverse a judgment, except to correct an error that prejudiced the substantial rights of the complaining party. *Davidson v. Moore*, 340 S.W.2d 227 (Ky. 1960).
An error is not prejudicial and a verdict should not be set aside where "upon consideration of the whole case it does not appear that there is a substantial possibility that the result would have been any different." *Rankin v. Commonwealth*, 265 S.W.3d 227, 233 (Ky. App. 2008).

In *Partin v. Sherman*, 437 S.W.2d 735 (Ky. 1969), the appellants complained that the trial court erred in denying their motion for directed verdict on liability. The Court held that the alleged error, if any, was harmless because the jury had found for appellants on liability. In other words, because the ultimate outcome was the same, the error was harmless.

Similarly, we find that error, if any, was harmless because there is not a substantial possibility that the result would have been any different if the trial court had not directed the verdict on destruction of earning capacity. Appellants claim that they were wrongfully denied an element of damages, but their

substantial rights were not affected because the jury found against them on liability. At trial, the jury found in favor of both Appellees and did not reach the question of damages. Any error was, therefore, harmless and did not impact the outcome of the trial.

E. Jury Instruction

Appellants argue that the trial court erred by instructing the jury regarding Mrs. Walker's duty to exercise reasonable care for her own health and well-being and by permitting the jury to apportion some degree of fault against her.

In *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006), this Court set forth the applicable standard of review:

> Alleged errors regarding jury instructions are considered questions of law that we examine under a de novo standard of review. *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006). "Instructions 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). "The purpose of an instruction is to furnish guidance to the jury in their deliberations and to aid them in arriving at a correct verdict. If the statements of law contained in the instructions are substantially correct, they will not be condemned as prejudicial unless they are calculated to mislead the jury." *Ballback's Adm'r v. Boland–Maloney Lumber Co.*, 306 Ky. 647, 652–53, 208 S.W.2d 940, 943 (1948).

Appellants argue that the trial court's jury instructions were prejudicially erroneous for the following two reasons: (1) the trial court

contradicted its previous ruling on the inherent antagonism between codefendants due to an apportionment of fault instruction by allowing the jury to entirely blame Mrs. Walker for the alleged negligence of Dr. Goodwin and Dr. Bell; and (2) the jury instructions improperly included Mrs. Walker as a party to whom the jury could attribute and apportion fault.

The trial court found that there was sufficient evidence to sustain an apportionment instruction against her, stating: "This jury, again, they could put a zero by her and that's up to them. But they've got to have, based upon the evidence that's presented, a reasonable juror might find that she has some fault in this situation and they're going to be allowed to consider that."

We find that even if the trial court erred in its instructions, any error was harmless because the jury found in favor of the Appellees on liability. Because the jury found in favor of Appellees on liability, they never considered whether Mrs.Walker was an "egg-shell plaintiff" and never allocated any percentages of fault to any party. Because the jury decided the case on standard of care and never reached the next step, we affirm the judgment of the circuit court. *See Kentucky Farm Bureau Mut. Ins. Co. v. Gray*, 814 S.W.2d 928, 930 (Ky. App. 2001)(citing *Richmond v. Louisville & Jefferson County MSD*, 572 S.W.2d 601 (Ky. App. 1978)).

However, we pause to note that we are deeply troubled by the apportionment instruction in a medical malpractice case. The fact that Mrs. Walker had some risk factors that made her more susceptible to cancer does not mean that she was responsible in whole or in part for the fact that her cancer spread or that it was not diagnosed by her physicians sooner. We wholeheartedly disapprove of an apportionment instruction in a case like the present. *See, e.g.*, *Zak v. Riffel*, 34 Kan. App. 2d 93, 101, 115 P.3d 165, 172 (2005) ("A patient's prior condition which required him to be under a physician's care cannot be a basis for comparative fault in a negligence claim against the physician."); *Martin v. Reed*, 200 Ga. App. 775, 776, 409 S.E.2d 874, 876 (1991).

F. Cumulative Error

Lastly, Appellants argue that even if the alleged errors were harmless individually, the cumulative effect of the errors requires a reversal. The Kentucky Supreme Court has noted "[T]he [cumulative error] doctrine is necessary only to address 'multiple errors, [which] although harmless individually, may be deemed reversible if their cumulative effect is to render the trial fundamentally unfair.'" *Elery v. Commonwealth*, 368 S.W.3d 78, 100 (Ky. 2012). Appellant argues that the trial court's many errors permeated the entirety of the trial and prevented them from a full and fair opportunity to present their case to the jury. Appellants argue

the cumulative effect of these alleged errors require reversal and retrial. We disagree.

Most, if not all, of the errors alleged by Appellants were either harmless or not errors at all. Moreover, due to the complexity of a medical malpractice trial and the issues in this case, the trial court adequately provided a proper trial for Appellants' case to be heard. Appellants had an opportunity to fully present their case and question the defense of Appellees. The jury found for Appellees on all counts. There was no cumulative effect of errors in this case.

III. CONCLUSION

For the foregoing reasons, the judgment of the Jefferson Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANTS:

James M. Bolus, Jr.
Louisville, Kentucky

BRIEF FOR APPELLEES:

Brittany Perrin Asher
Louisville, Kentucky