RENDERED: JANUARY 8, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001841-MR

ESTATE OF MARY CRUTCHER,
BY AND THROUGH HER PERSONAL
REPRESENTATIVE, REBA JEAN
CRUTCHER QUALLS — APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 04-CI-00225 & 05-CI-00939

PHILIP C. TROVER, M.D. AND
BAPTIST HEALTH MADISONVILLE,
INC., F/K/A THE TROVER CLINIC
FOUNDATION, INC. — APPELLEES

AND

NO. 2012-CA-001842-MR

DAVID POWERS — APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 04-CI-00225 & 05-CI-00940

PHILIP C. TROVER, M.D. AND
BAPTIST HEALTH MADISONVILLE,
INC., F/K/A THE TROVER CLINIC
FOUNDATION, INC. APPELLEES

AND

NO. 2012-CA-001856-MR

TERRY MITCHELL APPELLANT

APPEAL FROM HOPKINS CIRCUIT COURT
v. HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 04-CI-00225 & 05-CI-00968

PHILIP C. TROVER, M.D. AND
BAPTIST HEALTH MADISONVILLE,
INC., F/K/A THE TROVER CLINIC
FOUNDATION, INC. APPELLEES

AND

NO. 2012-CA-001859-MR

DAVID BREWER APPELLANT

APPEAL FROM HOPKINS CIRCUIT COURT
v. HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 04-CI-00225 & 05-CI-00975

PHILIP C. TROVER, M.D. AND
BAPTIST HEALTH MADISONVILLE,
INC., F/K/A THE TROVER CLINIC
FOUNDATION, INC. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; KRAMER, AND TAYLOR, JUDGES.

ACREE, CHIEF JUDGE: Appellants, Reba Jean Crutcher Qualls, as personal representative of the Estate of Mary Crutcher, David Powers, Terry Mitchell, and David Brewer, bring separate but identical appeals from separate but nearly identical orders of the Hopkins Circuit Court granting summary judgments against them in favor of appellees Dr. Philip Trover and Baptist Health Madisonville f/k/a Trover Clinic Foundation,[1] and dismissing Appellants' claims of medical negligence, outrage/intentional infliction of emotional distress (IIED), negligent infliction of emotional distress, fraud, negligent misrepresentation, and punitive damages.

More than four dozen cases were appealed to this Court related to Dr. Trover and the Foundation. About half of those cases settled prior to briefing.

[1] The Trover Clinic Foundation, Inc.'s name was changed effective November 1, 2012, and is now known as Baptist Health Madisonville, Inc., f/k/a Trover Clinic Foundation, Inc., d/b/a Baptist Health Madisonville. In their briefs to this Court, the parties continue to refer to what is now Baptist Health Madisonville as the Trover Clinic Foundation. Therefore, for purposes of clarity, throughout this opinion this Court will also refer to appellee Baptist Health Madisonville as the Foundation.

This Court, with the assistance of the parties, divided the remaining twenty-four cases into three groups, with a few outlying cases.

Because Appellants in this group raise common issues in their separate appeals, we have consolidated their cases and resolve each in this opinion. For the following reasons, we affirm as to each appeal.

COMMON BACKGROUND

The Foundation consists primarily of the Regional Medical Center and the Trover Clinic, both located in Madisonville, Kentucky. Dr. Trover began employment with the Foundation in 1980, and quickly assumed the position of Chair of the Medical Center Radiological Department.

In late 2003, Dr. Neil Kluger, an oncologist associated with the Foundation, became concerned over what he considered substandard work habits displayed by Dr. Trover and, specifically, an unacceptable number of misread radiological films. Dr. Kluger addressed his concerns to the Medical Center's Medical Executive Committee, the Foundation's Board of Governors, and the Kentucky Board of Medical Licensure.

The Committee extensively investigated the allegations and, on April 20, 2004, issued a report outlining its findings. The Committee concluded Dr. Trover's rate of error when interpreting mammographic slides was "unacceptable"; his 1.8% call-back rate[2] was significantly lower than the national average[3] and the

[2] The call-back rate is the number of patients who are called back (at the request of the reviewing radiologist) for further diagnostic work up.

[3] The national average call-back rate at the time was 7-15%.

average of his colleagues; his reports consistently lacked the detail necessary to assist treating physicians in developing and confirming diagnoses; he typically interpreted over 30,000 radiological examinations per year, well in excess of the average workload of a typical full-time radiologist;[4] and, his behavior toward employees in the radiological department created an atmosphere of uncertainty and distrust, compromising the overall effectiveness of the radiological department.

Based on its investigation, the Committee recommended that the Board of Governors revoke Dr. Trover's clinical privileges and terminate his membership on the Medical Center's medical staff, subject to reinstatement if certain conditions were met. Dr. Trover resigned from the Medical Center in April 2004 and resumed practice in Michigan.

The Kentucky Board of Medical Licensure also reviewed Dr. Trover's practice, and on July 14, 2005, issued an Emergency Order temporarily suspending his medical license. Dr. Trover contested the suspension, and on April 13, 2006, entered into an agreed order with the Board that reinstated his license with numerous restrictions.[5]

Based on the allegations, investigations, and the potential number of radiological misreads, the Foundation conducted a review of approximately 10,000 of Dr. Trover's radiological interpretations occurring between 2003 and 2004.

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[4] According to one survey group, the average workload for a full-time radiologist was 12,800 radiological examinations per year.

[5] The order was modified on May 9, 2007, reflecting that Dr. Trover completed an Education Plan outlined by the Board of Directors.

That review, according to the Foundation, indicated that the rate of discrepancy between Dr. Trover's interpretations and those of the reviewers was "well within the standard of care." Nevertheless, around this time, media reports began to surface concerning the allegations made by Dr. Kluger. In March 2004, an announcement appeared in the local newspaper, the Madisonville Messenger, encouraging members of the public who had received radiological exams at the Medical Center during the pertinent period to present themselves as potential members of a proposed class action lawsuit against Dr. Trover and the Foundation. All the named Appellants fell within these parameters.

RELEVANT MEDICAL FACTS

A. Crutcher v. Trover, 2012-CA-001841

Mary Crutcher[6] was in an automobile accident on April 27, 2002. She was seventy-five years old. Crutcher presented to the Medical Center for treatment. Three x-rays were taken and interpreted by Dr. James Esser, and Crutcher was released on the same day. On May 2, 2002, Crutcher stated she woke up and discovered she was bleeding. She was taken to MultiCare Specialists, and it was determined she was suffering from a lacerated kidney and three broken ribs. Crutcher then went back to the Medical Center and was hospitalized from May 3, 2002 until May 12, 2002.

[6] Crutcher died on October 22, 2009. Her case was revived by Agreed Order entered October 14, 2010, substituting the personal representative of her estate, Reba Jean Crutcher Qualls, as plaintiff. However, for ease of reading and comprehension, we refer to the Appellant as Crutcher.

During her stay, Dr. Trover read three CT scans of Crutcher's chest, abdomen, and pelvis. Crutcher alleges that Dr. Trover was negligent in the reading of her chest CT scan because his interpretation stated that her "lungs and pleural spaces are clear … mediastinum shows no abnormality." A re-read of the scan in October 2004 indicated "small right pleural effusion[,] … chronic lung changes seen peripherally and in the right lung apex." However, Crutcher had a documented history of chronic lung and breathing problems beginning in the 1970s.

On August 18, 2003, Crutcher presented to the Medical Center emergency room after falling and breaking her hip. Crutcher had a chest x-ray as a part of her evaluation. The film was read by Dr. Trover. Dr. Trover found no abnormalities in his interpretation. This chest x-ray was re-read on May 3, 2004, and noted "mild atherosclerosis of the aorta" and "biapical thickening from old disease" as well as a possible "component of chronic airway obstruction." Crutcher stated in her deposition that she did not seek any treatment after the alleged misinterpretation.

Crutcher believes that the misinterpretations by Dr. Trover, jointly or individually, delayed a proper treatment plan, exposed her to a greater risk of complications, and caused her great emotional harm as well as contributed to her considerable pulmonary pain.

B. Powers v. Trover, 2012-CA-001842

On December 29, 2002, David Powers was in a motorcycle accident in which he sustained multiple severe injuries. Upon Powers' admission to the hospital, several x-rays and CT scans were ordered. Dr. Trover interpreted several of Powers' films; however, only the chest CT scan is at issue. On his report, Dr. Trover noted infiltrates in both perihilar areas, possible aspiration or contusion, no fluid in the pleural spaces, and normal medistinum.

In Powers' follow-up treatment after his accident, he complained to Dr. Donley of neck and rib pain and headaches. As a result, Dr. Donley sent Powers to the Medical Center for a nuclear total body bone scan on March 6, 2003. Dr. Esser found "an abnormal increased uptake in the approximate T8 vertebral body region and suggested compression deformity" on the total body scan. Dr. Donley advised Powers to go to a spinal specialist. Powers went to Dr. Melvin Law in Nashville. Dr. Law informed Powers that he had shattered his T7 vertebrae, sustained damage to the surrounding vertebrae, and had seven broken ribs. Dr. Law subsequently performed surgery on Powers' spine.

On September 14, 2004, Dr. Patterson re-read Powers' December 29, 2002 chest CT scan originally interpreted by Dr. Trover. The re-read provided: "There is bony irregularity identified involving one of the lower thoracic vertebral bodies, approximately T9, consistent with a compression fracture. There is also a small amount of paraspinal hematoma seen in this region." Powers claims that because Dr. Trover did not report the fracture in his spine in December 2002, it went undetected and resulted in permanent nerve damage.

C. Mitchell v. Trover, 2012-CA-001856

Terry Mitchell was diagnosed with benign lung scarring in 1978. Since then, he had been in and out of the hospital due to various problems with his lungs and liver. He was later diagnosed with hepatitis C and cirrhosis of the liver. Mitchell's extensive medical record consists of a myriad of films, scans, and reports detailing his chronic chest pain and liver condition of the last several decades.

On May 15, 2003, Mitchell went to the emergency room at the Medical Center complaining of severe chest pain, intermittent tingling on the left side, diaphoresis, shortness of breath, and nausea. X-rays were taken of Mitchell's chest and lungs. Dr. Trover read Mitchell's x-rays as normal. Despite the normal reading, Mitchell was admitted to the hospital for further testing; however, Mitchell left the hospital that night against medical advice. Mitchell continued to have chest pain.

Mitchell was admitted to the hospital in August 2003 following an automobile accident. He had a chest x-ray among other tests. The film interpretation of his chest by Dr. Rohan Stern stated:

> There is an opacity seen projecting over the lateral left hemidiaphragm. This is unchanged from the previous examination and is of uncertain significance and may represent slight eventration of the diaphragm. A follow-up examination is recommended approximately in 3 months to assure stability of this finding.

The recommended follow-up examination did not occur.

On May 21, 2004, a re-read of Mitchell's emergency room x-ray from May 2003 noted a small discoid atelectasis representing a possible mass in Mitchell's left lung base. The doctor recommended a CT scan for further evaluation. Mitchell chose not to pursue additional testing and has received no further treatment for his lung condition. Mitchell now alleges that Dr. Trover negligently misread his May 15, 2003 chest x-ray film.

D. Brewer v. Trover, 2012-CA-001859

David Brewer was in a coal mining accident in 1968, in which he broke his back. He did not have surgery for his injuries. Since the accident, Brewer had several other traumas and diagnoses with his back including sprains, wedging and compression, degenerative disc disease, and herniated disks. Brewer underwent back surgery in 1988, performed by Dr. Donley. In 1994, Brewer was involved in another mining accident. The resulting compound fracture in his tibia caused him to develop numbness and pain in the legs.

On January 23, 1997, Brewer presented for a CT scan of the lumbar spine. Dr. Trover interpreted the CT as showing:

> Imaging through the L4-5 disc space was obtained. Contrast material was demonstrated in the disc itself. The exam demonstrates bulging through a fissure and into a bulging disc anterolaterally on the right side which appears to narrow the intervertebral foramen here somewhat. Hypertrophic changes are seen involving both of the facet joints. There is no evidence of fissuring or of bulging disc on the left side.

On August 24, 2004, Brewer's CT was re-read by Dr. Patterson. Appellees contend that Dr. Trover's interpretation of the CT was consistent with the re-read, although Dr. Trover's read explicitly stated there was no evidence of bulging on the left side observed in the re-read. Further, the reviewing paperwork of the re-read unequivocally states that the re-read disagreed with the initial interpretation by Dr. Trover. However, the answer to whether this disagreement was "clinically significant" was indicated on the re-read with a question mark.

Brewer presented to Dr. Donley approximately one week after the CT scan on January 29, 1997, complaining of left leg pain. Brewer contends Dr. Donley relied on the misread CT scan in his treatment recommendations and the mis-read contributed to his ongoing pain.

Brewer continued to experience back pain. In October 1998, Dr. Donley noted:

> The patient is informed that there is really not much we can do, short of some surgical procedure. The patient states that he is not ready for that at this point. The pain is not yet severe enough. . . . He will call us when his symptoms worsen and he feels that he is ready to have surgery.

Brewer had a lumbar spine MRI in October 2003 as he continued to experience back pain. Dr. Trover read the MRI. He noted slight bulging of the L5-S1 disk. Brewer was informed that he had a herniated disc, but he would not need surgery. Brewer stated in his deposition that he did not know that Dr. Trover was the person who read his MRI. A re-read of the MRI on March 17, 2004,

indicated a small lesion at L5, which was likely degenerative as well as slight disc bulges at L2-3, L3-4, and L4-5.

Brewer was sent to a doctor in Nashville, Tennessee, in January 2004. Brewer took his MRI films and Dr. Trover's report with him to Nashville. It was Brewer's understanding that the report of the MRI was the only material reviewed, not the actual x-ray film. The Nashville physician recommended Brewer have an epidural, but did not see the need for him to have an operation. Brewer decided not to get the epidural.

Brewer then went back to Dr. Donley. Brewer stated that Dr. Donley reviewed the October 2003 MRI film read by Dr. Trover. Dr. Donley informed Brewer that he did not have a herniated disc, but that Brewer needed his hip replaced. Brewer underwent hip replacement surgery in May 2004.

Brewer now alleges negligence by Dr. Trover in interpreting his January 27, 1997 CT scan and October 22, 2003 MRI causing him back pain and delay in appropriate treatment.

PROCEDURAL HISTORY

A proposed class action lawsuit was filed on March 17, 2004. Appellants joined the proposed class action as plaintiffs between August 2004 and March 2005. The circuit court ultimately denied class certification, and more than four dozen individual cases were ordered to be tried separately with joint discovery permitted.

Appellees first moved for summary judgment in 2005 citing a lack of lay and expert proof to support the asserted claims. Appellants objected, claiming inadequate time to prepare and declaring the motions premature because discovery was not yet complete. Between 2005 and 2007, over a hundred depositions were taken. Appellees renewed their summary judgment motions in 2007. The circuit court held the motions in abeyance to allow Appellants time to complete discovery on the issue of fraud. Each Appellant ultimately filed an eighth amended complaint alleging fraud with more specificity.

In the meantime, logistics discussions were had as to the procedure for the selection of cases for trial. The circuit court imposed a lottery system, whereby each party would designate five cases they would like to be tried and, from those cases, the Court would select which case would come to trial first. The circuit court further ordered: "within 60 days of the Court selecting the case to be tried first, the plaintiffs shall . . . give CR[7] 26 information regarding all expert witnesses . . . [and w]ithin one hundred and twenty days after the Court selects the first case to be tried, the defendants shall . . . give CR 26 information regarding all defendant's expert witnesses." The Court selected the case of *Estate of Judith Burton v. The Trover Clinic Foundation, et al.*, 05-CI-000932 to be tried first and imposed a 60/120 day scheduling order for the exchange of expert disclosures. Once tried, a jury returned a defense verdict. The Kentucky Supreme Court

[7] Kentucky Rules of Civil Procedure

ultimately affirmed the trial court's judgment and order dismissing based on that verdict. *Trover v. Estate of Burton*, 423 S.W.3d 165, 168 (Ky. 2014).

In February 2009, in the cases subject to this review, Appellees moved to dismiss for lack of prosecution and renewed their summary judgment motions, arguing Appellants had yet to produce evidence, including expert testimony, to support their claims. In response, Appellants argued that the motions were premature as the nature of each case required extensive discovery and there was no scheduling order. Appellants also filed in each case an expert affidavit in which the affiant opined Dr. Trover and the Foundation each violated the requisite standard of care. The senior judge assigned to the cases left the bench without issuing a ruling.

In August 2012, Appellees re-submitted to the successor trial judge their motions for summary judgment, arguing that Appellants' complaints were untimely, and again, arguing Appellants had failed to produce any evidence of a compensable injury or that Dr. Trover or the Foundation caused any alleged injury, and arguing that Appellants had failed to produce a causation expert. A hearing was held on September 20, 2012. The circuit court ultimately entered orders granting summary judgment in favor of Dr. Trover and the Foundation.[8] These appeals followed. Further facts will be developed as needed.

[8] *Crutcher*, *Powers*, *Mitchell*, and *Brewer*: orders granting summary judgment entered September 28, 2012.

STANDARD OF REVIEW

"The standard of review on appeal of summary judgment is whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). Under this standard, an action may be terminated "when no questions of material fact exist or when only one reasonable conclusion can be reached[.]" *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901, 916 (Ky. 2013). Summary judgment involves only legal questions and the existence, or non-existence, of material facts are considered. *Stathers v. Garrard County Bd. of Educ.*, 405 S.W.3d 473, 478 (Ky. App. 2012). Our review is *de novo*. *Mitchell v. University of Kentucky*, 366 S.W.3d 895, 898 (Ky. 2012).

Before the trial court, "[t]he moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present" evidence establishing a triable issue of material fact. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). That is, "[t]he party opposing a properly presented summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial." *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001).

ANALYSIS

The circuit court determined in each of these four cases that the respective complaints were time-barred by the statute of limitations provided in KRS 413.140(1)(e).[9] We are cognizant that "provisions of statutes of limitations should not be lightly evaded." *Munday v. Mayfair Diagnostic Lab.*, 831 S.W.2d 912, 914 (Ky. 1992) (citing *Fannin v. Lewis*, 254 S.W.2d 479, 481 (1952)). But, because we affirm summary judgment on alternative grounds provided in the circuit court's order, a discussion of that particular issue is not necessary for the resolution of these four appeals; therefore, for purposes of our analysis, we presume that the complaints of these four plaintiffs were timely filed.

A trial court adjudicates the entirety of a claim by resolving all its elements in favor of the party asserting it, or by resolving at least one element in favor of the party opposing it. *Summary* adjudication in favor of a defendant is justified when the defendant eliminates all genuine issues regarding all material facts relating to one or more elements of the claim against him and he convinces the court that, under the uncontroverted facts, he is entitled to judgment as a matter of law. That is the status of the various appeals before us.

In these cases, the trial court determined, as to at least one element of every claim of every Appellant, there was no genuine issue of material fact and, under the uncontroverted facts, the Appellees were entitled to judgment as a matter

[9] An action against a physician, surgeon, dentist, or hospital licensed pursuant to KRS Chapter 216, for negligence or malpractice, shall be commenced within one year after the cause of action accrued. KRS 413.140(1)(e).

of law. On appeal, it is Appellants' burden to demonstrate to this Court that the trial court's determination was erroneous or, at the very least, premature.

Appellants present three general arguments for our consideration. Those arguments are: (1) the entry of summary judgment on their medical negligence claims was both improper in light of the ample medical evidence in the record creating a genuine issue of material fact and premature; (2) sufficient evidence of outrage/IIED and negligent infliction of emotional distress was presented to warrant a denial of summary judgment; and (3) sufficient evidence of fraud was presented to warrant a denial of summary judgment.[10]

A. Medical Negligence Claim Against Dr. Trover

Appellants offer two grounds for reversing the summary judgment on their claims of medical negligence against Dr. Trover. They contend: (1) that they submitted sufficient expert medical evidence to create genuine issues of

[10] We considered Dr. Trover's request (not placed in the form of a motion) that we strike each Appellant's brief for failing to comply with Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iv). That rule requires an appellant's brief to contain "a statement with reference to the record showing whether the issue was properly preserved for appellate review and, if so, in what manner." CR 76.12(8)(a) permits, but does not require, a brief to be stricken for failure to comply substantially with CR 76.12. *Krugman v. CMI, Inc.*, 437 S.W.3d 167, 171 (Ky. App. 2014) ("We have wide latitude to determine the proper remedy for a litigant's failure to follow the rules of appellate procedure."). Exercising that discretion, we decline Dr. Trover's request. Each appellant's brief is deficient; it contains not a single statement of preservation. However, it is not so deficient as to foreclose us from reviewing the issues raised. Our decision is not incompatible with our Supreme Court's lenient approach to the application of procedural rules in the area of appellate practice and its adherence to the doctrine of substantial compliance. *See Kentucky Farm Bureau Mut. Ins. Co. v. Conley*, 456 S.W.3d 814, 818 (Ky. 2015) (Kentucky follows the rule of substantial compliance).

material fact as to their claims; and, alternatively, (2) that entry of judgment was premature, having occurred too soon in the litigation, depriving Appellants of a proper opportunity for discovery of sufficient evidence to create genuine issues as to the claim. Neither argument is persuasive.

A common law negligence claim requires proof of: (1) a duty owed by the defendant to the plaintiff, (2) breach of that duty, (3) injury to the plaintiff, and (4) legal causation between the defendant's breach and the plaintiff's injury. *Wright v. House of Imports, Inc.*, 381 S.W.3d 209, 213 (Ky. 2012). Due to the complexity of medical procedures, proof of these elements, almost always, must take the form of expert testimony. *Johnson v. Vaughn*, 370 S.W.2d 591, 596 (Ky. 1963) (explaining a physician's negligence must generally be established by expert medical testimony); *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676, 680–81 (Ky. 2005). That is, only expert testimony can establish for the jury "the applicable medical standard of care, any breach of that standard, and the resulting injury." *Blankenship v. Collier*, 302 S.W.3d 665, 675 (Ky. 2010).[11] That quotation embraces each of the four elements of a medical negligence claim.

[11] Of course, "[e]xpert testimony is not required . . . in *res ipsa loquitur* cases, where the jury may reasonably infer both negligence and causation from the mere occurrence of the event and the defendant's relation to it, and in cases where the defendant physician makes certain admissions that make his negligence apparent." *Love v. Walker*, 423 S.W.3d 751, 756 (Ky. 2014) (citations and internal quotation marks omitted). This case is not a *res ipsa loquitur* case. The circuit court found that the interpretation of radiological films and how such interpretations affect the subsequent treatment of a patient is a highly specialized area of medicine that a layperson with general knowledge cannot be presumed to understand. For these reasons, the court ruled that Appellants could not succeed on their medical-negligence claims without expert testimony. Appellants do not take issue with these conclusions.

Experience shows us that a tort defendant moving for summary judgment does not challenge the claim as a whole. Rather, the attack is more precise; the target of the summary judgment motion is an individual element of the claim that the defendant believes to be weak. To survive a defendant's summary judgment motion then, a plaintiff must respond to the attack and defend the targeted element. Fortifying an element that has not been targeted is meaningless. But that is what occurred here.

In the circuit court, Appellees moved for summary judgment arguing that Appellants had failed to produce evidence sufficient to create a genuine issue of material fact as to the third and fourth elements of a medical negligence claim – injury and causation. To defeat Appellees' motion, the Appellants were required to produce evidence of both elements. While proof of injury may be demonstrated, at least in part, by medical records or even lay testimony, proof of a causal link between a physician's breach of a standard of care and a patient's injury – *i.e.*, causation – must be established by expert testimony. *Andrew v. Begley*, 203 S.W.3d 165, 170 (Ky. App. 2006) (explaining a "plaintiff in a medical negligence case is required to present expert testimony that establishes . . . the alleged negligence proximately caused the injury").

Appellants presented no expert testimony of causation. Instead, they responded with medical records of Dr. Trover's radiological film reads and re-reads by others, and an affidavit from their own medical expert stating that "at least one" of the films read by Dr. Trover was interpreted in a manner that was below

the standard of care. While this evidence created a genuine issue of material fact regarding the first and second elements of the Appellants' claims for medical negligence (applicable standard of care and breach), it left the Appellees' challenge to the third and fourth elements (injury and causation) entirely undefended.

The circuit court recognized this evidence was insufficient to prevent summary judgment in favor of Appellees, stating the Appellants "failed to produce any affirmative evidence of: … physical injury causally connected to acts or omissions by Defendants" (R. 958).[12] On that basis, the circuit court granted summary judgment for Dr. Trover on each Appellant's claim of medical negligence.

These appeals to this Court were the Appellants' opportunity to direct us to evidence in these four records that demonstrates they did, in fact, put forth proof of causation. They failed to do that. In their briefs, identical in each of the four cases, Appellants again rely only on an "affidavit that the Appellees have had for years from Dr. Ronald Washburn that indicates that Dr. Trover breached the standard of care." (Appellants'[13] brief, p. 15). This is not enough. In fact, for purposes of our analysis, we can *presume* Dr. Trover breached the applicable standard of care, but without expert testimony that his breach caused injury to the

[12] Here, we quote the summary judgment in *Brewer v. Trover, et al.*, Hopkins Circuit Court, Nos. 04-CI-00225 & 05-CI-00975 contained in that record from R. 957-960. The summary judgments in each of these four cases addressed in this opinion used nearly identical language.

[13] The argument sections of each Appellant's brief in these four cases are identically worded. We quote here from the Appellant's brief submitted in *Brewer v. Trover*, *et al*, No. 2012-CA-001859-MR.

Appellants, there is no justification for reversing the summary judgment in favor of Dr. Trover.

What we have said in our review of previous cases with similar circumstances is equally applicable to these four cases. We said:

> To survive a motion for summary judgment in a medical malpractice case in which a medical expert is required, the plaintiff must produce expert evidence or summary judgment is proper. . . . The claim required expert testimony to establish . . . that the alleged negligence proximately caused the injury. Because [Appellants] produced no expert testimony [as to causation], summary judgment was proper in this case.

Andrew, 203 S.W.3d at 170, 173.

Notwithstanding the Appellants' failure to identify their proof of causation, they argue that Appellees did not meet their burden before the circuit court of proving the negative existence of a material issue of fact regarding causation and, absent such proof, Appellants were not required to produce positive proof of causation. We agree that "[t]he moving party has the initial burden of showing that no genuine issue of a material fact exists [and i]f the moving party does not sustain his burden . . . then the summary judgment should not be granted." *Roberts v. Davis*, 422 S.W.2d 890, 894 (Ky. 1967). However, that was not the situation in any of these four cases before us. Here, in each of the cases, this burden was sustained.

In their briefs before this Court, Appellees reference the distinct and specific factual support for their summary judgment motions in each individual case.

Furthermore, we have examined the record of those separate motions. The motions were supported by citation to the Appellants' various depositions in which they cannot answer questions probing how Dr. Trover's conduct caused the harm they perceived. We believe these motions satisfied the Appellees' burden under CR 56.03. The motions thus supported by the record were sufficient to shift the burden to the Appellants to come forward with proof of causation.

"Under the present practice of Kentucky courts, the movant must convince the court, by the evidence of record, of the nonexistence of an issue of material fact." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). The circuit court adjudged the Appellees' efforts as convincing. We are convinced as well. Unless we find merit in the Appellants' second ground for reversing – premature entry of summary judgment – we must affirm the circuit court's summary judgment on the medical negligence claim.

Appellants argue summary judgment was premature based on the protocol in place for the disclosure of expert witness. They claim that, as part of the lottery system instituted by the circuit court, it was understood by all parties that, once a particular case was selected for trial, a scheduling order would be entered for the exchange of expert disclosures in that case. In other words, until an individual case was selected for trial and a scheduling order imposed, Appellants were not required to disclose expert opinions to support their medical-negligence claims. This is a straw-man argument.

While the record indicates that a protocol was established whereby disclosure of experts would take place when each individual case was selected for trial, no order in any of these records prohibited any party from moving for summary judgment. Therefore, the issue is controlled by CR 56 governing summary judgments.

The specific rule for summary judgment motions by a defendant states that "a party against whom a claim . . . is asserted . . . *may, at any time, move* with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." CR 56.02 (emphasis added). The rule does not require the elapse of a discovery period delineated by a scheduling order, or even that discovery actually have been completed, so long as the parties were given "*ample opportunity* to complete discovery." *Suter v. Mazyck*, 226 S.W.3d 837, 841 (Ky. App. 2007) (emphasis added).

Appellants need not have provided every discoverable bit of proof at their disposal, but they were required to "show [their] hand, or enough of it to defeat the motion, before trial on the merits." *Barton v. Gas Service Co.*, 423 S.W.2d 902, 905 (Ky. 1968). That is, "it becomes incumbent upon the adverse party to counter [the movant's] evidentiary showing by some form of evidentiary material reflecting that there is a genuine issue pertaining to a material fact." *Neal v. Welker*, 426 S.W.2d 476, 479 (Ky. 1968) (citation omitted). Appellants made no showing as to causation whatsoever. That leaves the question of whether Appellants had ample opportunity to complete discovery.

Here, the record reflects that the latest motion for summary judgment was filed on August 27, 2012, and the matter went before the circuit court for a hearing on September 20, 2012. By that time the cases had been pending for almost eight years and Appellants had been granted multiple extensions to complete discovery. From the date of the latest-filed motion to the date of the hearing, Appellants were on notice that they must proffer some evidence of causation and injury to counter the evidence supplied by the Appellees. We must assume that this time was sufficient because Appellants did not request a delay of the hearing for additional time to gather the necessary evidence.

Furthermore, in each of the four cases, the Appellants "made affirmative representations that expert witnesses would be used to establish . . . causation." *Blankenship v. Collier*, 302 S.W.3d 665, 668 (Ky. 2010) ("[A] plaintiff bringing a typical medical malpractice case is required by law to put forth expert testimony to inform the jury of the applicable medical standard of care, any breach of that standard and the resulting injury."). If Appellants had such proof, they did not present it. If they did not have such proof when the final summary judgment was filed, then it was the trial court's responsibility first to assess whether the Appellants had sufficient time to procure it. "The trial court's determination that a sufficient amount of time has passed and that it can properly take up the summary judgment motion for a ruling is reviewed for an abuse of discretion." *Id.* Based on the foregoing, we are convinced that the trial court did not abuse its discretion when it found that there was ample time within which to

expect the Appellants to obtain and present proof of causation. The summary judgments were not premature.

For these reasons, we must affirm the circuit court's grant of summary judgment in each of the four cases as to the claims of medical negligence against Dr. Trover.[14]

B. Outrage/IIED and Negligent Infliction of Emotional Distress

Appellees sought and obtained summary judgment as to the claim of each of the Appellants for outrage/IIED and negligent infliction of emotional distress. An element common to both causes of action is the type of injury – emotional distress. Because it is dispositive as to both claims, our analysis focuses on that common element.

The circuit court ruled, as to each Appellant, that he or she, as the case may be:

> failed to produce any affirmative evidence of . . . physical contact by the Defendants . . . causing emotional distress; [or] intent by Defendants . . . to cause Plaintiff[s] . . . severe emotional distress[.]

[14] In its orders granting summary judgment, the circuit court made its findings and dismissed Appellants' negligence claims against Dr. Trover and the Foundation. (R. at 958). Because our previous analysis convinces us there can be no finding of liability on Dr. Trover's part, the Foundation is also exonerated of any vicarious liability on Appellants' claims of medical negligence. "Vicarious liability, sometimes referred to as the doctrine of respondeat superior, is not predicated upon a tortious act of the employer but upon the imputation to the employer of a tortious act of the employee[.]" *Patterson v. Blair*, 172 S.W.3d 361, 369 (Ky. 2005) (citation omitted). Accordingly, "[i]n circumstances under which the liability of the employer is purely derivative, he cannot be held liable while the employee at the same time is found not." *Kiser v. Neumann Co. Contractors, Inc.*, 426 S.W.2d 935, 937 (Ky. 1967).

(R. 958).[15] The proper measures of emotional injury are found in *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990).

In their attempt to reverse the circuit court's ruling on emotional distress, Appellants first erect another straw man that they proceed to knock down. They assert that emotional distress is a compensable injury even in the absence of any physical contact. We agree. In *Osborne v. Keeney*, 399 S.W.3d 1 (Ky. 2012), our Supreme Court rejected Kentucky's prior "impact rule" which formerly prohibited any claim "for fright, shock [,] or mental anguish which is unaccompanied by physical contact or injury." *Deutsch v. Shein*, 597 S.W.2d 141, 145-46 (Ky. 1980), *abrogated by Osborne*, 399 S.W.3d at 15-17. Noting that the overwhelming majority of jurisdictions had abandoned the impact rule, the Supreme Court expressly followed suit. *Osborne*, 399 S.W.3d at 17.

However, our agreement with this contention does not give cause for reversal. When it comes to proof of emotional distress, *Osborne* also said:

> we clarify the rule and now require that emotional-distress plaintiffs first satisfy the elements of a general negligence claim. Further, a plaintiff will not be allowed to recover without showing, by expert or scientific proof, that the claimed emotional injury is severe or serious. Put simply, a plaintiff must show that the defendant was negligent and that the plaintiff suffered mental stress or an emotional injury, acknowledged by medical or scientific experts, that is greater than a reasonable person could be expected to endure given the circumstances.

Id. at 6.

[15] *See*, *supra*, note 12.

We look to the Appellants' briefs for direction to the record where they presented such proof, but the briefs tell us nothing on this point. Rather, the briefs focus on Dr. Trover's conduct; Appellants claim "[t]his is a case study of outrageous behavior[,]" but fail entirely to tell us what emotional injury Appellants experienced as a direct and proximate result of that behavior.

Missing the mark, Appellants list specific examples of the doctor's conduct such as misreading x-rays, allowing other employees to read x-rays he was required to read, failing to obtain proper medical histories or the patient's informed consent in certain cases, and striking an employee. Not only do Appellants claim this conduct is sufficient in and of itself to sustain their outrage/IIED and negligent infliction of emotional distress claims against Dr. Trover, they argue it is also sufficient evidence of their claims against the Foundation because of its corporate knowledge of such behavior. To the extent the record supports these statements, the Appellants have demonstrated genuine issues of material fact sufficient to create a jury question as to whether Dr. Trover engaged in outrageous conduct. *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 788 (Ky. 2004) *overruled on other grounds by Toler v. Sud-Chemie, Inc.*, 458 S.W.3d 276, 287 (Ky. 2014) (finding "conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality"). However, that element of the claim is not the subject of our review.

For purposes of this opinion, we will *presume* the doctor's conduct was sufficiently outrageous to satisfy *that* element of the cause of action and survive

summary judgment. But where is there evidence: of "a causal connection between the [outrageous] conduct and the emotional distress; and [that] the emotional distress [is] severe"? *Id.* We will focus first on the evidence of severe emotional distress.

"[T]o meet the standard of severe emotional distress the injured party must suffer distress that is 'substantially more than mere sorrow.'" *Benningfield v. Pettit Envt'l Inc.*, 183 S.W.3d 567, 572 (Ky. App. 2005) (quoting *Gilbert v. Barkes*, 987 S.W.2d 772, 777 (Ky. 1999)).

> A "serious" or "severe" emotional injury occurs where a reasonable person, normally constituted, would not be expected to endure the mental stress engendered by the circumstances of the case. Distress that does not significantly affect the plaintiffs [sic] everyday life or require significant treatment will not suffice. And a plaintiff claiming emotional distress damages must present expert medical or scientific proof to support the claimed injury or impairment.

Osborne, 399 S.W.3d at 17-18 (footnotes omitted). Simply put, "not every upset plaintiff can recover for emotional distress." *Zurich Ins. Co. v. Mitchell*, 712 S.W.2d 340, 343 (Ky. 1986). This is particularly so in today's modern, razor-sharp society. *Osborne*, 399 S.W.3d at 17 (astutely observing that "emotional tranquility is rarely attained and . . . some degree of emotional harm is an unfortunate reality of living in a modern society").

Appellants have not provided, and we have not found in the record, any expert support for their claims of severe emotional distress. *Id.* Even if there were such evidence here, the Appellants fail to establish, by way of medical evidence or

otherwise, any causal connection between Dr. Trover's conduct or that of the Foundation and the claimed emotional distress felt. Without both, the claims necessarily fail. *Osborne*, 399 S.W.3d at 18.

Appellants, Brewer and Powers, actually have claimed no emotional distress beyond the bare allegations of their complaints. That will not save their claims against a motion for summary judgment. *Continental Cas. Co. v. Belknap Hardware & Mfg. Co*., 281 S.W.2d 914, 916 (Ky. 1955) (the party opposing summary judgment must do more than rest upon the allegations in his complaint). Brewer testified by way of deposition that he continued to have back pain because of Dr. Trover's alleged misinterpretations which delayed appropriate treatment. There was no mention of any emotional distress.

Similarly, emotional distress resulting from Dr. Trover's alleged misinterpretations of his radiological film is absent from Powers' testimony as well. Appellants have failed to come forward with any affirmative evidence of emotional distress, and certainly not severe emotional distress, to defeat summary judgment on these claims. *Chipman*, 38 S.W.3d at 390 (party opposing summary judgment must present at least some affirmative evidence establishing the existence of a genuine issue of material fact to defeat it).

Furthermore, the emotional distress complained of by Mitchell and Crutcher cannot be considered "severe" even when we factor in the presumption favoring the party opposing summary judgment. When asked in his deposition about the emotional distress he endured as a result of Dr. Trover's alleged misread, Mitchell

replied, "[s]cared of something – yeah, there's a lot of scared, if that's what you're talking about." (Mitchell Deposition at 93). He went on to state that he was not terrified, but just "[e]xtremely concerned" about receiving the letter stating his film may have been misread. This undoubtedly falls far short of the severity of the emotional distress necessary to support the claim of outrage/IIED. *Osborne*, 399 S.W.3d at 17 n.10 (citing *Smith v. Amedisys Inc*., 298 F.3d 434, 450 (5th Cir. 2002) (rejecting claim of plaintiff who felt angry, belittled, embarrassed, depressed, disgusted, humiliated, horrified, incompetent, mad, very offended, and repulsed, court stated this was not sufficient for severe emotional harm)).

Additionally, Crutcher merely stated in her brief that she "believes that the misinterpretations by Dr. Trover, jointly or individually, delayed a proper treatment plan, and caused her great emotional harm." (Crutcher's brief, p.11). However, a simple "belief" one has suffered injury is not sufficient to create an issue of material fact. *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990).

None of the Appellants sought any treatment or counseling, or appreciably altered their life as a result of the distress they claim. There is simply no evidence that any of these Appellants was unable to endure the mental stress of living with Dr. Trover's interpretations of the radiological films, or that it either significantly affected their everyday life or required significant treatment. *Osborne*, 399 S.W.3d at 17-18.

Most specifically, none of this evidence was in the form of expert medical or scientific proof required to prove the claim.

In sum, we find Appellants have failed to put forth affirmative evidence of severe emotional distress, supported by expert medical or scientific proof, caused by Dr. Trover's or the Foundation's "outrageous" behavior. In light of this shortcoming, the circuit court properly entered summary judgment on Appellants' outrage/IIED and negligent infliction of emotional distress claims. We again affirm.

C. Fraud

Finally, Appellants argue they have effectively pleaded and adequately established by proof the following theories justifying recovery of damages against Dr. Trover and the Foundation: (1) lack of informed consent, (2) direct fraud, and (3) constructive fraud. We disagree.

First, our highest court long ago rejected the idea that failure to obtain informed consent should be treated differently than other failures of medical responsibilities, *i.e.*, as a separate tort in and of itself. *Holton v. Pfingst*, 534 S.W.2d 786, 788 (Ky. 1975). Rather, Kentucky courts "regard the failure to disclose a mere risk of treatment as involving a collateral matter . . . and so have treated the question as one of negligent malpractice only, which brings into

question professional standards of conduct." *Id.* at 788 (quoting W. Prosser, Handbook of the Law of Torts, 106 (4th ed. 1971)). "[T]he action, regardless of its form, is in reality one for negligence in failing to conform to a proper professional standard." *Id.*

Perhaps the most direct explanation of the role played by lack-of-informed-consent issues in our jurisprudence was offered by Justice Leibson.

> "Lack of informed consent" is not, *per se*, a tort. It is only a term useful in analyzing . . . the type of negligence which occurs when a physician has not made a "proper disclosure of the risks inherent in a treatment." Louisell and Williams, Medical Malpractice, Vol. 2, Sec. 22.04. (Emphasis original.).

Keel v. St. Elizabeth Med. Ctr., 842 S.W.2d 860, 862–63 (Ky. 1992) (Leibson, J., concurring); *see also Fraser v. Miller*, 427 S.W.3d 182, 187 (Ky. 2014) (Keller, J., concurring) ("KRS 304.40–320 does not require a physician to obtain informed consent, it simply states when informed consent shall be deemed to have been obtained"). In other words, the claim of medical negligence, and our earlier analysis of that claim and the judgment dismissing it, subsumes the claim that Dr. Trover failed to obtain informed consent.

Next, we consider the claim of direct fraud. It is difficult to tell whether the Appellants' claim is one for fraudulent misrepresentation or fraud by omission. We shall analyze both.

Fraud by misrepresentation "requires proof that: (1) the defendant made a material representation to the plaintiff; (2) the representation was false; (3) the

defendant knew the representation to be false or made it with reckless disregard for its truth or falsity; (4) the defendant intended to induce the plaintiff to act upon the misrepresentation; (5) the plaintiff reasonably relied upon the misrepresentation; and (6) the misrepresentation caused injury to the plaintiff." *Giddings & Lewis, Inc. v. Industrial Risk Insurers*, 348 S.W.3d 729, 747 (Ky. 2011).

For purposes of our analysis, we will presume Appellees made material false representations; that takes care of the first and second elements of the cause of action. But the circuit court found, and we agree, that Appellants produced no affirmative evidence as to the third or fourth elements – that Dr. Trover or the Foundation made these representations with knowledge of their falsity (the third element), and with the intent to induce the Appellants to act (the fourth element). We have examined the respective records in these cases and can find no evidence to support these elements of the claim of fraud. The Appellants' briefs direct us to no such proof. Failure to present any proof of these two elements requires that we affirm the summary judgments.

Additionally, Appellants have not identified any injury caused by either Appellee's misrepresentation (the sixth element). "[F]raud is actionable only if it results in damage to the complainant[.]" *Gersh v. Bowman*, 239 S.W.3d 567, 573 (Ky. App. 2007) (citation omitted). Since our Supreme Court has chosen not to embrace lost chance for recovery or a better medical result as a compensable injury, *Kemper v. Gordon*, 272 S.W.3d 146, 152-53 (Ky. 2008), Appellants are left only with severe emotional distress as a compensable injury. Because our previous

analyses convinced us that the circuit court correctly found no severe emotional distress in any of these cases, we must conclude that Appellants presented no evidence of injury resulting from any representation by the Appellees.

To the extent the Appellants are arguing a claim of fraud by omission, it too must fail.

> [A] fraud by omission claim is grounded in a duty to disclose. To prevail, a plaintiff must prove: (1) the defendant had a duty to disclose the material fact at issue; (2) the defendant failed to disclose the fact; (3) the defendant's failure to disclose the material fact induced the plaintiff to act; and (4) the plaintiff suffered actual damages as a consequence. The existence of a duty to disclose is a matter of law for the court.

Giddings & Lewis, *Inc.*, 348 S.W.3d at 747.

Appellants focus on the first element, duty. They argue Dr. Trover had a duty to disclose that his medical license had been suspended by the Kentucky Board of Medical Licensure. Assuming such a duty was imposed upon Dr. Trover, it would not apply to this case. The emergency order temporarily suspending Dr. Trover's license was entered in 2005, well after Dr. Trover's alleged misreading of the Appellants' various films between 2000 and 2004.

Appellants also claim the Foundation failed in its duty to inform them that, while they were under treatment, Dr. Trover was in need of supervision or was actually being supervised because of behavioral problems. As a corollary, Appellants claim the Foundation failed to disclose that staff at the Foundation had expressed concerns to the administration regarding Dr. Trover's substandard

medical practices. We do not agree that these facts require our creation of a duty to disclose information. Again, for many, if not all, of the Appellants, the timing of these suspicions does not fit their claims. But there is another reason we agree with the circuit court that there is no duty here.

The existence of a duty is a question of law to be decided by the court. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003). The circuit court found no legal duty on behalf of a doctor or a hospital to disclose behavioral and personal issues of a treating physician to patients. Our review of the law confirms this. Whatever duty the Appellants might imagine in this regard would be unworkable. The likely result of recognizing such a duty – *i.e.*, a duty to inform patients of unproven complaints against doctors – is to create more liability than it avoids. We see nothing in our jurisprudence that would encourage or justify requiring the breach of one duty in order to satisfy another. The circuit court was correct in finding no such duty exists.

And, once again, we turn to the absence of an injury in these cases – the fourth element of the cause of action for fraud by omission. Fraud "without damage is, of course, not actionable." *Curd v. Bethell*, 248 Ky. 127, 58 S.W.2d 261, 263 (1932). We will say nothing more than that we are firm in our conviction that Appellants suffered no injury.

There was insufficient evidence in the records of each of the Appellants to create a genuine issue of material fact as to the various elements of their claims for

direct fraud, whether by misrepresentation or omission. Therefore, the summary judgment as to such claims must be affirmed.

This leaves constructive fraud. Constructive fraud, unlike direct fraud, "arises through some breach of a legal duty which, irrespective of moral guilt, the law would pronounce fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests." *Coomer v. Phelps*, 172 S.W.3d 389, 393 (Ky. 2005) (quoting *Wood v. Kirby*, 566 S.W.2d 751, 755 (Ky. 1978)). "Constructive fraud may be found merely from the relation of the parties to a transaction or from circumstances and surroundings under which it takes place." *Epstein v. United States*, 174 F.2d 754, 766 (6th Cir. 1949). The doctrine of constructive fraud is rooted in equity. *See Pickrell & Craig Co. v. Bollinger-Babbage Co.*, 204 Ky. 314, 264 S.W. 737, 740 (1924).

Appellants claim they relied on the Appellees and their expertise in assuring that they would receive the care of a competent physician. They assert that, had they known the issues relative to Dr. Trover's practice that were eventually uncovered in the Foundation's investigations, they would not have agreed to be a patient of Dr. Trover or the Foundation.

Again, there is the timing problem for some, if not all, of the Appellants; however and additionally, the duty analysis undertaken above with regard to fraud by omission applies equally here. We cannot find error in the circuit court's ruling that there is no duty to disclose unproven[16] allegations of a medical professional's

[16] Indeed, Appellants' citations to the record indicate that when Dr. Trover read their various films, most if not all the allegations challenging Dr. Trover's competence were yet to be made or

imperfections. And, again, Appellants can point to no evidence of injury. For these reasons, summary judgment on the issue of constructive fraud was proper.

And as a category of claims, all Appellants' fraud causes of action lack evidentiary support sufficient to create a genuine issue of material fact as to at least one element of the claim. Therefore, we cannot find that the circuit court erred as a matter of law in concluding that Dr. Trover and the Foundation were entitled to summary judgment.

CONCLUSION

For the foregoing reasons, we affirm the orders of the Hopkins Circuit Court granting summary judgment in favor of Dr. Trover and Baptist Health Madisonville f/k/a Trover Clinic Foundation as to each of the claims of each of the Appellants herein.

KRAMER, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

had only recently been made and yet to be investigated.

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