



**In the Missouri Court of Appeals
Eastern District
DIVISION FOUR**

HEATHER L. SHALLOW, MICHAEL	)	No. ED103811
BISHOP, and TODD BISHOP,	)	
	)	
Appellants,	)	Appeal from the Circuit Court of
	)	Lincoln County
vs.	)	13L6-CC00122
	)	
RICHARD O. FOLLWELL, D.O., and	)	Honorable Chris Kunza Mennemeyer
RICHARD O. FOLLWELL, P.C.,	)	
	)	
Respondents.	)	Filed: October 17, 2017

OPINION

This is a wrongful death medical negligence case. Appellants claimed that Dr. Follwell perforated Decedent Sandra Beaver's bowel during a November 30, 2012 hernia repair surgery, and that he negligently caused her death when he failed to recognize and properly treat the leaking bowel. The case went to trial, the jury reached a defense verdict, and the court entered judgment in favor of Respondents. Appellants assert two points of error: (1) that the trial court abused its discretion by permitting the unfairly cumulative and prejudicial repetition of expert opinions from Respondents' expert witnesses, and (2) that the trial court abused its discretion by permitting Dr. Follwell to give a causation opinion different from the one he gave during his deposition. As to the first point, we reverse and remand for a new trial because we find that the trial court abused its discretion by allowing the unfairly cumulative and prejudicial repetition of certain expert opinions. We deny the second point as moot.

Factual and Procedural Background.

The basic facts of this case are largely undisputed. On the morning of November 30, 2012, Dr. Follwell performed surgery on Decedent involving the placement of surgical mesh to repair an abdominal hernia. Decedent was discharged around 12:30 p.m. About six hours later, Decedent began experiencing severe post-operative symptoms. She returned to the hospital around 9 p.m. and was readmitted. Dr. Follwell re-evaluated Decedent at 7 a.m. the next morning, December 1st, and around 2 p.m. she was discharged for the second time. The next day, December 2nd, Decedent's condition again worsened and she returned to the hospital where she was diagnosed with sepsis, a serious infection-related complication caused by the leakage into her abdominal cavity, through a hole in her bowel, of the toxic and infectious contents of her digestive tract. Decedent eventually died as a result of this complication.

Appellants alleged that Dr. Follwell was negligent because he caused the hole during the hernia surgery and then failed to recognize and properly treat the problem when he saw Decedent in the hospital the next day. Appellants presented their theory of liability principally through the testimony of retained expert Dr. Garry Ruben, but also through the testimony of treating surgeon Dr. Mark Leibold, who took Decedent back to surgery on December 3, 2012, to, among other tasks, remove both a section of Decedent's necrotic bowel and the infected surgical mesh.

The testimony in defense of Dr. Follwell was provided by Dr. Follwell himself in his dual status as a fact witness and as an expert witness followed by four retained expert witnesses in the following order: Dr. Grant Boichichio, a critical care specialist; Dr. Morton Rinder, a cardiologist and internist; Dr. Thomas Naslund, a vascular surgeon; and Dr. Gregory Brabbee, a colorectal surgeon.

Dr. Follwell, for his part, did not dispute that Decedent's bowel perforated, leaked, and caused the infectious condition that led to her death. Nevertheless, he denied that he caused the hole, that Decedent's bowel had perforated while she was under his care, and that he was negligent. He presented an alternative theory of causation to the jury through his own testimony—and that of his retained experts—asserting that the hole (and Decedent's resulting infection, sepsis, and death) was caused when previously undiagnosed atrial fibrillation caused a blood clot to form, resulting in the restriction of blood flow to the section of Decedent's bowel in question. This blood restriction or ischemia caused the bowel wall to become weak, necrotic, and ultimately to perforate all unrelated to anything Dr. Follwell did or failed to do.

Further facts, as relevant, are included below.

Standard of Review.

We review trial court decisions with respect to the admission or the exclusion of evidence under our abuse of discretion standard of review. *Lozano v. BNSF Railway Co.*, 421 S.W.3d 448, 451 (Mo.banc 2014). A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration. *Id.* If reasonable persons can differ as to the propriety of the court's action, then it cannot be said that the court abused its discretion. *Id.* Moreover, by both statute and rule, we are not to reverse a judgment unless the error committed by the court materially affected the merits of the action. *Id.* at 451-52.

The Admission or Exclusion of Expert Testimony.

Pursuant to the expert witness statute, § 490.065, the trial court in a civil case may allow an expert to testify if “scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue” In addition, we apply the same

standards for relevance and admissibility to expert testimony that we do to other types of evidence. *Lozano*, 421 S.W.3d at 451 n.2. The party seeking to admit evidence, including expert testimony, bears the burden of establishing both its logical and its legal relevance. *Nolte v. Ford Motor Co.*, 458 S.W.3d 368, 382 (Mo.App.W.D. 2014). To be legally relevant, the probative value, or usefulness, of the evidence sought to be admitted must not be outweighed by its costs, including the dangers of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or *the needless presentation of cumulative evidence*. *Id.*; *Kroeger-Eberhart v. Eberhart*, 254 S.W.3d 38, 43 (Mo.App.E.D. 2007) (citing *State v. Sladek*, 835 S.W.2d 308, 314 (Mo.banc 1992) (Thomas, J., concurring)).

Excessive cumulative expert testimony may create the risk that a jury will resolve differences in expert opinion by “counting heads” instead of giving fair consideration to the quality and credibility of each expert’s opinions. *Cantu v. United States*, No. CV14-00219 MMM (JCGx), 2015 WL 12743881, *8 (C.D. Cal. April 6, 2015) (citing *Royal Bahamian Ass’n, Inc. v. QBE Ins. Corp.*, No. 10-21511-CIV, 2010 WL 4225947, *2 (S.D. Fla. Oct. 21, 2010); *Sunstar, Inc. v. Alberto-Culver Co., Inc.*, Nos. 01 C 0736, 01 C 5825, 2004 WL 1899927, *25 (N.D. Ill. Aug. 23, 2004)).

However, in Missouri, there is no bright line in terms of the number of expert witnesses that may testify on behalf of a party generally or specifically on any issue nor do we in this opinion seek to draw one. Nevertheless, the absence of a bright line does not mean that there is no line at all. At some point the repetition of the same opinions by successive experts becomes redundant and no longer assists the trier of fact to understand the evidence but instead *needlessly* accumulates “additional evidence of the same kind bearing on the same point.” *Sampson v. Missouri Pac. R. Co.*, 560 S.W.2d 573, 590 (Mo.banc 1978) (defining “cumulative evidence”). Such *legally*

irrelevant testimony should be excluded even when it is clearly logically relevant and goes to the very root of the matter in controversy or relates to the main issue.¹ In Missouri, no matter how logically relevant particular testimony may be, it is part of the trial court's task "to determine when cumulative evidence should stop." *Jackson v. State*, 205 S.W.3d 282, 288 (Mo.App.E.D. 2006) (citing *State v. Tompkins*, 277 S.W.2d 587, 591 (Mo.banc 1955)). The trial court's inquiry involves determining when repetitive evidence "become[s] so prejudicial or inflammatory as to outweigh [its] probative value"—i.e., when the repetitive evidence becomes *legally* irrelevant. *Id.*

Discussion.

Here, we find that the trial court abused its discretion in this case by allowing the serial repetition by the defense experts of their opinions regarding the critical issues in this case: (1) whether Dr. Follwell breached the standard of care and (2) what caused Decedent's death.

Our careful review of the record demonstrates that the trial court allowed all four of Dr. Follwell's experts to opine that Dr. Follwell did not cause the perforation to Decedent's bowel.

¹ Based on these principles, we reject Respondents' repeated contention that based on the quote from *Kummer v Cruz*, 752 S.W.2d 801, 809 (Mo.App.E.D. 1988) that "[e]vidence is not to be rejected as cumulative when it goes to the very root of the matter in controversy or relates to the main issue, the decision of which turns on the weight of the evidence," Respondents had the absolute right to present all the expert testimony in question and the trial court was without discretion to exclude it.

We do not read the authorities on which Respondents rely so expansively. Respondents' argument would eviscerate the trial court's duty to assess the legal relevance of the expert testimony in the context of whether it is prejudicially cumulative and would lead to absurd results. Thus, under Respondents' argument, since the only test for the admission of expert testimony would be whether it goes to the root of the matter or main issue in the case, there would be effectively no limit to the number of times a party's experts could testify to the same opinions. This would be absurd and it is not the law.

We reject that notion and the expansive reading of the principle found in *Kummer* and relied on by Respondents. We look instead, as we must, to the well-reasoned and well-established *legal* relevance analysis—whether the probative value of the evidence is outweighed by the dangers of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or the needless presentation of cumulative evidence, *Mathes v Sher Express, L.L.C.*, 200 S.W.3d 97, 112 (Mo.App.W.D.2006)—to avoid absurd results.

The trial court permitted Drs. Boicchio, Naslund, and Brabbee to opine that Dr. Follwell did not breach the standard of care. And the trial court permitted all four experts to repeatedly endorse the alternative theory of causation introduced by Dr. Follwell that the origin and cause of the perforation was Decedent's previously undiagnosed atrial fibrillation, not Dr. Follwell's surgery.

The issue before us is whether the cumulative evidence allowed by the trial court amounted to the "needless presentation of cumulative evidence" such that its probative value was outweighed by its cost which rendered it legally irrelevant and, if so, whether allowing such evidence constitutes an abuse of discretion. Again, we draw no bright line in terms of the number of experts that may be allowed to testify in this case or in any case. There is no magic number.

Instead, we focus our inquiry on the nature and the content of the testimony in the context of the considerations cited above applicable to the trial court's exercise of its discretion regarding the admission or exclusion of expert testimony. We note that Respondents' counsel represented that each of his experts was merely providing a specific part of Respondents' multi-faceted alternative causation theory that the bowel perforation resulted from atrial fibrillation not Dr. Follwell's surgery. And since this theory implicated multiple areas of medical expertise—cardiology, internal medicine, critical care, the vascular system, and the gastro-intestinal system—it was proper for each of his experts to testify as each did. We also note that in overruling one of Appellants' cumulative evidence objections, the trial court appeared to concur with Respondents' reasoning based on the trial court's statement that "[e]ach one of the experts did have a different specialty. They gave their own parts."

We may have been persuaded if this is what actually occurred, but it did not. What actually occurred was that the trial court allowed each of Respondents' retained experts to present not only the specific portion of the defense theory of causation which touched on his specialty but also

allowed each expert to repeat the sum and substance of the defense's alternative theory of causation (including those portions beyond his specialty) as well as the ultimate opinions that Dr. Follwell did not breach the standard of care (save one expert) or cause Decedent's death. In this regard, the trial court failed to properly apply the *legal* relevance test to this expert testimony.²

The result of the trial court's failure to apply the above-referenced principles of Missouri law was that the jury heard the same opinions repeated multiple times that Dr. Follwell's actions did not cause Decedent's injuries and death, that Dr. Follwell did not breach the standard of care, and that Decedent's injuries and death were actually caused by her previously undiagnosed atrial fibrillation. Missouri law certainly did not prohibit the defense from endorsing a doctor from each of the medical specialties that their theory of defense touched on—cardiology, internal medicine, vascular surgery, colorectal surgery, and critical care. This is certainly a formidable strategy as opposed to simply having one expert testify to the entire defense even if it touches on matters outside the expert's specialty which Missouri law also permits. In fact, Respondents sought to capitalize on their strategy by vigorously cross-examining Dr. Ruben, Appellants' lone retained expert, to demonstrate that Dr. Ruben was testifying in areas outside his specialty. It was certainly proper for him to do so and equally proper for the defense to point that out to allow the jury to assign the appropriate amount of weight to the testimony.

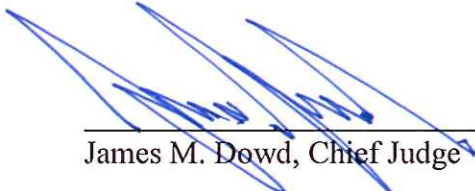
² Like the trial court, Respondents have largely ignored the requirements of Missouri law that expert testimony be legally relevant and assist the trier of fact. Respondents contend that the fact that several doctors of varying specialties arrived at the same conclusions in support of their defense, based upon the same set of data, is, in and of itself, probative and carries evidentiary weight. But this is the same as arguing fallaciously that testimony may garner probative value *from the fact that it is needlessly cumulative*. Missouri law does not recognize such a loophole, which would render impossible or absurd the application of the legal relevance test in cases like this one.

The problem with the trial court's handling of the scope of the defense experts' testimony is that all of them were permitted to not only provide opinions addressing the portion of the defense theory which touched on their specifically-endorsed expertise but they were then allowed to offer a chorus of the same ultimate opinions: that Dr. Follwell did not cause the injuries and death of Decedent, that Dr. Follwell did not breach the standard of care, and that the perforated bowel that lead to Decedent's death was caused by Decedent's previously undiagnosed atrial fibrillation and was unrelated to Dr. Follwell's conduct.

Based on the foregoing, we find that the trial court abused its discretion. We further find that the court's admission of such cumulative testimony posed a substantial risk of interfering with the jury's ability to properly perform its duty to weigh the evidence on each side of this case and thus materially affected the merits of the action and prejudiced the Appellants. The record demonstrates that the trial court decided, time and time again over Appellants' objection, to admit cumulative evidence from highly-educated and impeccably-credentialed expert witnesses ignoring its duty to properly assess whether the testimony was needed to assist the jury to understand the issues in the case and whether it was legally relevant. On remand, the trial court is reminded to adhere to the principles and standards set forth in this opinion and elsewhere in Missouri law for determining the admissibility of cumulative evidence.

Conclusion.

Point I is granted and this case is reversed and remanded for a new trial. In light of our disposition of Appellants' first point, Point II is denied as moot.



James M. Dowd, Chief Judge

Kurt S. Odenwald, J., and
Gary M. Gaertner, Jr., J., concur.