RENDERED: OCTOBER 9, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001111-MR

ROBERT LEE MEDLEY,
INDIVIDUALLY AND ON BEHALF
OF THE ESTATE OF PATRICIA
SUE MEDLEY — APPELLANT

v. — APPEAL AND FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY SHAW, JUDGE
ACTION NO. 04-CI-009727

JEWISH HOSPITAL, INC.;
PHYSICIANS IN EMERGENCY MEDICINE, P.S.C.;
NICOLE BREY, M.D.; AND
MICHAEL TZAGOURNIS, M.D. — APPELLEES

AND — 2008-CA-001192-MR

NICOLE BREY, M.D. — CROSS-APPELLANT

v. — CROSS-APPEAL AND FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY SHAW, JUDGE
ACTION NO. 04-CI-009727

ROBERT LEE MEDLEY, INDIVIDUALLY
AND AS ADMINISTRATOR OF THE ESTATE OF
PATRICIA SUE MEDLEY CROSS-APPELLEE

AND 2008-CA-001244-MR

JEWISH HOSPITAL, INC. CROSS-APPELLANT

v. CROSS-APPEAL AND FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY SHAW, JUDGE
ACTION NO. 04-CI-009727

ROBERT LEE MEDLEY, INDIVIDUALLY
AND AS ADMINISTRATOR OF THE ESTATE OF
PATRICIA SUE MEDLEY CROSS-APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MOORE, AND VANMETER, JUDGES.

MOORE, JUDGE: These are an appeal and subsequent cross-appeals of a defense verdict in a medical negligence wrongful death action alleging failure to diagnose and treat an aortic dissection. After careful review of the record, we affirm.

STATEMENT OF FACTS

On June 7, 2004, Mrs. Patricia Sue Medley presented to Jewish Hospital at 4:01 a.m., complaining of chest pain radiating to her back. Dr. Don Sherrard, an emergency room physician employed by Appellee Physicians in Emergency Medicine, P.S.C. (PEM), saw Mrs. Medley at 4:12 a.m. and obtained a history. At the time of Dr. Sherrard's examination, Mrs. Medley was complaining of an acute onset of epigastric abdominal pain and had had an episode of bloody diarrhea. Dr. Sherrard ordered a number of diagnostic tests, including an acute abdominal series, a series of three x-ray images that include a chest x-ray. Dr. Sherrard reviewed the x-ray images at 5:33 a.m. and interpreted them as "non-specific." Dr. Sherrard's impression was acute epigastric abdominal pain secondary to a gastrointestinal bleed.

Dr. Sherrard telephoned the attending physician, Dr. Rafi Hasan, at approximately 5:50 a.m. about his examination of Mrs. Medley. Dr. Hasan, an internal medicine physician, admitted Mrs. Medley to the hospital as an inpatient at approximately 6:00 a.m. and ordered a gastrointestinal consult.

Dr. Nicole Brey, a first-year resident on the gastroenterology rotation, performed a gastrointestinal consult on Mrs. Medley at approximately 8:45 a.m. After consulting by telephone with her supervising physician, Dr. Michael Tzagournis, a fifth-year gastroenterology fellow, Dr. Brey recorded a diagnosis of stable gastrointestinal bleed and changed Dr. Hasan's admit order to an Intensive Care Unit admission.

Despite first being admitted as an inpatient at 6:00 a.m. and subsequently being ordered transferred to Intensive Care, Mrs. Medley remained in the emergency room area until approximately 11:30 a.m., when a bed became available in the transitional care unit. During her stay in the emergency room, Dr. Sherrard's shift ended. The physician succeeding Dr. Sherrard, Dr. Jennifer Barefoot, came on duty at 7:30 a.m. and was never aware of Mrs. Medley's presence.

Dr. Frank Lee, a radiologist, performed an over-read[1] of the chest x-ray ordered earlier by Dr. Sherrard at approximately 9:45 a.m. Dr. Lee viewed the x-ray images on the hospital's DR (Diagnostic Radiology) computer system and dictated his impression onto the DR system. Dr. Lee's interpretation was that the chest x-ray showed an enlarged aortic arch, which could be suggestive of an aneurism, and that correlation with a CT scan was recommended. Dr. Lee did not believe that the situation was an emergency or urgent, nor did he inform anyone to the contrary. However, Dr. Lee called the emergency room and spoke with John Snider, R.N., an associate nursing manager. Dr. Lee asked Snider to convey Dr. Lee's interpretation of the chest film to a doctor taking care of Mrs. Medley and recommendation for a CT scan.

[1] The treating emergency room physician may order x-rays or other diagnostic studies which are performed and then interpreted by him. The patient may be discharged if the films are interpreted as negative. Later that day or the next day, a radiologist will then reinterpret those x-rays and may choose to disagree with the emergency room physician's interpretation. This is called "overreading the x-rays."

Snider testified that he conveyed Dr. Lee's information directly to Dr. Brey, who was in the emergency room. Nurse Snider also ordered that Dr. Hasan be paged. Dr. Hasan, who was in the hospital, did not respond to the page, and never saw his patient, Mrs. Medley.

Dr. Brey testified that she was not told in person about Dr. Lee's information; rather, she testified that she was not in the emergency room at the time and was instead paged from the emergency room at a point in time she could not remember. Dr. Brey testified that she called the emergency room after the page and was told over the telephone of Dr. Lee's impressions and recommendation for a CT scan. Dr. Brey testified that she spoke with Dr. Tzagournis, who told her to tell the caller to notify Dr. Hasan to see if he wanted to order the CT scan. Dr. Brey further testified that, after the call, Dr. Tzagournis told her that he was going to go see Mrs. Medley.

Dr. Tzagournis testified that he had no specific memory of Dr. Brey reporting the details of her examination of Mrs. Medley or informing him of Dr. Lee's impressions. However, Dr. Tzagournis testified that he would have remembered if she had not told him. Specifically, he stated "Yes. She told me. Nicole told me. I think I would have remembered if she didn't tell me for sure."

The DR system logs indicate that Dr. Brey accessed the DR system at 9:52 a.m., viewed the image of the chest x-ray, and listened to the voice clip of Dr. Lee's interpretation. At trial, Dr. Brey did not recall viewing Mrs. Medley's x-rays or listening to the voice clip, but did not dispute the accuracy of the DR system

report. The DR system logs also indicate that Dr. Tzagournis accessed the DR system at 9:57 a.m. and viewed the image of the chest film. Dr. Tzagournis testified that he could not remember when he logged into the DR system, and Dr. Brey did not recall discussing with Dr. Tzagournis his accessing the DR system. Neither Dr. Brey nor Dr. Tzagournis ordered a CT scan.

Mrs. Medley was transferred from the emergency room to the Intensive Care Unit at about noon. She coded approximately one hour later, and was pronounced dead at 1:05 p.m. An autopsy was performed, and the cause of death was found to be an acute aortic dissection. Additional facts relating to this matter will be developed as they become relevant in the analysis.

PROCEDURAL HISTORY

On November 17, 2004, Robert Medley, individually and on behalf of the Estate of Patricia Sue Medley (Medley), filed suit against the following parties: Jewish Hospital, Inc.; PEM; Dr. Hasan; and University Medical Associates, PSC. Medley sued Jewish for the conduct of its nurses and PEM for the conduct of the two emergency room physicians on duty during Mrs. Medley's stay, Dr. Sherrard and Dr. Barefoot. Dr. Hasan was the attending physician; University Medical Associates was a consulting gastroenterology group.

After preliminary discovery, Medley's counsel voluntarily dismissed Dr. Hasan and University Medical Associates.

On March 6, 2006, Jewish Hospital produced the DR system logs which indicated that Dr. Tzagournis and Dr. Brey had reviewed Mrs. Medley's x-

ray films both before and after Mrs. Medley's death. On March 9, 2006, Medley moved for leave to amend his original complaint to include Dr. Brey and Dr. Tzagournis as party-defendants. On March 10, 2006, Medley's motion was granted.

Dr. Brey and Dr. Tzagournis subsequently moved to dismiss Medley's claims on the basis of the statute of limitations. On January 2, 2007, the trial court entered an order dismissing Medley's claims against them. However, on January 17, 2007, the trial court vacated the order in its entirety. Then, on March 12, 2007, the trial court dismissed Medley's claims against Dr. Tzagournis on grounds of the statute of limitations, but allowed Medley's claims against Dr. Brey to proceed, finding that the "discovery rule" had tolled the statute of limitations as it applied to her. At issue were the following statements regarding whether Dr. Brey had seen Mrs. Medley's x-rays prior to Mrs. Medley's death, taken from Dr. Brey's discovery deposition on April 18, 2005:

> Q: Did you realize that Dr. Sherrard, who was the emergency room doctor when Patti Medley first came in -- did you notice he had done what's known as a three-view, some x-rays, and ABD series?
>
> Dr. Brey: Yes.
>
> Q: Did you review those yourself, or did you just note his interpretation?
>
> Dr. Brey: I noted his interpretations.
>
> . . . .
>
> Q: Obstructive series, nonspecific. Is that what you reviewed when you circled the "R" on the form?

Dr. Brey: Yes.

Q: What did you take that to mean?

Dr. Brey: Nothing acutely abnormal with the films.

Q: You did not see the films themselves, correct?

Dr. Brey: That's correct.

While this testimony tended to indicate that Dr. Brey had not seen Mrs. Medley's x-ray films prior to Mrs. Medley's death, the DR logs indicated that she had logged into the system and viewed the x-rays prior to Mrs. Medley's death. Thus, Medley argued:

> Plaintiff was operating under the assumption that Dr. Brey's testimony was correct and that she did nothing further after the page. Dr. Brey also testified she never reviewed the x-rays.
>
> However, the Jewish Hospital computer log shows that there was a misrepresentation. Dr. Brey did indeed access the x-rays on the computer system after the radiologist's over-read came in. This is a substantial misrepresentation, regardless of whether it is intentional or not.

In its March 12, 2007 order, the trial court agreed with Medley, stating in relevant part:

> Dr. Brey's deposition testimony contained partial truths which, whether intentional or unintentional, were misleading. Had Plaintiff known that Dr. Brey viewed Mrs. Medley's x-rays at 9:52 a.m., Dr. Brey would have likely been named as a party defendant within the one-year time limit. Consequently, dismissal of Dr. Brey was improper as the limitation period was tolled from the time of her deposition until Plaintiff was given the computer log. Plaintiff's claim against Dr. Brey is thus timely.

Thus, based upon the veracity of the DR computer logs, Medley was able to successfully toll the statute of limitations as it related to, and proceed with his claims against, Dr. Brey.

Dr. Brey filed a notice of appeal on April 3, 2007, regarding the statute of limitations; however, this Court determined that the issue was not ripe for appeal and remanded it to the trial court.

In December of 2007, Medley filed a motion for summary judgment, requesting a ruling that Drs. Brey and Tzagournis were actual or ostensible agents of Jewish Hospital. Jewish filed its own motion for summary judgment on the grounds that Drs. Brey and Tzagournis were not agents of the hospital. The court granted Jewish's motion and denied Medley's.

The case proceeded to trial against Dr. Brey, PEM, and Jewish Hospital beginning on February 18, 2008. On February 28, 2008, after the close of the evidence, the trial court granted a directed verdict in favor of Dr. Brey. The next day, the jury returned a verdict in favor of Jewish Hospital and PEM. Judgment was entered on March 6, 2008. Medley filed motions for a new trial and to vacate the judgment, which were denied. These appeals and cross-appeals followed.

The parties dispute whether error occurred in several areas, including closing arguments, the grant of a directed verdict and the denial of a motion to dismiss based upon the statute of limitations, jury instructions, evidentiary rulings of the trial court, and the trial court's determination of agency issues. The specific errors alleged, relating to these areas, are numerous and are discussed below.

ANALYSIS

I. CLOSING ARGUMENTS

Medley's statements of error relating to closing arguments are two-fold.

First, Medley claims that the radiology logs produced by Jewish were not conclusive evidence, and that because the radiology logs and testimony supporting their veracity were introduced as evidence at trial, he was entitled to question the credibility of the logs during his closing argument. As such, Medley contends that the trial court abused its discretion when it prevented him from doing so. Under the circumstances of this case, we disagree.

"The mere fact that evidence supports one argument does not foreclose the reasonableness of a different argument, so long as the evidence is consistent with both propositions." *Bixler v. Commonwealth*, 204 S.W.3d 616, 635 (Ky. 2006). However, "it is elementary that only that evidence becomes a part of the record that has actually been introduced." *Wilson v. Little*, 293 S.W.2d 715, 717 (Ky. 1956). As such, while counsel is allowed great latitude during closing argument, counsel must "confine themselves to facts brought out in the evidence, and to reasonable deductions to be drawn therefrom. They cannot safely or properly go beyond this limit." *Pullman Co. v. Pulliam*, 187 Ky. 213, 220, 218 S.W. 1005, 1007-08 (1920).

Here, the only evidence regarding the credibility of the radiology logs offered at trial came from Leanne Lilly, who was responsible for administering the DR computer system at Jewish Hospital during the time in question. She testified

that each doctor with access to the computer system had an individualized password. In relevant part, she stated:

> Q. And, is this a secure system? In other words, is there encryption to keep people from breaking into it?
>
> A. Absolutely.
>
> Q. Would it be possible to your knowledge for – you know, let's say a doctor outside of radiology or even a radiologist to try to hack into the system and change the information?
>
> A. No.
>
> Q. And, the last question I have for you, Ms. Lilly, is are you comfortable telling this jury that based on the audit you did that the information that was shown in these columns, in other words the time that the system was accessed and it being accessed by a person with either Dr. Brey's password or Dr. Tzagournis' password, are you comfortable telling the jury that is reliable information?
>
> A. Yes.

This evidence supported the proposition that the radiology logs were credible evidence; this evidence is not consistent with, nor does it reasonably support, Medley's unsupported counterargument that the radiology logs were suspicious or otherwise incredible. Medley made no contention at trial that the radiology logs were somehow erroneous. Moreover, Medley cites no evidence or testimony in support of his proposed argument that the radiology logs were not credible, nor, for that matter, does the record reveal he offered any, or that the trial court precluded him from doing so at any point before his closing argument. Instead, Medley argues the following points:

- Medley’s experts only assumed that the radiology logs were accurate for the purpose of answering hypothetical questions;
- Dr. Brey, or Dr. Tzagournis, could have given their passwords for Jewish’s DR computer system containing the radiology logs to other individuals, although neither admitted to doing so;
- “Jewish assumes the logs *a priori* were true and accurate because the only evidence regarding them came from Leanne Lilly, who administered the DR system at Jewish Hospital. The law is clear that even if there is only one piece of evidence on a particular subject, the jury is free to believe it or not to believe it. *Commonwealth v. Reynolds*, 113 S.W.3d 647, 650 (Ky. App. 2003); *Gillispie v. Commonwealth*, 279 S.W. 671, 672 (Ky. 1926).”

While it is true that the jury is free to believe or not believe any of the evidence in the record, we do not understand *Reynolds* or *Gillispie* to hold that a plaintiff may freely impeach any evidence or testimony in the record during his closing argument without having done so, or having created any foundation for doing so, at trial. The jury’s choice to disbelieve that evidence does not mean that evidence supporting a contrary conclusion exists in the record. For the court to have allowed Medley to go beyond the record and assert a proposition unsupported by the evidence under consideration by the jury (*i.e.*, that the radiology logs were suspicious and not credible) would have called upon the jury to speculate or conjecture--a wholly improper result. *See Gibbs v. Wickersham*, 133 S.W.3d 494, 496 (Ky. App. 2004).

More importantly, however, it is apparent that Medley did not contest the credibility of the radiology access logs at trial because part of his case depended entirely upon their veracity. At the trial level, Medley added Dr. Brey as a party-defendant after the statute of limitations had run for an action sounding in medical malpractice. Medley successfully tolled the statute of limitations as to Dr. Brey and was able to name her as a party defendant by relying upon the radiology logs for the proposition that Dr. Brey had previously perjured herself and misled the court. Specifically, Medley argued that, contrary to Dr. Brey's prior deposition testimony indicating that she never reviewed Mrs. Medley's x-ray films, "[p]roduction of the logs demonstrated Dr. Brey did have access, and at that point, knowledge. Her failure to act upon that knowledge was the source of Medley's criticisms." Nowhere is this more apparent from the record than in Medley's brief, styled "Plaintiff's Reply to Defendant's Response Memorandum Concerning the Discovery Rule," where he states that "the Jewish Hospital computer log shows that there was a misrepresentation. Dr. Brey did indeed access the x-rays on the computer system after the radiologist's overread came in. This is a substantial misrepresentation, regardless of whether it is intentional or not."

After having been allowed to add Dr. Brey as a party-defendant and defeat Dr. Brey's motion to dismiss on the basis of the strength and reliability of the radiology logs, Medley cannot then challenge the accuracy of the same radiology logs at the same trial and ask this Court to find that the trial court's refusal to allow him to do so was error. *See Lexington-Fayette Urban County Health Dept. v. Lloyd*,

115 S.W.3d 343, 349 (Ky. App. 2003) ("The appellants cannot be allowed to argue the issue one way before the administrative agency when it suits its purposes and then to take the opposite position before the courts.") *See also Kirkpatrick v. Lawrence*, 908 S.W.2d 125, 130 (Ky. App. 1995) ("Appellants cannot switch horses between the trial court and this Court.") Thus, in light of the above, and as "[m]atters pertaining to closing argument lie within the sound discretion of the trial judge," *Kemper v. Gordon*, 272 S.W.3d 146, 157 (Ky. 2008), we find that the trial court's discretion was not, in this instance, abused.

Second, Medley contends that the trial court abused its discretion by allowing Jewish excessive time to make its closing argument. Medley favors this Court with no authority supporting this contention. His argument is as follows:

> Medley acknowledges the trial court's discretion over the length of closing arguments, but the trial court abused it here. Closings began late on Friday morning before a jury finishing its third week of jury service, having already stayed an extra week. Timing was important because the attorneys had discussed it the day before closing. Jewish said it needed an hour and fifteen minutes at most. It took an hour and fifty one, approximately 50% more time than it reserved. The jury had not had lunch. Medley was placed in an untenable position of speaking to an extremely hungry jury anxious to conclude its deliberations after serving an extra week. Having significantly more argument from Jewish to address made Medley's closing longer. When brought to the trial court's attention, she refused to put a clamp on Jewish's argument. Under these circumstances, Medley simply asks this Court to hold that the discretion and latitude was too great, and given the jury's divided verdict that it conveniently returned around closing time on Friday, the timing of closing arguments was a factor.

In Kentucky, "[f]ixing the time for argument before a jury is a matter within the sound discretion of the trial judge, and, unless that discretion is palpably abused, the judgment will not be disturbed. In fixing the time to be allowed for argument, the importance of the case, the legal questions involved as shown in the instructions, the extent and character of the testimony, are all elements that must be considered." *Asher v. Golden*, 244 Ky. 56, 58, 50 S.W.2d 3, 4 (1932), *citing Miller v. Barnes*, 181 Ky. 473, 205 S. W. 549 (1918), and *Southern Express Co. v. Southard*, 182 Ky. 492, 206 S.W. 773 (1918).

In the case at bar, Medley had filed suit against several parties, Medley complained of damages potentially amounting to millions of dollars, and the testimony of numerous witnesses had been taken or read into evidence in the course of a trial lasting nearly three weeks. As such, we cannot say that the trial court palpably abused its discretion by allowing Jewish an additional 36 minutes to make its closing argument.[2]

Moreover, Medley fails to demonstrate how the additional time allowed for Jewish's closing argument could have prejudiced his case. We find no error on this basis.

II. DR. BREY'S DIRECTED VERDICT AND THE STATUTE OF LIMITATIONS

[2] Though it bears little relevance in this matter, we also note that the trial court actually offered to give the jury a lunch break immediately following Jewish's closing arguments, in no way limited the length of Medley's own closing argument, and did not require the jury to render a verdict on that day. However, rather than asking the trial court to provide the jury with a lunch break, or to postpone his closing arguments, Medley chose to proceed with his own closing argument immediately after Jewish's concluded.

Medley's statements of error relating to the trial court's grant of a directed verdict to Dr. Nicole Brey are also two-fold. Neither has merit.

In total, the trial court's order for directed verdict states:

> Motion having been made by the Defendant, Nicole Brey, M.D., and a hearing having been held on the Motion, and the Court being otherwise duly and sufficiently advised;
>
> IT IS HEREBY ORDERED AND ADJUDGED that the Motion of the Defendant, Nicole Brey, M.D., for a directed verdict on the issue of liability and causation is hereby granted. The Plaintiff's claims against Nicole Brey, M.D., are hereby dismissed with prejudice.
>
> This is a final and appealable order and there is no just cause for delay.

First, Medley contends that it was error for the trial court to direct a verdict in favor of Dr. Brey based upon Medley's failure to offer any affirmative evidence demonstrating that Dr. Brey breached the standard of care for a first-year unlicensed intern. Such a directed verdict, argues Medley, is the product of the trial court impermissibly engaging in weighing the evidence.

As stated by the Kentucky Supreme Court in *Grubbs ex rel. Grubbs v. Barbourville Family Health Ctr., P.S.C.*, 120 S.W.3d 682, 693-694 (Ky. 2003),

> [i]n Kentucky, a medical malpractice action is merely a "branch of [the] well traveled road [of common law negligence]," and a medical malpractice plaintiff must demonstrate the same prima facie case- consisting of duty, breach, causation, and injury-required in any negligence case. Thus, a medical malpractice plaintiff must "prove that the treatment given was below the degree of care and skill expected of a reasonably competent practitioner and that the negligence proximately caused injury[.]"

Moreover, "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 speculation or conjecture." *Harris v. Cozatt, Inc.*, 427 S.W.2d 574, 575 (Ky. 1968).

In the case at bar, the duty Dr. Brey owed to Mrs. Medley was defined by whether, and how quickly, she reported the findings of her GI consult with Mrs. Medley and acted upon Dr. Lee's recommendation for Mrs. Medley to undergo a CT scan and the information Dr. Lee provided that indicated that Mrs. Medley's aortic arch was abnormal. Medley offered two expert witnesses: Sorabh Khandelwal, M.D., and Alexander Geha, M.D. who testified regarding the extent of the duty Dr. Brey owed to Mrs. Medley. Dr. Khandelwal testified as follows:

> KHANDELWAL: I think we've all be in Dr. Brey's position as, you know, we all, we all were residents at one point. And there are times when you obtain information and you know you need to relay that information onto the appropriate people.
>
> Q: And the chain of command as an intern is to tell your superior. Like, I'm sure you run around with these kinds of interns that you expect to bring information to you so you can act on it or react to it, correct?
>
> KHANDELWAL: Yes.
>
> Q: And if we assume that that's what she did, would her conduct have been reasonable?
>
> KHANDELWAL: Yes.

Q: And if we assume that her superior told her, Dr. Brey, tell the caller to get in touch with Hasan? Would her conduct have been reasonable in doing what her superior asked her to do?

KHANDELWAL: No. I mean, yes, that's reasonable.

Q: Okay, let's get straight on that. It's the end of the day and that might be a biggie. Dr. Brey's conduct was reasonable in following the orders of her superior if he in fact told her to tell the caller to get in touch with Dr. Hasan?

KHANDELWAL: Correct.

Q: So it was reasonable for her, in taking the phone call, to tell the caller, in sum and substance, wait a minute, and get in touch with Dr. Tzagournis. And it was reasonable for her to convey the information back to the caller to get in touch with Dr. Hasan. We have established that?

KHANDELWAL: Yes. If, yes, if Dr. Tzagournis... if those were the instructions from Dr. Tzagournis.

Q: Okay. And that's basically the understanding of this case. What happened, right? Based on the, that's exactly what happened?

KHANDELWAL: That specific time period, yes.

Q: Okay. And that conduct then of Dr. Brey was reasonable under the circumstances, correct?

KHANDELWAL: If, if that, yes, if the, if that's what happened, yes.

Moreover, Dr. Geha testified as follows:

> Q: And what Dr. Brey has said is that she told the caller to get the information to Dr. Hasan, correct?
>
> GEHA: Well, if we believe her, we believe her. On that, we would have to believe what she said.
>
> Q: Which is exactly what you're telling us. The information should get to Dr. Hasan.
>
> GEHA: It should get to somebody. Sure.
>
> Q: It should get to Dr. Hasan.
>
> GEHA: Hasan, or the emergency room attending, or somebody. I mean, I don't think that she, in her position, is the one who is going to decide on treating this patient.
>
> Q: Right. So she...
>
> GEHA: Or doing something. She has to pass this information onto somebody, and, and note that she passed it on and that it was taken care of by somebody else.
>
> Q: And by her testimony she passed it onto Dr. Tzagournis. And by her testimony, Dr. Tzagournis said to pass it on to Dr. Hasan, correct?
>
> GEHA: That's all... that's, uh, verbal.
>
> Q: Okay.
>
> GEHA: Yeah.
>
> Q: Now. She didn't need to tell—she didn't need to order the CT scan herself, did she? Without any kind of input from her boss or anybody else?
>
> GEHA: I don't know what the relationship with the boss is. Did he tell her order the CT scan, did he tell her do not

do a CT scan, did he tell her I'm going to order the CT scan, did he tell her call Hasan to order a CT scan, I don't know.

Q: Okay. But, according to her testimony, she told him to tell Hasan, and that he, Dr. Tzagournis, was going to look in on the patient. Does that sound reasonable?

GEHA: Well that's all testimony that she has given.

Q: Right.

GEHA: But I don't see any record of it.

Q: Right. But does it sound reasonable?

GEHA: Sounds reasonable if that's what she did.

Q: Okay. Alright. And it would also be reasonable for her to convey that message back to the caller. That the caller should notify Dr. Hasan?

GEHA: As long as she. . .

Q: Correct?

GEHA: As long as she, if she documents that she has done so, then it's fine.

Q: So the criticism here that you have is maybe that she didn't document what she did. If she documented what she did, you would have no problems with it.

GEHA: That's correct. If she documents that somebody else took that responsibility that, of knowing about the concern in this patient for a widened mediastinum, enlarged arch, whatever was the report, I think she has taken care of her responsibility.

Q: And you're saying that you haven't seen hard enough evidence yet to satisfy you that she did what she says she did.

GEHA: I don't see any hard evidence. That's correct.

Q: Alright. But if she did do what she said she did, you would be okay with it.

GEHA: If she did.

In sum, both of Medley's experts testified at trial that if Dr. Brey reported her initial findings and her conversation regarding Dr. Lee's information to Dr. Tzagournis, then Dr. Brey acted reasonably and did not breach a duty to Mrs. Medley.

Applying this standard to the facts of this case, we find that the evidence in the record supports the conclusion that Dr. Brey acted reasonably, because the only evidence that Dr. Brey discussed the case with Dr. Tzagournis, her supervisor, was the testimony of Dr. Brey, the testimony of Dr. Tzagournis and the computer logs in this case. During the trial, Dr. Brey testified that she told Dr. Tzagournis about the examination of Mrs. Medley and told Dr. Tzagournis about the radiology over-read. Dr. Tzagournis testified that he was sure that Dr. Brey told him about the over-read, because he would remember if he was not told. The radiology logs indicate that Dr. Brey logged onto the radiology system on June 7, 2004 at 9:52 a.m. Finally, the logs also indicate that Dr. Tzagournis accessed the radiology system on June 7, 2004 at 9:57 a.m.; circumstantially, this supports the proposition that Dr. Tzagournis' access of the radiology logs was in response to Dr. Brey informing him about the issue.

Urging a contrary result, Medley contends that

> [t]estimony about when Brey actually became aware of the abnormal x-ray was all over the map and disputed between Brey and Jewish. Nurse Snider claimed to have told Brey immediately after receipt of Dr. Lee's phone call, across his desk, 8-10 feet away. Brey claimed to have received the first word by page and a return call later while on another floor. Dr. Tzagournis, whose testimony was premised upon what he read of Dr. Brey's deposition, indicated that he and Brey never received the phone call until after the code.

Assuming that how Dr. Brey became apprised of Dr. Lee's over-read is relevant, Medley already stated, in order to overcome Dr. Brey's statute of limitations defense, that "the Jewish Hospital computer log shows that . . . Dr. Brey did indeed access the x-rays on the computer system after the radiologist's overread came in." As such, Medley has already settled that matter. Moreover, while the evidence in the record supports the notion that Dr. Brey did tell Dr. Tzagournis, nothing in the record indicates with any amount of certainty that Dr. Brey did not tell him about the over-read.

More to the point, however, Medley entirely avoids the issue of the burden of proof; as the plaintiff in this litigation, the burden was squarely upon him, and not Dr. Brey, to prove that Dr. Brey breached a duty to Mrs. Medley. When the trial court directed a verdict in favor of Dr. Brey, it held as a matter of law that Medley had failed to introduce any evidence which could sustain that burden. Upon careful review of the record, it is apparent to this Court that, rather than introducing evidence to support the contention that Dr. Brey breached a duty, Medley instead

sought to attack the credibility of the evidence which Dr. Brey introduced to defend herself. In his brief, Medley explains

> Dr. Brey complains Medley failed to present proof that she did not tell Tzagournis about Medley's x-ray results. (Brey Brief at 16). It would be nearly impossible for Medley to prove this negative, particularly when Drs. Tzagournis and Brey were joined at the hip, and Dr. Tzagournis relied exclusively upon Dr. Brey's testimony to form his recollection. The only two individuals involved in this conversation were Drs. Brey and Tzagournis. However, Dr. Tzagournis' deposition, as referenced on page 21 of Medley's Appellant Brief, indicated that the only material he reviewed before his deposition was Dr. Brey's deposition. His answers were repeated attempts to mirror Dr. Brey's testimony, having little independent memory himself. If Medley presented no proof that Dr. Brey did not tell Dr. Tzagournis, it still was up to the jury to decide whether to believe Drs. Brey, Tzagournis and the logs. The jury was free to disbelieve and disregard the testimony of all of them. See Reynolds, 113 S.W.3d at 647; Gillispie, 279 S.W. at 672.

Neither *Reynolds*, nor *Gillispie*, holds that a plaintiff may defeat a defendant's properly supported motion for directed verdict in a medical malpractice case without having offered at trial any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of information relevant to the claim. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict. Even under the standard of summary judgment, which inquiry the Supreme Court described as requiring greater judicial determination and discretion than that for directed verdict (*see Steelvest, Inc. v.*

Scansteel Serv. Ctr, Inc., 807 S.W.2d 476, 482 (Ky. 1991)), a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. *Hoskins Heirs v. Boggs*, 242 S.W.3d 320, 330 (Ky. 2007). A plaintiff must present affirmative evidence at trial in order to defeat a properly supported motion for directed verdict. *See, e.g.*, *Forgy & Wells v. Rapier Sugar Feed Co.*, 191 Ky. 416, 230 S.W. 534 (1921) ("A motion for a directed verdict is essentially, in its practical effect, a demurrer to the evidence[.]"); *see also, Pearson ex rel. Trent v. National Feeding Systems, Inc*.
90 S.W.3d 46, 49 (Ky. 2002) (addressing the higher standard of summary judgment, holding that "a party opposing a properly documented summary judgment cannot defeat it without presenting at least some affirmative evidence indicating that there is a genuine issue of a material fact.") The difficulty of proving an issue of fact material to the case is not sufficient reason to brush aside the requirements of the civil rules regarding directed verdicts. *See Keeneland Ass'n v. Pessin*, 484 S.W.2d 849, 852 (Ky. 1972) (holding that "difficulty to prove a material element" is not reason enough to ignore civil rules governing summary judgments); *see also*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 106 S.Ct. 2505, 2514 (1986) (holding summary judgment or directed verdict under Federal standards is proper "even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery.")

In short, we give no weight to Medley's argument that it is "nearly impossible to prove" that Dr. Brey did not discuss Dr. Lee's over-read with Dr. Tzagournis because it would require him to "prove a negative." The very breach of duty which Medley alleged against Dr. Brey was that she did not discuss Dr. Lee's over-read with Dr. Tzagournis; if proving this theory entailed proving a negative, then this was a burden that Medley's own theory required him to bear, regardless of the difficulty. Consequently, we find no error in the trial court's decision.

In light of the above, we find it unnecessary and decline to address the second basis upon which the trial court granted Dr. Brey's directed verdict, *i.e.*, that Medley failed to adduce any evidence tending to prove the element of causation as well. Moreover, neither Medley nor Dr. Brey addressed this issue in their briefs.

We also find it unnecessary to decide the issue of whether Dr. Brey should have been entitled to a dismissal on the basis of the statute of limitations as, in light of the above, that issue is also moot.

Medley's second statement of error relating to the trial court's grant of a directed verdict to Dr. Brey is that, even if the evidence warranted a directed verdict in favor of Dr. Brey, it was improper to dismiss her because "if the trial court was going to dismiss her, then it was extremely prejudicial to do so immediately before closing argument, after the presentation of the case, and after Brey exercised four peremptory strikes to exclude jurors who may have been favorable to Medley." However, Medley presents no authority demonstrating that this Court should

presume any prejudice resulting from a trial court's decision to direct a verdict. As we stated in *Cherry v. Augustus*, 245 S.W.3d 766, 781 (Ky. App. 2006),

> Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v) states, in part, that an appellant's brief shall contain "[a]n 'ARGUMENT' conforming to the Statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law...." Because [appellant's] brief lacks any citations of authority pertinent to the issue [at hand], it does not comply with CR 76.12(4)(c)(v). Rather than ordering the brief stricken for this deficiency, a more appropriate penalty in this instance is to refuse to consider [appellant's] contentions. . . . Therefore, we need not address the merits of [this] claim. . . .

As Medley fails to cite any authority indicating that this Court should presume any prejudice resulted to Medley as a result of Brey's directed verdict, this claim will not be reviewed.

III. JURY INSTRUCTIONS

Whether a jury is properly instructed is a question of law and is to be reviewed by this Court under a *de novo* standard. *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006). Medley's statements of error relating to jury instructions are also two-fold.

First, Medley contends that the trial court should have allowed the jury to consider the conduct of a non-party, Dr. Barefoot, in its instructions regarding the liability of PEM. Dr. Barefoot was an agent of PEM. Medley argues that liability could have attached to PEM because Dr. Barefoot failed to intervene in Mrs. Medley's care. We disagree.

As a preliminary matter, it is generally unnecessary to join principal and agent as defendants in tort actions where the "principal's only responsibility is derivative." 53 Am.Jur.2d Master and Servant, § 453, at p. 475 (1970); Annot., *Right to bring separate actions against master and servant, or principal and agent, to recover for negligence of servant or agent, where master's or principal's only responsibility is derivative*, 135 A.L.R. 271 (1941 and Supps.). Also, as Dr. Barefoot was PEM's agent, PEM could be held liable for Dr. Barefoot's negligence by virtue of vicarious liability. However, "[if] the liability of the master or principal is merely derivative and secondary, exoneration of the servant removes the foundation upon which to impute negligence to the master or principal." *Copeland v. Humana of Kentucky, Inc.*, 769 S.W.2d 67, 69 (Ky. App. 1989). As such, if the trial court was correct in holding that Dr. Barefoot owed no duty to Mrs. Medley, then the omission of Dr. Barefoot's conduct from the jury instructions was proper.

In general, "[t]he question of duty presents an issue of law. When a court resolves a question of duty it is essentially making a policy determination." *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 248 (Ky. 1992) (internal citations omitted). "If no duty is owed by the defendant to the plaintiff, there can be no breach thereof, and therefore no actionable negligence." *Ashcraft v. Peoples Liberty Bank & Trust Co., Inc.*, 724 S.W.2d 228, 229 (Ky.App.1986).

Medley presents this Court with no legal authority specifically defining the standard of care an emergency room physician owes to a patient who has been transferred out of the emergency room and into another department, but who

remains there pending transfer. However, Drs. Hasan, Litner, and Khandelwal testified at trial that emergency room physicians, such as Dr. Barefoot, have a duty to monitor the patients in the emergency room and have a responsibility to intervene in a patient's care if the patient's condition becomes markedly unstable. In precluding Medley from introducing Dr. Barefoot's conduct from the jury instructions, the trial court stated:

> I don't think there was any testimony that Dr. Barefoot, without notification, was somehow responsible to go into this, and keep an eye on, at least, I mean, if she became unstable, I agree, everybody thought that Dr. Barefoot should have gone, but without notification she would never have known that.

Thus, the trial court concluded that there was no evidence of marked instability in Mrs. Medley's condition during her stay in the emergency room between the start of Dr. Barefoot's shift as the emergency room physician at 7:30 a.m. and Mrs. Medley's transfer out of the emergency room later that morning. As such, the trial court held that Dr. Barefoot owed Mrs. Medley no duty of care. However, Medley contends evidence existed demonstrating that, while Mrs. Medley remained in the emergency department awaiting transfer to the transitional care unit, her condition did become markedly unstable, which should have put Dr. Barefoot on notice and given rise to a duty, on the part of Dr. Barefoot, to intervene in her care. In support, Medley asserts the following:

- "Dr. Brey's consult at 8:31 a.m., on [Dr.] Barefoot's watch, described [Mrs.] Medley as a very sick lady,";

- Dr. Brey "changed Mrs. Medley's orders from a regular admit to an ICU admit"; and
- "Mrs. Medley's vital signs were ranging from stable to unstable while in the emergency room, prior to her transfer to the transitional care unit."

Upon review, however, it is apparent that this evidence fails to provide any reasonable indication or notice that Mrs. Medley's condition had become markedly unstable, giving rise to a duty of Dr. Barefoot to intervene in her treatment.

To begin, the note written by Dr. Brey memorializing her consult does not indicate that Mrs. Medley was markedly unstable. To the contrary, while Dr. Brey notes Mrs. Medley as "acutely ill," her impression, written in the note, was limited to "53 yrs. Upper GI bleed, hemodynamically unstable on arrival. Appears acutely dehydrated / hemownantia[?]. Bleed appears stable, as pt w/out gross blood." In sum, the note mentions that Mrs. Medley was unstable upon arrival, but demonstrated that her "bleed" subsequently appeared stable. Without more, we cannot find that notice of marked instability in Mrs. Medley's condition could have arisen by virtue of Dr. Brey's note.

Similarly, we cannot find that Dr. Brey's change of Mrs. Medley's admit order following her consult, by itself, objectively demonstrates that Mrs. Medley's condition had become markedly unstable.

Finally, the testimony Medley cites in support of his assertion that Mrs. Medley's vital signs were ranging from stable to unstable while in the emergency

room, prior to her transfer to the transitional care unit, is misleading and also fails to support his contention that Mrs. Medley's condition became noticeably and markedly unstable. The specific testimony cited by Medley came from Dr. Litner, PEM's emergency room physician expert:

> Q: Do you agree that when Dr. Brey saw, when Dr. Brey saw her, Patty Medley was a different patient than Dr. Sherrard had seen her in the emergency room?
>
> Dr. Litner: Yes.
>
> Q: She was sicker than when Dr. Brey saw her, wasn't she?
>
> Dr. Litner: Well, she was... I don't know if she was sicker. I think she was a little bit more unstable.
>
> . . . .
>
> Q: Do you agree with this statement: Mrs. Medley had epigastric pain and her vital signs were ranging from stable to unstable under [Nurse] Susan Clark's care?
>
> Dr. Litner: Yes. Probably unstable to stable.
>
> Q: Well, in your deposition, you said stable to unstable and I'll give you a little hint, every one of these is directly from your testimony.
>
> Dr. Litner: That's correct.
>
> Q: Alright. That's correct. Now, next one. By the way, while we're on this one, she had gone, ranged from stable to unstable while under Susan Clark's care and you were of the opinion that, in the ideal world, Susan Clark should have mentioned this to Dr. Barefoot, the emergency room physician on duty at the time?
>
> Dr. Litner: Ideally. Although, if she had to mention it to anybody, she should've admitted, mentioned it to the

doctor, admit team, which was Dr. Hasan, or to Dr. Brey
or Dr. Tzagournis.

In sum, Dr. Litner stated that Mrs. Medley became "a little unstable" during her stay in the emergency room and that, "in an ideal world," if Nurse Susan Clark had to mention it to anybody, she should have mentioned this to Drs. Barefoot, Hasan, Brey, Tzagournis, or the admit team. However, upon cross examination, while reviewing the entries of ER nurse Susan Clark in Mrs. Medley's emergency room treatment log, Dr. Litner further stated:

> Q: At 7:36 [a.m.], does that say the patient is resting quietly and is in no apparent distress?
>
> Dr. Litner: Right.
>
> Q: And, uh, we have a blood pressure, there's a pulse reading of 119. Did you tell us that your understanding of reviewing this record, that that was an isolated, uh, elevated. . .
>
> Dr. Litner: That was the only time her pulse was elevated.
>
> Q: Okay. And we have notes about the patient talking about increased pain at 8:16. Is it unusual in an emergency room for a patient to complain about increased pain?
>
> Dr. Linter: No.
>
> Q: And we haven't talked about, uh, examination. That would be Dr. Brey, is that right?
>
> Dr. Litner: I presume.
>
> Q: And we have a medication at 8:32 here. Let's go to the next page, page 13 please. And let just maybe do the top half. Okay, we have the medication there. Um, would that be pursuant to the doctor's orders?

Dr. Litner: Yes. A small, very very small dose of demerol.

Q: Okay. And then we have a nursing note at 9:26 that the patient is in no apparent distress.

Dr. Litner: Right.

Q: And it talks about blood pressure being decreased and the nurse applying oxygen and putting the patient in tran dellenburg and then it, actually, his vital signs listed down there that the nurse recorded on the chart, uh, 101 over 55. Is that a normal blood pressure?

Dr. Litner: Probably normal, presumably in response to the tran dellenburg, which is when you put their head down and their feet up.

Q: And pulse 91, correct?

Dr. Litner: Yes.

Q: And respirations. Those are within normal limits?

Dr. Litner: Yes.

Q: And ER nurses, you do expect nurses in your ER, if a patient might be having an isolated, uh, episode of low blood pressure, to be able to intervene by giving them oxygen and putting them in tran dellenburg, don't you?

Dr. Litner: ER nurses do that all the time.

Q: And you don't expect an ER nurse to call you every single time they give a patient oxygen or put them in tran dellenburg, do you?

Dr. Litner: No. If nurses did that, I wouldn't be able to see any other patients.

Q: Okay. Uh, then we have some blood being, let's see, we have some blood being drawn, an IV catheter, some

> more medication. Let's go to the bottom of the page here. Uh, let's see: medication, medication. Vital signs at 11:37 [a.m.], which is one minute before the patient leaves for the ICU. Are those within the normal limits?
>
> Dr. Litner: Yes.
>
> Q: And we have now looked at all of Susan Clark's entries, Dr. Litner. Based upon looking specifically at each of her nursing entries, did this patient appear to be relatively stable during Nurse Clark's shift?
>
> Dr. Litner: Yes.
>
> Q: Now, the ER doctor who was on duty during this period of time that Susan Clark was caring for Mrs. Medley, Dr. Barefoot, has testified that she would not expect an ER nurse to notify her of anything going on with this patient at this time. Would you agree with that?
>
> Dr. Litner: Yes.

In sum, Dr. Litner further stated that, based upon each of the nursing entries, Mrs. Medley's blood pressure was elevated on only one occasion, and he would not have expected Dr. Barefoot to have been notified of anything going on with Mrs. Medley during her time in the ER because her condition appeared to be relatively stable. Medley's experts unequivocally stated that Dr. Barefoot would have had a duty to intervene in Mrs. Medley's care if Mrs. Medley's condition became markedly unstable. Also, Medley points to nothing more in the record indicating that Mrs. Medley's condition became markedly unstable during her stay in the emergency room, nor does our own review of the record find anything more. As such, we find no error in the trial court's refusal to include the conduct of Dr.

Barefoot in the jury instructions, as there is no indication that Dr. Barefoot should have intervened in Mrs. Medley's treatment.

In his reply brief, and for the first time, Medley also argues that Dr. Barefoot's conduct should have been submitted to the jury because, alternatively, an independent physician-patient relationship, giving rise to a duty, existed between Dr. Barefoot and Mrs. Medley. This relationship, argues Medley, is

> best illustrated by her immediate response to the code. When the code was called, she immediately responded and attended to Mrs. Medley. She further demonstrated her duty by launching a warpath investigation after responding to the code in which she questioned multiple individuals about Mrs. Medley's time in the ER. She wanted to know why this patient was in the ER, what was going on with her, and why no one ever told her about it. . . . If she had no authority to act as Medley's physician, then she would not have had authority to attend her during the code.

With respect to this argument, we first note that CR 76.12(4)(e) mandates that "reply briefs shall be confined to the points raised in the briefs to which they are addressed. . ." Medley failed, in his Appellant Brief, to assert the existence of a physician-patient relationship independent of any duty Dr. Barefoot could have owed Mrs. Medley, had Medley's condition become markedly unstable in the ER. Moreover, we find no record of Medley's having preserved this argument at the trial level. Thus, we refuse to consider Medley's contention that Dr. Barefoot owed a duty to Mrs. Medley outside of the context of intervening in her care upon notice of a marked instability in Mrs. Medley's condition.

However, even if Medley had preserved this argument, it would still fail. “The physician's duty to a patient arises when, by his words or deeds, he agrees to treat a patient, thus establishing a physician/patient relationship.” *Jenkins v. Best*, 250 S.W.3d 680, 688 (Ky. App. 2007) (internal citations omitted). While Dr. Barefoot may have owed Mrs. Medley a duty to intervene in her care if Mrs. Medley’s condition had markedly changed, there is nothing in the record to suggest that Dr. Barefoot’s words or deeds demonstrated the establishment of a physician-patient relationship outside of that context. Here, it is undisputed that, prior to being called to attend to the code, Dr. Barefoot never examined or even saw Mrs. Medley, never provided any care to Mrs. Medley, never provided any advice about Mrs. Medley’s care, was never given any information about Mrs. Medley’s condition or its deterioration, never played any role in Mrs. Medley’s diagnosis, and never knew anything whatsoever about Mrs. Medley’s presence at Jewish Hospital until the code. As such, the extent of Dr. Barefoot’s involvement in Mrs. Medley’s treatment prior to the code was limited to being physically present in the emergency room. Thus, we refuse to conclude that Dr. Barefoot owed a duty to Mrs. Medley outside of the context of intervening in Mrs. Medley’s care upon notice of a marked instability in Mrs. Medley’s condition. In light of the above, the trial court did not err in omitting mention of Dr. Barefoot’s conduct from the jury instructions on this basis as well.

Medley’s second contention of error regarding the jury instructions concerns the issue of apportionment, and is also meritless. Medley maintains that

Drs. Hasan and Tzagournis were not "parties to the action" within the meaning of KRS 411.182 because both were dismissed as party defendants. As such, Medley contends Dr. Hasan and Dr. Tzagournis should not have been listed in the jury instructions as parties to whom fault could be allocated, their status as active parties having been terminated before the case was submitted to the jury.

As to both Dr. Hasan and Dr. Tzagournis, however, the issue is moot. The jury found that no degree of fault was attributable to either, and we thus have no occasion to express an opinion as to what course of action would have been required if the jury had found either partly to blame for Medley's damages. Thus, we cannot find error on this basis.

IV. EVIDENTIARY RULINGS OF THE TRIAL COURT

Medley next claims that the trial court made two separate and erroneous evidentiary rulings. The standard of review for evidentiary rulings is abuse of discretion. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000).

First, Medley claims that the trial court erroneously admitted a medical record into evidence. The record in question is a document entitled "Progress Notes," which contains Mrs. Medley's name and date of birth, and is dated "7/1/02." In its entirety, the document reads:

> S: 51 yo wf in with complaints of continued abdominal pain although she has been on Protonix for a couple of days now she states her pain is really not improving and seems to radiate into her back.

> O: BP 110/80; WT 164; R 16; P 60; T 97.9; heart rate and rhythm regular no murmer; bilateral lungs clear in all fields; abdomen soft non distended slight epigastric discomfort with deep palpation; bowel sounds positive; no HSM.
> A and P: Abdominal pain will schedule her for an ultrasound of the gallbladder with DSIDA scan if negative and have her back after that for follow up; continue the Protonix and follow up in 2-3 weeks.

To understand the significance of this document, it must first be put into context. At trial, Medley's experts, Drs. Geha and Khandelwal, stated that, upon their review of the record, the possibility of an aortic dissection was not brought up in Dr. Sherrard's differential diagnosis of Mrs. Medley in the emergency room. Importantly, both stated one of the symptoms that should have put Dr. Sherrard on notice of the potential of an aortic dissection was Mrs. Medley's complaint of pain radiating into her back. By way of example, Dr. Geha testified at trial:

> Well, from reviewing the record, this patient was brought by the emergency medical technicians to the hospital with a complaint of severe chest pain, sudden, radiating to the back. Eventually, abdominal pain. There's a picture of pain that shifts: chest, abdomen, back. Radiation. Sudden, coming on. Some drop in blood pressure. And the triage nurse registers a similar complaint also, that the pain was sudden, chest pain, epigastric, also going back to the back. And all of these, in this kind of a picture in a patient of her age and her history would raise, amongst a differential diagnosis, a diagnosis of dissection of the aorta, which I do not find has been brought up in the differential diagnosis in the emergency room.

On cross-examination of both Geha and Khandelwal, the trial court allowed PEM to introduce the above-referenced document, upon condition that

PEM inform the jury that Dr. Sherrard never possessed this document and that this document was created two years prior. PEM then presented the jury with an enlarged copy of the document. The following exchange between PEM and Dr. Geha ensued:

> Q: This is a record from July of 2002. And Mrs. Medley has presented to Dr. King, her family practitioner. And I will grant you this record is not in the ER chart for Dr. Sherrard. But that's not why I'm asking questions about it. She presented on this day with continued abdominal pain, although she'd been on Protonix for a couple of days now, and she states her pain is really not improving. Again, we're talking about abdominal pain. Not improving, and seemed to "radiate into her back." Would you agree with me that a patient with reflux-type problems can have abdominal pain that radiates to the back?
>
> Dr. Geha: She can, possibly. I wasn't aware of any of that.

A similar exchange took place between PEM and Dr. Khandelwal. The trial court subsequently admitted the document into evidence. During its closing arguments, PEM again presented the jury with the enlarged copy of the document. Regarding the medical record, PEM stated:

> [C]ramping, tenderness, aching, and radiating to the back. That does fit the diagnosis of a GI bleed, which we know was accurate in hindsight, okay? This is also available for you. It is defense exhibit number 11. And we all know, I've said it now for the third time, Dr. Sherrard did not have this piece of paper. This is July of 2002, Mrs. Medley has presented to a family practitioner named Dr. King. And she has complaints of abdominal pain, although she's been on Protonix for a couple of days now, she states her pain is really not improving and seems to

> radiate to her back. Why is this important? It substantiates that a GI bleed diagnosis in the hospital is consistent with GI-type problems. So I have a low index of suspicion and no clinical presentation consistent with a dissection. I have a high index of suspicion and a completely consistent presentation for a GI bleed. And I submit to you that a reasonable emergency room physician has made the appropriate diagnosis, and is moving forward in that regard.

On appeal, Medley makes no contention that this document, relating to Mrs. Medley's medical history, was inauthentic, inaccurate, or otherwise unreliable. Rather, Medley argues that 1) this document was erroneously introduced because no witness was familiar enough with it to support it with testimonial evidence, 2) this document is irrelevant, and 3) even if it were relevant, the prejudice its introduction created outweighed any probative value it may have had.

With regard to Medley's argument that no witness was familiar enough with the document to support it with testimonial evidence, we note as a preliminary matter that testimonial evidence is not necessary to support medical records satisfying the evidentiary requirements of authenticity. *Baylis v. Lourdes Hosp., Inc.*, 805 S.W.2d 122, 123 (Ky. 1991). As we find no indication that Medley ever challenged the authenticity of this document, no supporting testimony was ever required.

With regard to Medley's argument that the document was not relevant, we disagree. Rebuttal evidence is proper if offered in an attempt to explain a fact the adverse party had attempted to prove. *See Keene v. Commonwealth*, 210 S.W.2d 926, 928 (Ky. 1948) (overruled in part, *Colbert v. Commonwealth*, 306 S.W.2d 825

(Ky. 1957). Here, Medley attempted to prove that "pain radiating to the back" is a "classic sign of aortic dissection." (Appellant's Brief at 18.) The document was relevant to demonstrate that "pain radiating to the back" is also a symptom of problems outside the realm of an aortic dissection, and that another physician recognized it as a symptom of a GI bleed. The degree of accuracy of Dr. Sherrard's diagnosis of Mrs. Medley's condition in the emergency room was relevant to the issue of the standard of care, *i.e.*, whether Dr. Sherrard acted as a reasonable emergency room physician in giving Mrs. Medley, under the circumstances of her symptoms and complaints, a diagnosis of a GI bleed. Therefore, the evidence was relevant.

However, we must also determine if the tendency of the evidence to unduly prejudice Medley or to confuse the jury outweighed its relevance. *See* Kentucky Rule of Evidence (KRE) 403. We hold that it did not. Medley explained to the jury through expert testimony and during closing arguments that pain radiating to the back is a symptom of an aortic dissection. Medley also explained to the jury that regardless of whether a GI bleed was a reasonable diagnosis of Mrs. Medley's condition, Dr. Sherrard should have also considered the possibility of an aortic dissection in his differential diagnosis. As such, the testimony of the physicians and Medley's explanation of the evidence during closing argument clarified any confusion in the jurors' minds. PEM also admonished the jury, each time it introduced this document, per the trial court's instruction, that this document was created two years prior, was not relied upon by Dr. Sherrard when he formed

his diagnosis of Mrs. Medley's condition, and was never in his possession. Furthermore, none of Medley's experts testified that this document altered their opinions regarding the ultimate issues in this case. Therefore, Medley was able to address, and did address, any undue prejudicial impact of the document. In light of the above, the trial court did not err in admitting the document to evidence. Furthermore, even if the trial court did err, any such error was harmless.

Second, Medley contends that the trial court erroneously excluded evidence that Jewish Hospital contracted to provide a defense and indemnity for Drs. Brey and Tzagournis. Drs. Brey and Tzagournis were residents at Jewish Hospital through the residency program of the University of Louisville School of Medicine. The Residency Program Agreement between the school and Jewish Hospital provides:

> 7. In addition, the Hospital will provide the necessary amount of professional liability insurance coverage for each Resident participating in the University Service while on assignment to the Hospital, said coverage to be in the minimum amount of $200,000 per occurrence.

Medley maintains such evidence revealed an underlying bias on the part of Dr. Brey, Dr. Tzagournis, and Jewish Hospital, alleging it motivated them to present a "unified defense." However, evidence of bias would have affected the credibility of Dr. Brey and Dr. Tzagournis as witnesses; here, both doctors were properly dismissed from this action for reasons unrelated to their credibility as witnesses, *i.e.*, Dr. Tzagournis was dismissed on grounds of the statute of limitations, and Dr. Brey was dismissed because Medley failed to adduce any

evidence that Dr. Brey breached a duty owed to Mrs. Medley, resulting in a directed verdict. Thus, even if this information was relevant to the issue of bias and could have indicated that Jewish presented a unified defense with Dr. Brey and Dr. Tzagournis, it does not affect the propriety of Dr. Brey's or Dr. Tzagournis' dismissal from this case, and we find that this issue is moot.

V. AGENCY

Medley's final contention of error is that the trial court improperly held that Drs. Brey and Tzagournis were not agents or ostensible agents of Jewish Hospital. However, because we have found that Dr. Brey's directed verdict was proper and because the jury did not attribute any amount of fault to either Jewish Hospital or Dr. Tzagournis, this argument is also moot.

CONCLUSION

For the reasons stated, the judgment of the Jefferson Circuit Court and its directed verdict in favor of Dr. Brey are affirmed. In light of our holding, Dr. Brey's appeal regarding the statute of limitations and Jewish Hospital's appeal of the trial court's denial of a directed verdict are denied as moot.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-APPELLEE:

Chadwick N. Gardner
F. Thomas Conway
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANT/CROSS-APPELLEE:

Chadwick N. Gardner
Louisville, Kentucky

BRIEF FOR APPELLEE/CROSS APPELLANT, JEWISH HOSPITAL, INC. & ST. MARY'S HEALTHCARE, INC (d/b/a JEWISH HOSPITAL, INC.):

W. Kennedy Simpson
Clay M. Stevens
Sallie J. Stevens
Louisville, Kentucky

BRIEF FOR APPELLEE/CROSS APPELLANT, NICOLE BREY, M.D.:
Richard P. Schiller
Kimberly S. Naber
Louisville, Kentucky

BRIEF FOR APPELLEE, PHYSICIANS IN EMERGENCY MEDICINE, P.S.C.:
Daniel G. Brown
David B. Gazak
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE/CROSS APPELLANT, JEWISH HOSPITAL, INC. & ST. MARY'S HEALTHCARE, INC (d/b/a JEWISH HOSPITAL, INC.):

W. Kennedy Simpson
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE/CROSS APPELLANT, NICOLE BREY, M.D.:

Kimberly S. Naber
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE,
PHYSICIANS IN EMERGENCY
MEDICINE, P.S.C.:

Daniel G. Brown
Louisville, Kentucky