New COAKY Decision Suggests Supplementing CR 26 Expert Disclosure If Co-Party's Expert Expands on Opinions in Deposition Testimony; Also Rules on Separate Peremptories For Defendants, Trial Management Order Compliance, Witness Bias, And Causation Instruction

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In a wide-ranging new decision that was not designated for publication, the Kentucky Court of Appeals in a case originating in Boone County suggested that a litigant should supplement its CR 26 expert witness disclosure with new opinions offered by a co-party's expert at the expert's discovery deposition rather than simply rely on the deposition testimony as sufficient pretrial disclosure. In *Dornbusch v. Miller*, http://opinions.kycourts.net/coa/2011-CA-001354.pdf (rendered 8/30/13, not yet final), the Court, though declining to reverse on that basis, stated that a party who wishes to adopt another party's expert at trial after the expert provides favorable deposition testimony should supplement its CR 26 discosure with the opinions that the first party wishes to elicit at trial. The Court found that adequate pretrial disclosure was provided under the circumstances and upheld the trial court's decision permitting the testimony at trial without formal supplementation. It appears the fact that the opinions were rendered in response to cross-examination by plaintiff's counsel was a factor in the Court's decision.

Of course, in such situations there may be ethical, practical and logistical implications of requiring one party to provide information from another party's expert beyond that which was testified to at the deposition, since the party who is supposed to supplement its disclosure after the deposition should not have *ex parte* communication with the other party's expert without the retaining party's authorization. Providing such authorization may undercut an assertion that the co-parties who are thus effectively sharing the expert are antagonistic for purposes of obtaining separate peremptory challenges, which was another issue raised in *Dornbusch*. In addition, experts routinely expand on their prior opinions during discovery depositions, and parties customarily rely on the statements of opinion given by their own experts in deposition testimony and on the opponent's cross-examination as to those opinions as additional disclosure without filing follow-up CR 26 disclosures. The Court of Appeals in *Dornbusch* recognized the trial court's discretion to determine that such disclosure was adequate to enable an expert to testify in keeping with his or her prior deposition testimony.

On the peremptory challenge issue, the Court relied on *Sommerkamp v. Linton*, 114 S.W.3d 811 (Ky. 2003), holding that antagonism for purposes of determining whether co-parties should receive separate peremptories is to be determined at the time of jury selection, and will not be subject to second-guessing based on subsequent cooperation between the co-parties at trial. The *Sommerkamp* factors (includuing separate acts of alleged negligence, separate counsel, and whether an apportionment instruction has been requested) supported the trial court's decision to afford the defendant's separate peremptories in *Dornbusch*.

Another issue the Court upheld the trial court on was declining to exclude a defense expert based on plaintiff's assertion that one defendant did not strictly comply with an agreed trial management order relating to the provision of a certain amount of advance notice of which witnesses would be called on the next trial day. The Court of Appeals found substantial compliance and held that the trial court did not commit an abuse of discretion in permitting the defendant to call the expert. The proffering defendant in *Dornbusch* met the letter if not the spirit of the order by advising the plaintiff that it planned to call six witnesses on the next trial day but was considering dropping some, including the expert in question who was ultimately called. In my experience, trial courts usually provide some leeway to parties in complying with such agreed orders as long as the proferring party does not appear to be consciously attempting to achieve ambush on the opponent and no unfair prejudice results. This is particularly true in the late stages of a relatively long trial when timing and logistics become trickier, parties are re-evaluating the need for additional witnesses, and everyone is attempting to conclude the trial.

Other issues the Court upheld the trial court on were precluding plaintiff from cross-examining one of the defendants' experts on his views on tort reform and the judicial system (the trial court permitted considerable other evidence of the expert's possible bias to come in) and including in a jury instruction an interrogatory highlighting the fact that the plaintiff was required to prove causation of injury, not merely negligence.

Decisions that are not final should not be cited as authority in Kentucky courts. Citation of unpublished decisions is governed by CR 76.28(4)(c).