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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002269-MR
AND
NO. 2010-CA-000431-MR

JEFFREY FRANZ, ADMINISTRATOR
OF THE ESTATE OF ELWANDA G.
FRANZ — APPELLANT

APPEALS FROM BOYD CIRCUIT COURT
v. HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 01-CI-01150

ASHLAND HOSPITAL CORPORATION,
D/B/A KING'S DAUGHTERS' MEDICAL
CENTER; MICHAEL RICHMAN,
M.D. AND CUMBERLAND
CARDIOLOGY, P.S.C. — APPELLEES

AND NO. 2009-CA-002313-MR

MICHAEL RICHMAN, M.D. — CROSS-APPELLANT

CROSS-APPEAL FROM BOYD CIRCUIT COURT
v. HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 01-CI-01150

JEFFREY FRANZ, ADMINISTRATOR
OF THE ESTATE OF ELWANDA G.
FRANZ — CROSS-APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; COMBS AND STUMBO, JUDGES.

ACREE, CHIEF JUDGE: Appellant Jeffrey Franz, Administrator of the Estate of Elwanda G. Franz, appeals from a Judgment of the Boyd Circuit Court following a jury verdict that Appellee Michael Richman, M.D., was not liable for medical malpractice. In addition to challenging the Judgment, Franz seeks our review of four (4) pretrial orders and post-trial summary judgments finding Dr. Richman's co-defendants below, Appellees King's Daughters' Medical Center (KDMC) and Cumberland Cardiology, not vicariously liable. We find no grounds warranting reversal and, therefore, affirm.

Dr. Richman filed a protective cross-appeal arguing the circuit court erred when it ordered him to produce his psychological treatment records; he claims the order violates Kentucky Rules of Evidence (KRE) 507. Because we affirm the Judgment and other orders, the issue raised in the cross-appeal is moot and we need not address it.

I. Facts and Procedure

On February 17, 2001, Elwanda presented herself at King's Daughters' Medical Center complaining of chest, arm, and jaw pain. Richard Paulus, M.D., Elwanda's attending cardiologist, placed Elwanda on Plavix, an anti-platelet medication, and performed a cardiac catheterization. The results revealed

blockages in several of Elwanda's coronary arteries. Dr. Paulus sought a consultation with Dr. Richman for evaluation of Elwanda as a candidate for coronary artery bypass grafting (CABG).

During the consultation, Dr. Richman discussed with Elwanda several medical options, including CABG surgery and medical management, and discussed the respective risks. Upon Dr. Richman's recommendation, Elwanda elected to undergo CABG surgery. On February 19, 2001, Dr. Richman and Elwanda executed a "Consent for Cardiac Surgery" form; a nurse witnessed Elwanda's signature. The form authorized Dr. Richman to perform the CABG procedure. Later that evening, Dr. Richman discontinued Elwanda's treatment with Plavix.

Elwanda underwent surgery on February 20, 2001. She was taken to the operating room at 11:54 AM; her surgery was scheduled to commence at noon. Larry Michael Fraley, M.D., was Elwanda's anesthesiologist. Dr. Fraley decided that surgery would be better facilitated by inserting a Swan Ganz Catheter (SGC) into Elwanda's right internal jugular vein, through her heart, and into her pulmonary artery. He attempted this procedure for approximately two-and-one-half hours, but was unsuccessful. During this effort, Dr. Fraley inadvertently punctured Elwanda's superior vena cava, a principal vein located behind the heart. Because the procedure was undertaken through a small incision in Elwanda's neck, no one was aware that the vein had been punctured.

At 2:55 p.m., Dr. Richman commenced surgery. When Dr. Richman opened Elwanda's chest, her blood pressure suddenly dropped. In response, Dr.

Richman dissected Elwanda's pericardium to view her heart. Dr. Richman observed "a little bit of blood" in the pericardial sac, the lining of the heart,[1] but no active bleeding. He could not identify the source of the blood at the time. However, the patient's vital signs stabilized. Dr. Richman proceeded and completed the CABG procedure without complication.

Prior to closing, Dr. Richman, aware of Elwanda's history of congestive heart failure, made a small nick in the pleura, a membrane encasing the lungs, to suction any fluid build-up. Upon doing so, he observed a large amount of dark blood. Dr. Richman first suspected the pulmonary artery as the source of the blood but, finding no injury, continued searching for the source, eventually correctly determining the location as the posterior aspect of the superior vena cava. Concerned, Dr. Richman summoned assistance. Although the laceration's location made access and visualization difficult, Dr. Richman successfully repaired it.

Elwanda's recovery initially progressed well. However, she later suffered several setbacks resulting in significant respiratory and other medical troubles, some requiring extended hospitalization. She died in July 2002, sixteen months after the surgery.

Prior to Elwanda's death, on December 4, 2001, Jeffrey Franz, Elwanda's attorney-in-fact, filed suit in Boyd Circuit Court claiming medical negligence

[1] The parties vigorously dispute the source of the blood in the pericardium. Franz claimed the blood in the pericardial sac was from the superior vena cava laceration. Dr. Richman testified the superior vena cava puncture was outside the pericardium, and thus the blood he found inside the pericardium could not possibly have come from the puncture or serve as cause for suspicion of an injury outside the pericardium.

against Dr. Richman and Dr. Fraley, and vicarious liability against KDMC and Cumberland Cardiology as Dr. Richman's employers. In 2006, Franz was named executor of Elwanda's estate; thereafter he substituted himself in that capacity as the party plaintiff. Franz also added Dr. Paulus as a defendant, and asserted various new allegations against the defendants. Those new allegations included:

> (1) claims against Dr. Richman for medical battery and negligent failure to obtain Franz's informed consent;
>
> (2) claims against Dr. Paulus for medical negligence, negligent referral, negligent hiring, negligent misrepresentation of Dr. Richman's qualifications, and for Dr. Richman's negligence on a theory of ostensible agency;
>
> (3) claims against Cumberland Cardiology for negligent hiring, negligence retention, and ostensible agency liability; and
>
> (4) claims against KDMC for Dr. Paulus's and/or Dr. Richman's negligence on the basis of joint venture liability theory, for negligently credentialing Dr. Richman, for absolute liability for having allowed Dr. Richman to perform surgery without credentials, for liability as a guarantor of Dr. Richman's work, and for Dr. Richman's negligence on a theory of ostensible agency.
>
> Prior to trial, Franz settled all claims against Dr. Fraley.

By order entered August 4, 2009, the circuit court granted summary judgment in favor of Dr. Richman on the claim of medical battery. On August 17, 2009, having previously denied KDMC's first motion to bifurcate the trial, granted its second motion to do so; Franz's medical negligence claims against Dr. Richman

and Dr. Paulus would be tried first, followed by a trial on all remaining vicarious and derivative claims against the other parties.

The trial to determine whether Dr. Richman or Dr. Paulus had committed medical negligence began on October 13, 2012, and lasted three-and-one-half weeks. Franz's position at trial with respect to Dr. Richman was that he deviated from the medical standard of care when he: (1) failed to obtain informed consent by not specifically discussing with Elwanda the effects of Plavix; (2) failed to delay the CABG surgery until the anticoagulant effects of the drug Plavix had dissipated; and (3) continued with the CABG procedure before locating and repairing the superior vena cava laceration.

Prior to submission of the case to the jury, Franz settled all claims against Dr. Paulus.

After a short deliberation, the jury returned a unanimous verdict that Dr. Richman did not fail to exercise that degree of care and skill which is expected of a reasonably competent physician practicing the specialty of cardiothoracic surgery under the same or similar circumstances. Based upon the jury's verdict, a trial order and judgment was entered on November 6, 2009, in Dr. Richman's favor. Franz appeals that trial order and judgment.

By another order entered December 18, 2009, the circuit court granted KDMC and Cumberland Cardiology's separate summary judgment motions on Franz's remaining vicarious and derivative claims, including claims Franz identified as "independent liability" claims against KDMC. The circuit court also

granted KDMC and Cumberland Cardiology's separate motions to compel Franz to pay expert witness fees incurred during his taking of their depositions. Franz also appeals from that order.

As additional facts become relevant, they will be discussed.

II. Standard of Review

Because various review standards govern the issues, we will set out the applicable standard in the context of the separate analyses.

III. Medical Battery

Franz does not dispute that Elwanda signed the consent form authorizing Dr. Richman to perform her CABG surgery. Nor does Franz deny that Dr. Richman did perform the CABG surgery. However, Franz also notes there is no dispute that Dr. Richman's privileges to perform surgery at KDMC had expired. That fact is what Franz believes justifies reversing the summary judgment in favor of Dr. Richman on this claim.

Because there is no genuine issue as to these material facts, our review of the summary judgment is purely a question of law which requires *de novo* review. *Mitchell v. University of Kentucky*, 366 S.W.3d 895, 898 (Ky. 2012). Applying this standard, we conclude that the circuit court correctly applied *Vitale v. Henchey* as the controlling authority. In the words of the circuit court,

> [a] fair reading of [*Vitale*] makes it perfectly clear as to what is required to support a claim for medical battery. First, a claim can be maintained when a patient did consent to surgery by the physician but the procedure that was actually performed was not the procedure to which

> the plaintiff consented. The other scenario is where a patient consents to the procedure that was actually performed, but the procedure was performed by a physician other than the physician that obtained the consent of the patient.

(Circuit Court Order, August 4, 2009) (citing *Vitale v. Henchey*, 24 S.W.3d 651 (Ky. 2000)). Neither of those circumstances exists in this case.

Furthermore, the Supreme Court in *Vitale* said it agreed with the statement that courts "reserve battery solely for the cases involving a *complete lack of consent*." *Vitale*, 24 S.W.3d at 657 (citation omitted; emphasis added). In Elwanda's case, it was impossible to prove the complete lack of consent.

Nevertheless, Franz argues that this Court should create a new route to proving lack of consent. Relying on statutes and regulations regarding hospital privileges, Franz urges this Court to apply public policy to nullify any consent to surgery performed by a physician who lacks privileges in the hospital in which the surgery is performed. We do not believe Kentucky's jurisprudence authorizes such a step.

In essence, Franz attempts to bootstrap Kentucky's public policy of protecting patients from *unskilled* practitioners into a virtual strict liability tort for medical battery when a physician lacks privileges.[2] But *Vitale* gives us some

[2] Battery is an intentional tort, a concept entirely distinct from the doctrine of strict liability. "'Strict liability' is a judicial doctrine which relieves a plaintiff from proving specific acts of negligence and protects him from certain defenses[.]" *Carmical v. Bullock*, 251 S.W.3d 324, 326 (Ky. App. 2007). Strict liability "does not depend on actual negligence or intent to harm . . . ." Black's Law Dictionary, Strict liability (9th ed. 2009). With respect to strict liability, intent is simply irrelevant. In contrast, intent is the cornerstone element of every intentional tort. *See* Black's Law Dictionary, Intentional tort (9th ed. 2009) (defining an "intentional tort" as "[a] tort committed by someone acting with general or specific intent"). To claim a defendant is "strictly liable" for an "intentional tort" ignores the distinction between these concepts.

direction here as well; the Supreme Court held that a medical battery "claim depends on neither professional judgment nor the physician's surgical skill." *Id*. at 656. If we embraced Franz's argument, not only would we be ignoring that guidance and placing the physician's skill directly in issue, we would be *presuming* a lack of skill based on the lack of hospital privileges. We cannot accept this rationale.

Franz focuses on *Dr. Richman's* capacity to obtain consent from Elwanda, arguing that a physician who lacks surgical privileges cannot legally perform surgery, and is thereby incompetent to obtain consent for surgery. That is, so goes the argument, Dr. Richman's lack of privileges equals *his* "incapacity," which in turn renders Elwanda's consent null and void. We reject Franz's argument.

The focus is not on the *physician's* capacity – legal, contractual, or otherwise – to obtain a patient's consent, and there is no evidence that Dr. Richman's lack of privileges impacted Elwanda's capacity. Whether and to what degree a physician lacks hospital privileges and how the physician came to lack such privileges have no bearing on either party's capacity; a physician's lack of hospital privileges simply has no effect on the patient's otherwise valid consent.[3] In this context, we agree with what the circuit court said on the subject.

[3] Even if we read the argument as claiming Elwanda's consent was uninformed because she was not told Dr. Richman lacked hospital privileges, this would not support a claim for medical battery; it would, however, support a medical malpractice claim based on lack of informed consent. *Naughright v. Weiss*, 826 F.Supp.2d 676, 686 (S.D.N.Y. 2011)(medical battery claim based on fact physician was not licensed was dismissed; such allegations only supported malpractice claim based on lack of informed consent). Franz does not make that argument.

> There is no authority before this Court holding that the current state of a physician's hospital staff privileges nullifies an otherwise valid consent.

(Circuit Court Order, August 4, 2009). Franz has directed us to no authority to support this argument, and we are aware of none. Therefore, we find no basis for reversing the circuit court's summary judgment in favor of Dr. Richman on the claim of medical battery.

IV. Battery and Independent Liability Claims Against KDMC

Franz pleaded three "direct" (*i.e.,* independent) liability claims against KDMC. Those claims are:

> 48. KDMC violated its own bylaws, policies and procedures with respect to the credentialing of Defendant Richman and allowing Defendant Richman to continue to provide medical services at its facilities.
>
> 49. KDMC is absolutely liable to Plaintiff for the injuries to Elwanda G. Franz because it allowed a surgeon without credentials to operate at its facilities.
>
> 50. KDMC is a guarantor to Plaintiff for the injuries to Elwanda G. Franz because it allowed a surgeon without credentials to operate at its facilities.

(Appellant's First Amended Complaint). He asserted that recovery could be had against KDMC under these independent theories of liability even absent negligence by Dr. Richman. The circuit court rejected Franz's position, concluding:

> Although an independent claim, the claim is derivative from the conduct of Richman in treating Elwanda Franz. Unless the jury finds that Dr. Richman deviated from the standard of care and further determines the required

> causal link between the deviation and Mrs. Franz's damages, no recovery can be had against KDMC under a strict liability approach.

(Trial Court Order, August 4, 2009).

Before this Court, Franz continues to argue that he is not required to prove negligence or causation against Dr. Richman to recover on his independent claims against KDMC. Franz maintains that a hospital has independent duties to follow its own policies, the breach of which results in independent liability, not mere vicarious liability.

The particular hospital policies at issue need not be set out in detail. It is sufficient to say that these policies require a physician to be granted privileges to perform surgery at the hospital and treat hospital patients before actually doing so. Franz argues that KDMC's breach of these policies is actionable. The arguments fuse elements of medical battery, strict liability, and negligence. In the interest of thoroughness, we address each possible cause of action.

A. Medical Battery Against KDMC

As explained above, a tortfeasor commits battery when he or she unlawfully touches the person of another. *Andrew v. Begley*, 203 S.W.3d 165, 171 (Ky. App. 2006). In this matter, KDMC cannot be held independently and directly liable for battery because KDMC did not touch anyone, including Elwanda. The claim has no merit.

B. Strict (Absolute) Liability in Tort

Franz maintains that, because a hospital's duty under modern law is to provide a safe environment for patients, public policy requires that the hospital be held strictly liable for permitting a physician without hospital privileges to perform surgery. He argues that a rule allowing a hospital to escape liability when surgery is performed by a physician lacking privileges unless the physician is actually negligent would have a chilling effect on the beneficence of requiring staff privileges in the first place. This argument defies logic because it would make a hospital liable even when the physician, in fact, satisfied the medical standard of care. Furthermore, under this theory, the hospital would be held liable even when the surgery is entirely medically successful. We decline to recognize such a novel theory of liability.

C. Independent Negligence

We agree that a hospital's failure to abide by its own administrative rules and policies *may* result in independent negligence liability. As pointed out by Franz, this Court held in *Williams v. St. Claire Medical Center*, 657 S.W.2d 590 (Ky. App. 1983), that "a hospital owe[s] a duty to [its patients] to enforce its published rules and regulations pertaining to patient care, the breach of which may result in independent liability of the hospital[.]"[4] *Id.* at 591. We also acknowledge, as Franz claims, that KDMC's failure to follow its own surgical privileges protocols and policies put a surgeon in a position to potentially do harm. But that does not end the inquiry.

[4] Despite Franz's assertion to the contrary, *Williams* does not stand for the proposition that a hospital may be held *strictly* liable for failing to enforce its administrative rules and policies.

Even assuming, without deciding, that the hospital's liability is not purely derivative – that is, not entirely dependent on the negligence of the physician – elementary negligence law still requires the injured party to establish a causal connection between her injury and the hospital's violation of its duty of care. *See Stacy v. Williams*, 253 Ky. 353, 69 S.W.2d 697, 704-05 (1934) ("The presumption of negligence is never indulged in from the mere evidence of mental pain and suffering of the patient, or from failure to cure, or poor or bad results, or because of the appearance of infection. The burden of proof is upon the patient to prove the negligence of the physician or surgeon [or hospital], and that such negligence was the proximate cause of his injury and damages."). Stated differently, the injured party must make a causal connection between the hospital's administrative misstep and his or her injury.

Setting aside Dr. Richman's performance of the surgery, which both Franz's "direct" liability theory and the jury's verdict exclude as the causal link, there is not a scintilla of evidence connecting the hospital's breach of duty to Elwanda's injury. As there is no genuine issue of material fact regarding this issue, the circuit court properly granted summary judgment in favor of KDMC on this claim.

In summary, there is no genuine issue of material fact, considered in the context of these theories individually or in combination, that would require reversal of the grant of summary judgment in favor of KDMC.

V. Evidentiary Issues

Franz claims numerous errors in evidentiary rulings. They are: (1) the circuit court's failure to admit evidence at trial of (i) Dr. Richman's mental illness, (ii) Dr. Richman's absence from the surgical suite at induction, and (iii) Dr. Richman's lack of privileges at KDMC; (2) the circuit court's failure to allow Franz's examination of Dr. Richman regarding his current qualifications; and (3) the circuit court's refusal to peremptorily instruct the jury that Dr. Richman was an employee of Cumberland Cardiology, and, in turn, the court's refusal to admit evidence of the degree of control Dr. Paulus exercised over Dr. Richman.

We review a circuit court's evidentiary rulings for an abuse of discretion. *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 725 (Ky. 2009) (citation omitted). "An abuse of discretion occurs when a 'trial judge's decision [is] arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676, 684 (Ky. 2005) (citation omitted). With this standard in mind, we review these grounds for reversal *seriatim*.

A. Dr. Richman's Alleged Mental Illness

Prior to trial, Franz revealed he intended to call as a witness at trial Dr. Thomas Tsao, a board-certified psychiatrist. According to Dr. Tsao, at the time of Elwanda's surgery, Dr. Richman was suffering from an untreated and disabling mental illness – bipolar disorder – resulting in feelings of grandiosity and invincibility, and an "I can do anything" delusion. Dr. Tsao opined that Dr.

Richman's psychiatric disorder caused him to display inappropriate judgment during Elwanda's surgery, and rendered Dr. Richman incapable of making rational decisions.

By order entered October 1, 2009, the circuit court granted Dr. Richman's motion *in limine* to exclude as irrelevant pursuant to KRE 401 or as unduly prejudicial under KRE 403, or both, any evidence of Dr. Richman's so-called mental illness, including Dr. Tsao's testimony. Franz takes issue with the circuit court's ruling.

In Franz's view, Dr. Richman's alleged bipolar condition was relevant because it affected his perception and judgment. Consequently, Franz argues, the circuit court erroneously excluded this evidence. In response, Appellees claim that Franz sought to admit evidence of Dr. Richman's mental illness solely to explain *why* Dr. Richman breached the standard of care. Appellees maintain that the *why* inquiry, and evidence pertaining thereto, is irrelevant because Kentucky law imposes an objective, not a subjective, standard of care. That is, evidence of Dr. Richman's mental illness is not probative of whether he failed to exercise reasonable care. Franz counters that he sought to admit evidence of Dr. Richman's bipolar disorder not to prove the *why* but the *what*, that is, to prove *whether* Dr. Richman acted as Franz claims he did. Franz's argument does not persuade us.

Dr. Tsoa's own testimony makes it clear that he had no opinion whether Dr. Richman breached the medical standard of care. Dr. Tsao said:

Dr. Tsao: Now, I am not a surgeon. So I can't comment on

whether he made a tactical mistake in terms of being a cardiac surgeon. . . . [L]ook, if the group of experts say Richman made a mistake – and, look, we all make mistakes as physicians. If they said he made a mistake, then I guess it's my job to say: did his bi-polar disorder impact ***why*** he made a mistake?

Q: Well, first you have to come to the conclusion that in fact he made a mistake, don't you?

Dr. Tsao: Right. That's what I said, if.

Q: And you can't do that?

Dr. Tsao: No, I didn't say I could. I said I couldn't.

(Dr. Tsao Deposition, pp. 60, 74 (emphasis added)). Dr. Tsao later said Dr. Richman was capable of making rational decisions and it "depend[ed] on the other cardiothoracic surgeon's opinion that he had made, I guess, a bad choice." (*Id.* at 75).

Subject to certain delineated exceptions, "[a]ll relevant evidence is admissible." KRE 402. And evidence is relevant if it has "any tendency to make the existence of ***a fact that is of consequence to the determination of the action*** more probable or less probable than it would be without the evidence." KRE 401 (emphasis added). The consequential fact in a medical malpractice case is ***whether*** the standard of care is met or exceeded, not ***why***.

Physicians are human; they have human problems and, try as they might not to, they carry their problems into the operating room with them. Asking a jury, as part of their responsibility to determine whether the standard of care has been breached, to consider the particular psychological stressors of the physician

on trial, would have the effect of converting an objective standard to a subjective one. That is inappropriate.

In Kentucky, the standard of care for physicians is an objective one – a physician has the duty to use the degree of care and skill expected of a competent practitioner of the same class and under similar circumstances. *Hyman & Armstrong, P.S.C. v. Gunderson*, 279 S.W.3d 93, 113 (Ky. 2008). The objective nature of the physician standard provides no basis for delving into a physician's subjective mental state. *Macy v. Blatchford*, 8 P.3d 204, 208 (Or. 2000).

As aptly explained by the Superior Court of Pennsylvania:

> [I]n all medical malpractice actions, the proper focus is whether the physician's *conduct* . . . was within the standard of care. If, on one hand, a physician's conduct violates the standard of care, then he or she is negligent regardless of the nature of the conduct at issue. If, on the other hand, a physician's conduct does not violate the standard of care, then he or she has not, by definition, committed any culpable error of judgment.

Pringle v. Rapaport, 980 A.2d 159, 173-74 (Pa. Super. Ct. 2009) (emphasis in original)(citation omitted). Stated differently, despite a physician's "less than optimal mental and emotional condition," if the physician's "actual treatment of a patient reflects the appropriate degree of care," he or she "cannot be held liable in negligence." *Macy*, 8 P.3d at 208. The salient point to be derived from *Macy* and *Pringle* is that medical negligence focuses on behaviors and conduct.

Here, Franz claimed Dr. Richman was negligent in not sooner locating and repairing the injury to Elwanda's superior vena cava caused by Dr. Fraley.

The issue to be decided by the jury, then, was whether that decision was ***objectively*** reasonable. That is, did Dr. Richman use the same degree of care and skill expected of a reasonably competent cardiothoracic surgeon under similar circumstances? Dr. Richman's subjective mental state was not relevant to that inquiry. *See Kasper v. Damian*, 689 F. Supp. 2d 492, 499-500 (W.D.N.Y. 2010) ("[I]n determining whether a doctor breached the standard of care the concern is with what the doctor actually did, or did not do, without regard to what he may have been thinking at the time.").

Proper application of our jurisprudence will not result in a finding of liability based on a physician's state of mind under circumstances in which the objective standard of care has been satisfied. Such evidence is not relevant to the issue of liability for medical negligence. In this case, the jury was convinced that a physician satisfied the appropriate objective medical standard of care and there is no reason or justification for our jurisprudence to demand more proof that he successfully suppressed every distraction working against his effort to satisfy that duty. We cannot say the circuit court abused its discretion when it excluded evidence of Dr. Richman's alleged mental illness.

B. Dr. Richman's Absence from the Surgical Suite at Induction

Franz next asserts the circuit court abused its discretion when it excluded evidence that Richman was absent from the surgical suite – in violation of hospital policy[5] – when Dr. Fraley anesthetized Elwanda. Because Dr. Richman

[5] The policy states: "All surgeons must be in the Operating Room or Outpatient Surgery Room and ready to commence operations at the time scheduled and in no case will the Operating or

was not present during Dr. Fraley's attempts to insert the SGC, Franz argues, Dr. Richman was unable to perceive or assess the cause, source, or extent of Elwanda's internal bleeding. Franz maintains "the jury never knew any of this, because the trial judge repeatedly excluded all such testimony." (Appellant's Brief at 21).

A review of the record belies Franz's argument that "the jury never knew" that Richman was absent from the surgical suite in violation of hospital policy. The jury heard evidence from Margie Robinson, KDMC's Director of Surgical Services, that one of Dr. Richman's "out-of-line" issues was that he preferred to arrive in the operating room when it was time for him to start working, despite KDMC's standard and express policy that the surgeon be present in the operating room at the time the patient is put to sleep and remain in the operating room from that time onward. Franz also elicited testimony from Dr. Fraley that he did not recall Dr. Richman being in the operating room when he induced Elwanda, but claimed he would not have put her to sleep unless Dr. Richman was present. Dr. Fraley repeated that hospital rules required Dr. Richman to be present at induction. Mary Thornsberry Nivens, R.N., testified by deposition that Dr. Richman typically was not present during induction. Furthermore, Franz represented in his brief that Nurse Miller testified that she paged Dr. Richman two or three times, but he did not promptly report to the operating room.[6]

Outpatient Surgery Rooms be held longer than fifteen (15) minutes after the time scheduled."

[6] We are unable to locate Nurse Miller's testimony in the record and Franz has not directed to it. For purposes of analyzing this argument, however, we accept as true Franz's representation of Nurse Miller's testimony.

Franz further elicited testimony on this issue from Dr. Robert Campbell, his expert witness. Dr. Campbell opined that, under the circumstances of this particular case, even absent hospital policy, the surgeon needed to be present at the induction; Dr. Richman was not. Dr. Campbell opined that Dr. Richman's actions represented a deviation from the applicable standard of care. Dr. Campbell further reiterated that it took Dr. Richman fifteen minutes to arrive in the operating room after being paged by KDMC medical staff. Dr. Campbell explained that, once induction commenced, the surgeon needed to remain in the operating room for the duration of surgery. KDMC's policy on this issue was read to the jury, and admitted into evidence. Franz referenced KDMC's policy during closing argument.

The crux of Franz's argument appears to be that the circuit court erred by declining to permit *additional* testimony on this issue. Specifically, Franz sought to admit Nurse Nivens' testimony that Dr. Richman did not answer his pages, and spent the time between Elwanda's arrival in the surgical suite and the beginning of the chest surgery in either the nurse's lounge or doctor's lounge watching television with his girlfriend and that by doing so he was in direct violation of KDMC's policy. The circuit court viewed this evidence as "inflammatory" and "unduly prejudicial," and refused its admission.

The trial judge is the gatekeeper of evidence. *Leatherman v. Commonwealth*, 357 S.W.3d 518, 529 (Ky. App. 2011) (citation omitted). In this role, the trial judge enjoys substantial discretion. *See Washington v. Goodman*,

830 S.W.2d 398, 400 (Ky. App. 1992) ("[The] trial court has the power to control the course of litigation, including control of the amount of evidence produced on a particular point." (Citation omitted)). Again, "[a]n abuse of discretion occurs when a 'trial judge's decision [is] arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Miller*, 177 S.W.3d at 684.

Substantial evidence was presented concerning KDMC's hospital policy, Dr. Richman's violation thereof, and the delay between when the nursing staff paged Dr. Richman and when he ultimately arrived in the operating room. The circuit court viewed Nurse Nivens' particular testimony as prejudicial and inflammatory because it implied Dr. Richman was potentially engaging in inappropriate conduct beyond violating the hospital's rule instead of attending to his patient. To avoid prejudice, and in consideration of the other evidence already admitted on this issue, the circuit court declined to admit Nurse Nivens' testimony. We cannot say the circuit court abused its discretion.[7]

C. Dr. Richman's Lack of Privileges at KDMC

[7] Our conclusion also disposes of Franz's argument that he "should have been allowed to argue the effect of violation of KDMC's policies" because "[e]vidence of a hospital policy is 'evidence bearing on the standard of care[.]'" (Appellant's Brief at 38) (quoting *Williams v. St. Claire*, 657 S.W.3d 590, 597 (Ky. App. 1983) (Wilhoit, J., concurring in the result)). As discussed, Margie Robinson and Dr. Fraley both referred to and discussed the KDMC policy at issue, the policy was read to the jury, the policy was ultimately admitted into evidence and submitted to the jury, and Franz referred to the policy during his closing argument.

In 1999, KDMC's Board of Directors granted Dr. Richman temporary privileges[8] to perform surgical services at KDMC. When those temporary privileges expired, KDMC's Board of Directors issued Dr. Richman provisional privileges for a period of twelve months, beginning on January 25, 2000. On January 19, 2001, Dr. Richman submitted his application for active-staff privileges. Whether by design or oversight, KDMC failed to take action on Dr. Richman's active-staff-privileges application prior to the expiration of his provisional privileges on January 25, 2001.

Franz argues that the circuit court abused its discretion when it excluded evidence that Dr. Richman lacked staff privileges to perform surgery at KDMC when he scheduled and performed Elwanda's surgery in February 2001. Franz asserts only that this evidence was relevant under KRE 401 and therefore admissible.[9] We fail to see what relevance Dr. Richman's lack of staff privileges at KDMC had on the question of consequence here -- whether his treatment of Elwanda fell below the standard of care expected of a reasonably competent cardiothoracic surgeon. *See Meiman v. Rehabilitation Center, Inc.*, 444 S.W.2d

[8] KDMC's bylaws define "privileges" as "the permission granted to a Practitioner by the Board [of Directors] to render specific diagnostic, therapeutic, medical, dental, or surgical services."

[9] Franz also asserts that Dr. Richman's lack of privileges is evidence of habit admissible under KRE 406. Franz's argument is this: "[P]roof that KDMC did not grant Richman's privileges, and the reasons for that, is relevant to an assessment of Richman's negligence because his habit (a grandiose, inflated sense of self and manic behavior leading to poor judgments and risky medical care) makes it more likely that he engaged in the same behavior during [Elwanda's] surgery." (Appellant's Reply Brief at 24). Franz did not make this argument to the trial court and did not raise it in his primary brief, but only in his reply brief. "The reply brief is not a device for raising new issues which are essential to the success of the appeal." *Catron v. Citizens Union Bank*, 229 S.W.3d 54, 59 (Ky. App. 2006) (citation omitted). We decline to further address Franz's argument in this regard.

78, 81 (Ky. 1969) ("Whether or not [medical professional] was licensed had no relevance to the question of her negligence.") The circuit court did not abuse its discretion by excluding this evidence.

D. Examination of Dr. Richman's Qualifications

Franz claims that the trial court erred by refusing to allow Franz to examine Dr. Richman regarding his licensure and qualifications as they existed at the time of trial. He asserts "[t]his trial error is obvious. A party cannot misrepresent himself. No citation to case law is required to establish that an expert can be examined concerning his qualifications." (Appellant's Brief at 37).

We reject Franz's assertion that citation to legal authority is needless or futile for we do not share his belief that, under these facts, this claimed error is self-evident. The fact that the witness is a professional – in this case, a physician – does not automatically make him an expert. Dr. Richman was not called as an expert witness, but as a fact witness. A fact witness is a witness who testifies to his or her observations and, sometimes, his or her opinions. Lay opinion testimony must be: "(a) Rationally based on the perception of the witness; (b) Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; and (c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." KRE 701. A fact witness is not subject to the requirements in KRE 702, 703, or 705 if he has not also been qualified as an expert. Dr. Richman was not qualified by the court as an expert witness. His credentials at the time of trial, therefore, were irrelevant.

Furthermore, Franz's failure to cite pertinent legal authority falls short of the requirements of Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v),[10] and that would be enough to doom his argument. "Our courts have established that an alleged error may be deemed waived where an appellant fails to cite any authority in support of the issues and arguments advanced on appeal. . . . It is not our function as an appellate court to research and construct a party's legal arguments[.]" *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky. App. 2005)(citations omitted). However, we need not deem this argument waived to reject it as unpersuasive.

E. Vicarious Liability of Cumberland Cardiology

Franz sought to hold Cumberland Cardiology vicariously liable for Dr. Richman's alleged negligence under theories of *respondeat superior* and ostensible agency. The circuit court apparently refused to peremptorily instruct the jury that Dr. Richman was an employee or agent of Cumberland Cardiology.[11] Franz then sought to admit at trial a complaint filed by Dr. Richman against Cumberland Cardiology in an unrelated lawsuit. The purpose of such evidence, Franz suggests, was to establish the relationship between Dr. Richman and Cumberland Cardiology, and the extent to which Dr. Paulus controlled Dr. Richman. The

[10] This rule requires that an appellant's brief include: "An '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***[.]" CR 76.12(4)(c)(v)(emphasis added).

[11] Franz's failure to include a statement of preservation significantly hinders our ability to ascertain whether Franz indeed requested the circuit court to peremptorily instruct the jury as to Dr. Richman's employment status at Cumberland Cardiology. We are surmising from the argument both Franz's request for such an instruction and the circuit court's denial.

circuit court denied Franz's proffer of evidence. Franz characterizes this ruling as error and an abuse of discretion.

To the extent the circuit court abused its discretion, if at all, by failing to peremptorily instruct the jury or admit evidence concerning the degree of control Dr. Paulus exercised over Dr. Richman, such error is now moot. The jury concluded Dr. Richman was not negligent. The particular claims against Cumberland Cardiology at issue are grounded exclusively in vicarious liability – whether Dr. Richman was acting as an employee or an ostensible agent – and thus were dependent upon a finding that Dr. Richman was indeed negligent. As explained in *Baldwin v. Wiggins,* 289 S.W.2d 729 (Ky. 1956):

> In the case at bar the sole actor was the employee. The employer's liability is purely derivative and is dependent solely upon the doctrine of *respondeat superior*. There was no independent negligence on his part. His responsibility is imputed as a matter of law. The liability for all damages is inseparable as between the employer and employee.

Id. at 731; *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 257 (Ky. 1985) (clarifying that the doctrine of ostensible agency is such that an employer who "represents that another is" its agent "and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability" for harm to the third person caused by the purported agent's lack of skill or care). The jury's finding of no liability on Dr. Richman's part also exonerated Cumberland Cardiology of any vicarious liability. *Id.* No further discussion of this issue is warranted.

VI. *Voir Dire*

Franz argues that the larger-than-usual jury venire created logistical problems, and the circuit court's resolution of those problems rendered the *voir dire* process fundamentally unfair. Dr. Richman disagrees.

The circuit court called ninety potential jurors. To accommodate this large venire, the circuit court directed twenty-eight members of the venire to be seated in and around the jury box (prospective panel jurors); the remaining sixty-two potential jurors remained in the gallery (gallery jurors). Prior to commencing *voir dire*, the circuit court instructed the gallery jurors to "pay very close attention to the questions" asked of the prospective panel jurors because, if gallery jurors are called upon to replace prospective panel jurors, the circuit court would be able to bring the gallery jurors "up to speed quickly."

Franz proceeded with *voir dire*, exhaustively questioning those prospective jurors sitting in the jury box.[12] During the course of Franz's *voir dire*, five gallery jurors replaced prospective panel jurors. The trial judge asked each new juror if he or she heard the questions already asked by the trial judge and Franz's counsel, and asked if the juror needed to respond to any of those questions. Likewise, three additional gallery jurors were seated after Dr. Richman completed his *voir dire*. Regarding these latter three jurors, the circuit court twice inquired whether Franz desired to conduct additional *voir dire*; Franz declined.

[12] Franz's *voir dire* lasted approximately three hours.

Franz argues the circuit court's refusal to conduct *voir dire* of all members of the jury venire simultaneously effectively deprived Franz of prompt, candid, and accurate answers to Franz's *voir dire* questions. Franz also maintains he "was never allowed to question" the eight gallery jurors who were ultimately seated on the empanelled jury. We cannot perceive whether Appellant raised these issues before the circuit court and thus preserved them for our review.[13] Accordingly, we need not address any of them. *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011). In any event, "[i]t is well established that the trial court has broad discretion in conducting *voir dire*." *Reece v. Nationwide Mut. Ins. Co.*, 217 S.W.3d 226, 232 (Ky. 2007); *Humana of Kentucky, Inc. v. Rogers*, 726 S.W.2d 707, 709 (Ky. App. 1986) ("Civil Rule 47.01 leaves the matter of conducting *voir dire* to the discretion of the court."). We understand Franz's desire to conduct a simultaneous *voir dire* of all prospective jurors. However, the size of this venire necessitated some procedure that would ensure orderly administration of the jury selection process. What those procedures may entail rests within the circuit court's sound discretion. We have reviewed the record and find no abuse of discretion with the *voir dire* procedures implemented by the circuit court.

Franz also asks us to find the circuit court erred: (i) when it furnished Dr. Richman and Dr. Paulus four peremptory strikes each (as opposed to four

[13] As referenced previously, Franz has failed to include a single statement identifying where in the record the errors he claims were preserved. CR 76.12(4)(c)(v). It is not our function to scour the record in search of preserved issues, particularly when the record, such as the one in this case, is voluminous.

peremptory strikes to share);[14] and (ii) thereafter, failed to prohibit collaboration in the exercise of those strikes. Again, we are not persuaded. CR 47.03 states:

> (1) In civil cases each opposing side shall have three peremptory challenges, but co-parties having antagonistic interests shall have three peremptory challenges each.
>
> (2) If one or two additional jurors are called, the number of peremptory challenges for each side and antagonistic co-party shall be increased by one.[15]

CR 47.03(1), (2). *Sommerkamp v. Linton*, 114 S.W.3d 811 (Ky. 2003), is the seminal case interpreting CR 47.03. *Sommerkamp* explains the antagonistic-interests inquiry requires consideration of three factors: "1) whether the coparties 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." *Id.* at 815. *Sommerkamp* then tempers those factors with several other considerations, namely: "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.*

Franz's argument is grounded in the Appellees' failure of two of the three initial *Sommerkamp* factors because none of the defendants had cross-claims

[14] Prior to trial, Franz moved to require Dr. Richman, Dr. Paulus, and Cumberland Cardiology to share one set of peremptory strikes. By order entered October 1, 2009, the circuit court overruled Franz's motion, and ruled that Dr. Paulus and Dr. Richman would each have four preemptory challenges to exercise independently. While not clear from the circuit court's order, it appears Dr. Paulus and Cumberland Cardiology shared four peremptory strikes.

[15] Without dispute, the circuit court in the matter called four additional jurors.

against the other and they shared consistent trial positions. Franz concedes there were separate acts of negligence alleged, but argues there was never any effort by Dr. Richman or Dr. Paulus to shift the blame to the other. A review of the record reveals no cross-claims were filed by Dr. Paulus or Dr. Richman against the other. However, the absence of this factor alone is not determinative. *Davis v. Fischer Single Family Homes, Ltd.*, 231 S.W.3d 767, 774 (Ky. App. 2007); *Sommerkamp*, 114 S.W.3d at 816 ("It was error for the Court of Appeals to give disqualifying weight to a single factor, the absence of cross-claims.")

Franz asserted separate direct negligence claims against Dr. Richman and Dr. Paulus. Each physician was represented by separate counsel. Franz also asserted each physician's independent act(s) of negligence occurred at different points during the continuum of Elwanda's care – Dr. Paulus's prior to surgery, and Dr. Richman's later during surgery. Dr. Paulus and Dr. Richman practice different medical specialties. Dr. Paulus is a cardiologist, and Dr. Richman is a cardiothoracic surgeon. Each physician had an individual and particularized defense theory. Dr. Paulus claimed not to be negligent when he prescribed and administered the platelet-inhibiting drug Plavix. Dr. Richman claimed not to be negligent when he chose to proceed with the CABG procedure before locating and repairing the superior vena cava injury.

Furthermore, fault was subject to apportionment. "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. 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).

"[T]he clear language" of CR 47.03(1) "does not require the defendants to demonstrate a certain degree of antagonism, but only the existence of antagonism . . . at the time of jury selection, in order to permit separate preemptory challenges." *Sommerkamp*, 114 S.W.3d at 816. We cannot say the circuit court abused its discretion when, finding Dr. Richman and Dr. Paulus had antagonistic interests, it awarded each physician four peremptory challenges.

We turn now to the second facet of Franz's argument – that the circuit court improperly allowed Dr. Richman and Dr. Paulus to collaborate and coordinate their peremptory strikes. In support of his argument, Franz points out that, ultimately, Dr. Richman's and Dr. Paulus's peremptory strikes contained no overlap. However, the record reveals that prior to exercising their peremptory strikes, defense counsel affirmatively represented to the circuit court that they agreed not to confer and to exercise their strikes independently. Thereafter, subsequent to the exercise of their respective strikes, defense counsel again represented they did not coordinate or collaborate. The circuit court found defense counsels' representations satisfactory and we see no basis for differing with the circuit court. A lack of overlap between Dr. Richman's and Dr. Paulus's peremptory strikes does

not constitute conclusive or even *prima facie* evidence that defense counsel's representations to the circuit court were fallacious. We find no error here.

VII. Trial Bifurcation

Franz next takes issue with the circuit court's order of bifurcation. In November 2008, the circuit court declined to bifurcate any claims and ruled one jury would hear all claims against all defendants simultaneously. Dr. Richman and KDMC moved the circuit court to reconsider its bifurcation decision. By order entered August 17, 2009, the circuit court reversed its prior ruling and bifurcated the trial so that Franz's direct medical negligence claim against Drs. Richman and Paulus[16] would be tried first and separately from Franz's remaining and various indirect liability and derivative claims against KDMC, Cumberland Cardiology, and Dr. Paulus. In so bifurcating, the circuit court reasoned:

> Throughout the discovery process, Plaintiff has gathered a great deal of information about the personal life of Dr. Richman which is extremely unflattering to the point of being outrageous. Much of this information would be inadmissible in a trial of any of the various claims. However, some of the testimony would be admissible in Plaintiff's claims against KDMC, Cumberland Cardiology, PSC, and Richard E. Paulus, M.D. The Court is concerned that such inflammatory proof might interfere with a jury's ability to fairly weigh the evidence when attempting to determine whether Dr. Richman was negligent in the first place. Human nature being what it is, and jurors being asked to decide whether Dr. Richman was negligent without the inflammatory proof creeping into the thought process, the Court is of the opinion that Dr. Richman could not receive a fair trial if all of the various claims were litigated before the same jury. This

[16] Again, as previously noted, Franz's ostensible agency claim against Cumberland Cardiology was also tried in the first phase.

> is precisely the situation CR 42.02 addresses when it speaks of conducting separate trials to avoid prejudice. This Court does not believe that any type of jury admonition could prevent such prejudice.
>
> CR 42.02 also states that separate trials are appropriate if the Court determines that it would be "conducive to expedition and economy." In the event the jury were to determine that Dr. Richman did not deviate from the standard of care and cause injury to Plaintiff's deceased, to say that judicial economy would be promoted would be a gross understatement. In the event the jury does find for the Plaintiff on the negligent claim, the subsequent trial of the other claims would be less complicated and more easily followed by a jury. Trying all these claims together would result only in mass confusion for the jury.

(Trial Court's August 17, 2009 Order).

Franz asserts that the circuit court's decision to bifurcate constituted reversible error. We disagree.

CR 42.02 provides:

> ***If*** the court determines that separate trials will be in furtherance of convenience ***or*** will avoid prejudice, ***or*** will be conducive to expedition and economy, it ***shall*** order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims or issues.

CR 42.02 (emphasis added). The rule's disjunctive nature is significant. *See id.* The circuit court need only first determine that separate trials would be convenient, *or* avoid prejudice, *or* be expeditious. *Id.* If the circuit court finds just one of these three circumstances, it then *shall* order separate trials. *Id.* The rule clearly intends

to provide the trial court with considerable discretion in determining how to manage its own resources. *Earle v. Cobb*, 156 S.W.3d 257, 269 (Ky. 2004).

"[A] trial court has broad discretion in ruling on a motion to bifurcate." *Calhoun v. Provence*, 395 S.W.3d 476, 481 (Ky. App. 2012). Absent an abuse of that discretion, we decline to disturb the circuit court's bifurcation decision. *Id.*

Franz raises three points in attempting to persuade us that bifurcation in this case was an abuse of that broad discretion. First, he argues the evidence the circuit court deemed extremely unflattering was nonetheless admissible against Dr. Richman, resulting in no unfair prejudice. Second, because much of the evidence in both trials would overlap, bifurcation would not be in furtherance of convenience or expedition. Third, bifurcation prevented Franz from adequately establishing the relationship among the parties.

In this matter, we perceive no abuse of the circuit court's discretion. The circuit court stated its basis for bifurcation and thoroughly explained how bifurcation would avoid prejudice, and be conducive to expedition and economy. The record supports the circuit court's reasoning.[17] As it turns out, the trial court's statement regarding judicial economy should the jury find no liability on Dr. Richman's part proved prescient.

We also cannot agree with Franz's claim that bifurcation that results in separate juries violates KRS 411.182(2), KRS 411.186(1), and KRS 304.40-290(5). KRS 411.182(2) authorizes apportionment of fault. Likewise, KRS

[17] The trial of the underlying negligence claims against Dr. Richman and Dr. Paulus, alone, lasted over three weeks.

304.40-290 permits a jury to "apportion damages in different percentages against the defendants" or "return a verdict of joint and several liability against two (2) or more defendants."

Furthermore, KRS 411.186 mandates that the jury "determine concurrently with all other issues presented whether punitive damages may be assessed." KRS 411.186(1). The Kentucky Supreme Court has interpreted this statute so "that the issue of punitive damages . . . [is] not to be bifurcated from the issues of liability and compensatory damages." *Kentucky Dep't of Corrections v. McCullough*, 123 S.W.3d 130, 139 (Ky. 2003) (quoting KRS 411.186). In light of *McCullough*, we agree the circuit court's decision to try the claim regarding Dr. Richman's and Dr. Paulus's liability and compensatory damages separately from the claim against them for punitive damages was error.[18] However, in view of the jury's verdict in favor of Dr. Richman,[19] we deem the error harmless.

Franz has presented no grounds for disturbing the jury's verdict. That verdict eliminated the need for the jury to consider issues pertaining to punitive

[18] Had the jury not returned a verdict of no liability on Dr. Richman's part, we would be bound by the rule set forth in *McCullough*. However, we are not prohibited from "disagreement . . . or constructive criticism" of the Supreme Court's decisions, including its decision in *McCullough*. *Special Fund v. Francis*, 708 S.W.2d 641, 642 (Ky. 1986). "In order to justify punitive damages there must be first a finding of failure to exercise reasonable care, and then an additional finding that this negligence was accompanied by 'wanton or reckless disregard for the lives, safety or property of others.'" *City of Middlesboro v. Brown*, 63 S.W.3d 179, 181 (Ky. 2001) (footnote omitted). We view this first finding as solely related to liability and the second solely related to damages. Notwithstanding *McCullough*, bifurcation could avoid tainting the jury's liability determination with evidence of wantonness or recklessness that would enhance the damages award. Therefore, in some cases, perhaps such as the one now before us, the kind of bifurcation addressed in *McCullough* might be upheld rather than considered reversible error.

[19] We note again that Dr. Paulus settled his claims prior to submission of the case to the jury.

damages, joint and several liability, and apportionment. *See Kentucky-West Virginia Gas Co. v. Burchett*, 402 S.W.2d 421, 423 (Ky. App 1966) ("[I]f it was erroneous to deny the punitive damages instruction (which we do not decide), it was harmless error [in light of the jury's decision not to award compensatory damages] and may not serve as a basis for reversal."); *City of Middlesboro v. Brown*, 63 S.W.3d 179, 181 (Ky. 2001) ("In order to justify punitive damages there must be ***first*** a finding of a failure to exercise reasonable care[.]" (Emphasis added)). We decline to reverse due to harmless error.

VIII. Expert Witness Fees

Finally, Franz claims the circuit court abused its discretion when it ordered him to pay expert witness fees in amounts he considers unreasonable. We have considered Franz's argument in light of the applicable rules, case law cited, and the record, including the circuit court's orders dated August 17, 2009, and August 29, 2009, and find no abuse of discretion.

The rule most directly addressing this issue is CR 26.02(4). The rule grants to circuit courts certain supervisory authority over the "[d]iscovery of facts known and opinions held by experts[.]" CR 26.02(4). Specifically regarding discovery by deposition, the court has the authority to impose "restrictions as to [the deposition's] scope and such provisions, pursuant to paragraph (4)(c) of this rule, concerning fees and expenses as the court may deem appropriate." CR

26.02(4)(a)(ii). Another portion of the rule anticipates that the fees are to be "reasonable." CR 26.02(4)(c)(i). The clear implication is that, prior to the taking of the deposition, lawyers should attempt to resolve issues of scope and compensation between and among themselves as professionals, but failing that may turn to the court to do so.

The paragraph quoted above, (4)(a)(ii), references paragraph (4)(c). There are two parts to paragraph (4)(c) and both parts are subject to exception for "manifest injustice[.]" CR 26.02(4)(c). The first part of the paragraph states that:

> the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under paragraphs (4)(a)(ii) and (4)(b) of this rule[.]

CR 26.02(4)(c)(i). This part of the paragraph requires that the party taking the expert's deposition must compensate the *expert* for his "time spent in responding to discovery" without regard to whether the expert is one expected to testify at trial, CR 26.02(4)(a), or is an expert "who is not expected to be called as a witness at trial[.]" CR 26.02(4)(b).

The second part of the paragraph says,

> with respect to discovery obtained under paragraph (4)(a)(ii) of this rule the court may require, and with respect to discovery obtained under paragraph (4)(b) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

CR 26.02(4)(c)(ii). This part of the paragraph addresses payment by "the party seeking discovery" to "the *other party* a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert." CR 26.02(4)(c) (emphasis added). If the discovery sought originated with an expert expected to testify at trial, *see* CR 26.02(4)(a)(i)-(ii), the court has the discretion of awarding partial reimbursement to the other party. CR 26.02(4)(c)(i). If the discovery sought originated with an expert who will *not* testify, the court is *required* to order such reimbursement. CR 26.02(4)(c)(ii).

In the case before us, all of the experts involved were, when deposed, expected to testify at trial. Therefore, CR 26.02(4)(c)(ii) is not implicated.

Prior to taking depositions of experts, the attorneys exchanged some information regarding the fees to be charged and some of the depositions were taken without need of the court's authority to decide the reasonableness of any fee charged by the experts (the mandatory payment) or to be reimbursed to the other party (the discretionary reimbursement). With regard to most of the depositions, court intervention in the fee dispute was sought after the depositions were taken. By various competing motions which the court heard, the parties sought payment from each other for the various expert depositions; Franz also sought an evidentiary hearing and an order compelling the defendants in the case to prove that the expert deposition and preparation fees charged were reasonable.

The circuit court never conducted the evidentiary hearing Franz sought. Franz claims this was error, but we do not find it so. The various motions were

supported by extraneous material bearing on the issue, the court heard the parties' arguments in open court, and some of the actual depositions taken were filed and of record when the court ruled. Although it would not have been error for the court to have conducted an evidentiary hearing, neither was such a hearing a requirement in the application of our jurisprudence.

It is generally acknowledged that there is little guidance for determining the reasonableness of an expert's fees under the various iterations of the discovery rule codified in Kentucky as CR 26.02(4). *See Goldwater v. Postmaster General of U.S.*, 136 F.R.D. 337, 339 (D.Conn. 1991). "[M]ost courts acknowledge the paucity of authority and then use their discretion to select an amount deemed reasonable." *Hurst v. U.S.*, 123 F.R.D. 319, 321 (D.S.D.1988). However, there seems to be consensus that the trial court should consider certain factors, including:

> (1) the witness area of expertise; (2) the education and training required to provide the expert insight that is sought; (3) the prevailing rates of other comparably respected available experts; (4) the nature, quality and complexity of the discovery responses provided; (5) the fee actually being charged to the party who retained the expert; (6) fees traditionally charged by the expert on related matters; and (7) any other factor likely to be of assistance to the court in balancing the interests implicated by Rule 26.

Fiber Optic Designs, Inc. v. New England Pottery, LLC, 262 F.R.D. 586, 589 (D. Colo. 2009) (citation omitted); *Edin v. Paul Revere Life Ins. Co.*, 188 F.R.D. 543, 546 (D. Ariz. 1999). We believe these are appropriate factors for the trial courts of Kentucky to consider when making the reasonableness determination. Of course,

the weight to be given any one of the factors in a particular case depends on the circumstances before the court.

In several orders between August 2009 and February 2010, the circuit court ordered Franz and some of the defendants to pay specific amounts either to the experts directly (a ruling pursuant to the authority contained in CR 26.02(4)(c)(i)), or to the other party (a ruling pursuant to CR 26.02(4)(c)). We have examined these orders in light of the factors set out above, we have reviewed the record, and we have considered Franz's arguments and citations to that record. We cannot conclude that the circuit court failed to consider any of these factors when determining the fees to be paid, and we cannot conclude that the circuit court abused its discretion in determining the reasonableness of the fees charged.

IX. Conclusion

The Boyd Circuit Court's November 6, 2009 Trial Order and Judgment and December 18, 2009 Order are affirmed.

Because we have found no grounds warranting reversal of the judgments in favor of the Appellees, Dr. Richman's protective cross-appeal is denied as moot.

STUMBO, JUDGE, CONCURS AND FILES A SEPARATE OPINION.

COMBS, JUDGE, CONCURS WITH THE MAJORITY OPINION AND JOINS THE CONCURRING OPINION WRITTEN BY JUDGE STUMBO.

STUMBO, JUDGE, CONCURRING: Reluctantly, I concur. The deceased in this case was to have undergone what should have been a relatively routine coronary bypass operation which her surgeon stated would subject her to but a 3% to 5% risk of death or injury in his hands. Instead, she suffered the laceration of a major vein behind her heart, two separate stints on a cardiopulmonary bypass pump, and required the infusion of more that twenty-eight units of blood. This all occurred during a more than five-hour procedure from which she never truly recovered. The remainder of her life was spent in hospitals or skilled nursing facilities leaving medical bills of nearly $1,000,000.

The majority opinion correctly sets forth the standard of care, and a careful review of the testimony presented by all parties establishes that there was sufficient evidence to support the jury's determination that the standard of care was not breached. The evidence was conflicting and the jury could have easily found that Dr. Richman was negligent — perhaps in failing to attend the botched application of anesthesia, but it did not. The result does not please me, but I cannot say the court erred in its decision regarding the evidentiary rulings.

ORAL ARGUMENT AND BRIEFS FOR APPELLANT/CROSS-APPELLEE, JEFFREY FRANZ, ADMINISTRATOR OF THE ESTATE OF ELWANDA G. FRANZ:

Ann B. Oldfather
Louisville, Kentucky

BRIEFS FOR APPELLANT/CROSS-APPELLEE, JEFFREY FRANZ, ADMINISTRATOR OF THE ESTATE OF ELWANDA G. FRANZ:
Kirsten R. Daniel
Louisville, Kentucky

ORAL ARGUMENT AND BRIEFS FOR APPELLEE, ASHLAND HOSPITAL CORPORATION D/B/A KING'S DAUGHTERS MEDICAL CENTER:

Carl D. Edwards, Jr.
Ashland, Kentucky

BRIEFS FOR APPELLEE, ASHLAND HOSPITAL CORPORATION D/B/A KING'S DAUGHTERS MEDICAL CENTER:

W. Mitchell Hall, Jr.
Ashland, Kentucky

ORAL ARGUMENT AND BRIEF FOR APPELLEE, CUMBERLAND CARDIOLOGY, P.S.C.:

David Latherow
Ashland, Kentucky

BRIEF FOR APPELLEE, CUMBERLAND CARDIOLOGY, P.S.C.:

Kenneth Williams, Jr.
Catherine C. Hughes
Ashland, Kentucky

ORAL ARGUMENT AND BRIEFS FOR APPELLEE/CROSS-APPELLANT, MICHAEL RICHMAN, M.D.:

Johann Herklotz
Lexington, Kentucky

BRIEFS FOR APPELLEE/CROSS-APPELLANT, MICHAEL RICHMAN, M.D.:

Kenneth W. Smith
Lexington, Kentucky