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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000665-MR

KENTUCKY GUARDIANSHIP ADMINISTRATORS, LLC, AS CONSERVATOR FOR KALI CRUSENBERRY; AND LOUISE YOUNT, AS GUARDIAN OF KALI CRUSENBERRY — APPELLANTS

APPEAL FROM WHITLEY CIRCUIT COURT
v. HONORABLE DANIEL BALLOU, JUDGE
ACTION NO. 14-CI-00590

BAPTIST HEALTHCARE SYSTEM, INC., d/b/a BAPTIST HEALTH CORBIN; APOGEE MEDICAL GROUP, KENTUCKY, PSC; AND SUBHOSE BATHINA, M.D. — APPELLEES

AND NO. 2017-CA-000727-MR

BAPTIST HEALTHCARE SYSTEM, INC., d/b/a BAPTIST HEALTH CORBIN — CROSS-APPELLANT

CROSS-APPEAL FROM WHITLEY CIRCUIT COURT
v. HONORABLE DANIEL BALLOU, JUDGE
ACTION NO. 14-CI-00590

KENTUCKY GUARDIANSHIP ADMINISTRATORS, LLC, AS CONSERVATOR FOR KALI CRUSENBERRY;

AND LOUISE YOUNT, AS GUARDIAN OF KALI CRUSENBERRY CROSS-APPELLEES

AND NO. 2017-CA-000752-MR

APOGEE MEDICAL GROUP, KENTUCKY, PSC; AND SUBHOSE BATHINA, M.D. CROSS-APPELLANTS

CROSS-APPEAL FROM WHITLEY CIRCUIT COURT
v. HONORABLE DANIEL BALLOU, JUDGE
ACTION NO. 14-CI-00590

KENTUCKY GUARDIANSHIP ADMINISTRATORS, LLC, AS CONSERVATOR FOR KALI CRUSENBERRY; AND DORA LOUISE YOUNT, AS GUARDIAN FOR KALI CRUSENBERRY CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND NICKELL, JUDGES.

DIXON, JUDGE: Kentucky Guardianship Administrators, LLC, as conservator for Kali Crusenberry, and Louise Yount, as guardian of Kali Crusenberry (collectively "Crusenberry"), appeal, and Baptist Healthcare System, Inc., d/b/a Baptist Health Corbin ("Baptist"), as well as Apogee Medical Group, Kentucky,

PSC ("Apogee") and Subhose Bathina, M.D., cross-appeal[1] the Whitley Circuit Court's trial order and judgment entered March 3, 2017, and order denying Crusenberry's motion for new trial on April 5, 2017.[2] After careful review of the record, briefs, and applicable law, we affirm.

On August 1, 2013, Kali—22 years old at the time—presented to Baptist's Emergency Department ("ED") with a myriad of health concerns, including fever, nausea, vomiting, urinary tract infection ("UTI"), kidney infection, gallstones, pneumonia, and critically low potassium—also referred to as hypokalemia—which can cause an abnormal heart rhythm, known as a prolonged QT interval, and lead to cardiac arrest. Kali was admitted to Baptist's Telemetry Unit and administered potassium and an antibiotic, Azithromycin—a QT-prolonging drug. Her then-treating nephrologist ordered that potassium be replaced pursuant to Baptist's standing "Potassium Replacement Order." On August 4, nurses ceased administering potassium to Kali. After making positive

[1] Baptist's notice of cross-appeal states it cross-appeals from the trial court's order denying its motion for summary judgment entered on January 3, 2017, and its motions for directed verdict at trial on February 20 and 23, 2017. However, no argument concerning its motion for summary judgment is included in its briefs. Lack of any argument on a point constitutes its abandonment. "The failure to argue before the Court of Appeals . . . is tantamount to a waiver." *Osborne v. Payne*, 31 S.W.3d 911, 916 (Ky. 2000).

[2] Kentucky lawyers continue to improperly appeal from, and our courts unnecessarily address, non-final, interlocutory denials of motions brought pursuant to Kentucky Rules of Civil Procedure ("CR") 59.01 and CR 59.05. Naming these orders in the Notice of Appeal is no longer fatal to an appeal because of *Ready v. Jamison*, 705 S.W.2d 479 (Ky. 1986).

strides toward recovery, including Kali's interacting with family members, eating food from McDonald's, and ambulating to smoke, Dr. Raymond Hackett—who surgically performed a stent placement to aid with Kali's kidney stone on August 4—recommended that Kali be discharged from the hospital.

On August 5, Dr. Bathina first became involved in Kali's medical treatment when he reported to work for his first shift since Kali's admission to Baptist. Having examined Kali, reviewed her records, and consulted with Dr. Hackett, Dr. Bathina discharged Kali with a prescription for Levaquin—another antibiotic which can also prolong the heart's QT interval—instead of Azithromycin to continue treatment of Kali's pneumonia, kidney infection, and UTI.

At approximately 10:00 a.m. the morning following discharge, Kali took her first dose of Levaquin. About an hour later her mother—who had been at the house helping Kali take care of her three young children—discovered Kali in cardiac arrest and called 911. Paramedics arrived and shocked Kali's heart into rhythm while in transit to Baptist's ED. An EKG performed at the ED showed that Kali had a prolonged QT interval, which is potentially fatal. Kali's potassium levels were also critically low again.

Although Kali survived this episode of cardiac arrest, her brain was deprived of oxygen for such a period that she consequently lost her ability to speak, use her upper and lower extremities, feed herself, and control her bowels

and bladder. An echocardiogram performed the day following her cardiac arrest revealed a condition known as Takotsubo Syndrome or "broken heart syndrome" which is a sudden and unforeseeable condition immediately preceded by an emotional or physical trigger that causes transient weakening of the left ventricle of the heart.

On October 24, 2014, Kali's husband, Branden, initiated the instant lawsuit. However, Branden eventually moved Kali and their three children in with his mother, Louise Yount, and voluntarily dismissed his loss of spousal consortium claim just prior to the commencement of trial. As a result, Kentucky Guardianship Administrators, LLC, was appointed Kali's conservator, and Louise Yount was appointed Kali's guardian. The case was tried before a jury on February 13-27, 2017. Crusenberry's theory of liability presented at trial was that the failure of Baptist's nurses to administer potassium to Kali during the last three shifts of her hospitalization, counter to the standing replacement order, led to her low potassium levels after discharge and, combined with her prior consumption of Azithromycin and first dose of Levaquin prescribed by Dr. Bathina—both QT-prolonging medications—resulted in a cardiac arrhythmia called *Torsades de Pointes*, and ultimately her cardiac arrest. Crusenberry further contended that the Takotsubo Syndrome was the *result* rather than the *cause* of Kali's cardiac arrest and subsequent anoxic brain injuries. A unanimous defense verdict was rendered

finding no defendant breached the standard of care, without reaching issues of causation or damages. The judgment was entered, Crusenberry moved for a new trial, and the motion was denied. These appeals followed.

Crusenberry presents twelve arguments on appeal, which fall into the following three categories: (1) evidence Crusenberry argues was improperly *excluded* at trial; (2) evidence Crusenberry argues was improperly *included* at trial; and (3) submission of what Crusenberry asserts was a prejudicial jury instruction. Baptist presents two arguments on cross-appeal that the trial court erred in denying its motion for directed verdict on the bases of: (1) proximate cause; and (2) ostensible agency. Apogee and Dr. Bathina present two arguments on cross-appeal: (1) the trial court should have granted their motion for directed verdict on the issues of standard of care and causation; and (2) the trial court erred in denying their motion to exclude the testimony of Drs. James Tisdale, Carl Blond, and Michael J. Hiestand under KRE[3] 702 and *Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). We will address each set of arguments, in turn.

[3] Kentucky Rules of Evidence.

ISSUES RAISED IN CRUSENBERRY'S DIRECT APPEAL

I. EXCLUSION OF EVIDENCE

The standard of review concerning a trial court's evidentiary rulings is abuse of discretion. *Tumey v. Richardson*, 437 S.W.2d 201, 205 (Ky. 1969). "The test for an abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound reasonable principles." *Penner v. Penner*, 411 S.W.3d 775, 779-80 (Ky. App. 2013) (citation omitted).

Issue 1: Whether Kali was unfairly prejudiced from telling the jury about her evidence in opening statements. Crusenberry withdrew her argument on this issue in her reply brief; therefore, no discussion is required.

Issue 2: Whether Kali's key expert witness was arbitrarily limited in his testimony. Crusenberry argues that the trial court improperly limited the causation testimony of James Tisdale, Pharm.D. However, it is well-settled that the "trial court is vested with wide discretion in determining [whether] to admit or exclude expert testimony." *Jones v. Stern*, 168 S.W.3d 419, 424 (Ky. App. 2005). It is also undisputed that Dr. Tisdale is not a medical doctor but is, instead, a Doctor of Pharmacy.

Crusenberry's arguments pertaining to *Savage v. Three Rivers Med. Ctr.*, 390 S.W.3d 104 (Ky. 2012), are distinguishable. In that case, a nurse with specialized experience in interpreting x-rays testified regarding her interpretation

of an x-ray, and no medical opinions concerning causation were elicited from the nurse. In this case, the trial court properly limited Dr. Tisdale's testimony to areas within his expertise, excluding the actual cause of Kali's cardiac event. Further, the testimony Crusenberry claims was improperly excluded pertained only to the issue of causation, one not reached by the jury. Additionally, Crusenberry presented other expert evidence on the issue of causation. Therefore, any error or potential error in excluding Dr. Tisdale's testimony was harmless.

Issue 3: Whether Kali was unfairly precluded from mentioning Baptist's incident report. Crusenberry argues that she should have been allowed to introduce a Baptist Healthcare Systems Incident Report produced at the deposition of Baptist's pharmacist, Herb Petitt.[4] Defense counsel objected to introduction of the report into evidence at trial, citing *Pauly v. Chang*, 498 S.W.3d 394 (Ky. App. 2015). In that case, another panel of our court held that "simply because the information is discoverable does not necessarily mean that it is relevant or admissible." *Id.*, 498 S.W.3d at 408, *as modified* (Dec. 23, 2015). The panel noted:

> CR [Kentucky Rules of Civil Procedure] 26.02 provides that the parties may obtain discovery of any matter not privileged which is relevant to the subject matter in the

[4] Crusenberry made a Freedom of Information Request to the U.S. Food and Drug Administration ("FDA") for adverse events following Levaquin ingestion. This redacted report was included in the FDA's response to Crusenberry's request. No author of the report was identified.

> pending action. Relevancy is more loosely construed for purposes of discovery than for trial. It is not necessary that the information sought be admissible as competent evidence at trial. Even though it might be otherwise incompetent and inadmissible, information may be elicited if it appears reasonably calculated to lead to the discovery of admissible evidence. It is allowable if there is a reasonable possibility that the information sought may provide a lead to other evidence that will be admissible.

Pauly, 498 S.W.3d at 408-09. KRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable[.]" KRE 403 notes that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

In *Pauly*, 498 S.W.3d 394, plaintiffs claimed that evidence pertaining to a Trauma Conference investigation after their decedent passed was relevant because it made it more probable that defendants deviated from the standard of care in diagnosing and treating the decedent's injury than it would have been without the evidence—an argument strikingly similar to the one at bar in the instant case. The panel in that case disagreed. The *Pauly* court held that evidence relating to the Trauma Conference was not relevant to defendants' standard of care. In that case, the doctor responsible for drafting the minutes of the conference

testified that the purpose of the Trauma Conference was to conduct a "highly critical" examination that exceeded any standard of care analysis, was designed to address system improvement, and did not evaluate any individual doctor's compliance with the requisite standard of care. The *Pauly* court went further to opine that even if evidence pertaining to the Trauma Conference was relevant, they nevertheless believed any probative value to be outweighed by the danger of unfair prejudice and confusion of the jury, stating, "[t]he Trauma Conference minutes did not contain any information that was directly relevant to the specific issue of whether Dr. Chang or Dr. Mullett deviated from the standard of care in their diagnosis and treatment of Dr. Pauly and, thus, the minutes would have served no other purpose than to confuse the jury." *Id.* at 409-10. The *Pauly* court also held that the Trauma Conference minutes did not constitute proper impeachment evidence.

Similarly, in the case at hand, Baptist argues that the purpose of its investigation was to conduct more critical examinations of patient care which were more stringent than the applicable standards of care required by law. Moreover, the report merely repeated information contained in Kali's medical record and stated it was "[c]linically suspected that combination of levofloxacin and hypokalemia led to ventricular arrythmia." Therefore, the report related neither to the applicable standard of care nor causation in a more probative than prejudicial

manner and—aside from issues of whether it was properly authenticated, or an appropriate foundation laid for its introduction into evidence—was, therefore, irrelevant, prejudicial, and otherwise inadmissible. The fact that Baptist may have incorrectly labeled this argument as a "subsequent remedial measure" affects neither the analysis nor application under *Pauly*. It is clear from review of the record that the trial court relied on *Pauly* in making its ruling rather than the defense's "subsequent remedial measure" label as Crusenberry now contends. Crusenberry's arguments that the report could be used for impeachment and that defense witnesses opened the door are likewise unavailing. This is especially true considering the fact that neither witness Crusenberry attempted to impeach with this report had ever previously seen the report.

Issue 4: Whether Kali was unfairly precluded from using Baptist's "QT Poster." Crusenberry also withdrew her argument on this issue in her reply brief; therefore, no discussion is required.

Issue 5: Whether Kali was unfairly precluded from cross-examining Dr. Bathina on a critical issue. Crusenberry claims that she was prevented from confronting Dr. Bathina on cross-examination with an audit trail. The audit trail at issue tracked access to Kali's medical records and shows what portions of the electronic medical records were viewed, when, where, by whom, and any actions taken in the records, such as editing. Crusenberry did confront Dr.

Bathina with the audit trail during cross-examination; however, Dr. Bathina testified that he was not only unfamiliar with the audit trail but did not know what it was. As a result, Dr. Bathina could neither authenticate nor explain the audit trail, and the trial court correctly held that cross-examination upon the unauthenticated and unexplained audit trail was improper.

Crusenberry admits in her brief that she had a witness competent to authenticate and explain the audit trail, Jennifer Hollon; her failure to do so at trial does not invalidate the trial court's correct evidentiary ruling. Further, even had the record been deemed self-authenticated under KRE 803(6), KRE 902(11), or KRS[5] 422.300, absent an explanation, the audit trail may have been confusing to the jury. Crusenberry cites an unpublished case to support her contention to the contrary, *Bullington v. Bush*, No. 2007-CA-000705-MR, 2009 WL 1347177 (Ky. App. May 15, 2009). However, that case pertains only to medical records in their customary form and does not address the issue of their audit trails. That case was further distinguishable because the plaintiff was limited to asking only hypothetical questions based on the records which the trial court deemed inadmissible; whereas, in the instant case, Dr. Bathina was asked questions from Kali's medical record and was even presented with a copy of the audit trail and asked questions about same.

[5] Kentucky Revised Statutes.

There is a dearth of case law in Kentucky concerning the admissibility of audit trails and the extent to which they are part of a patient's medical record. One of only a few cases that seems to even remotely address the issue was a recent decision by another panel of our court where the plaintiff alleged that the medical audit trail revealed numerous edits, which would have cast doubt on the reliability of the defense experts who relied upon these records. *Palmer v. Abedi*, No. 2016-CA-000520-MR, 2018 WL 4050749, at *11 (Ky. App. Aug. 24, 2018).[6] In that case:

> [plaintiff's] counsel had the opportunity to cross-examine [the defendant doctor] about the alleged alterations to the medical records. The trial court limited other questioning because [plaintiff] presented no evidence showing that the Hospital's records had been altered in any significant way so as to affect their reliability as evidence. In the absence of any showing that the testimony of the corporate representative would have led to the discovery of admissible evidence, we decline to address that issue further.

Similarly, in the case at hand, without presentation of the necessary testimony of the corporate representative—Hollon—Crusenberry failed to demonstrate that the audit trail was admissible for use at trial in the manner and method she attempted to introduce and use it. Although certain procedures may allow for "shortcuts" in admission and use of evidence, it is the role of the trial

[6] This unpublished opinion is cited pursuant to CR 76.28(4)(c) as illustrative of the issue before us and not as binding authority.

court to ensure that the use of these methods does not unduly confuse the jury. As such, we hold that the trial court did not err in limiting the cross-examination of Dr. Bathina using the unexplained audit trail, especially when Crusenberry was able to ask questions regarding what portions of Kali's medical records Dr. Bathina viewed without using the audit trail.

Crusenberry's argument that defendants' failure to object to the audit trail as an exhibit prior to trial somehow allowed it to be admissible as evidence at trial is also without merit. The primary objection at trial was lack of proper foundation, a necessity for any exhibit to be admitted as evidence at trial. Defendants had no duty to object prior to trial in anticipation that Crusenberry would fail to have a competent witness lay the foundation for this exhibit. Additionally, even if sufficient foundation existed for the exhibit's admission, or it was properly authenticated, Crusenberry was not prejudiced by the ruling limiting cross-examination of Dr. Bathina with the exhibit because she was still able—and did—ask Dr. Bathina what records he reviewed during Kali's admission.

Issue 6: Whether Kali was unfairly prohibited from cross-examining and impeaching defense expert Dr. George Stacy on issues of credibility. Crusenberry claims that she was improperly precluded from cross-examining and impeaching Dr. Bathina's cardiology expert, Dr. Stacy, regarding a lawsuit he filed against Pfizer, claiming the drug company failed to warn him of

the risk of vision loss from taking Viagra. Crusenberry knew of Dr. Stacy's lawsuit prior to his discovery deposition and asked him whether he had vision loss for the sole purpose of using any denial for his impeachment at trial. At trial, Crusenberry's attempt to impeach Dr. Stacy regarding his loss of vision claim in his personal, unrelated litigation was met with vigorous objection by defense counsel. At the following bench conference, defense counsel pointed out that this was impermissible impeachment by contradiction regarding collateral facts. *Eldred v. Commonwealth*, 906 S.W.2d 694, 705 (Ky. 1994), *as modified on denial of reh'g* (Sept. 21, 1995), *and abrogated by Commonwealth v. Barroso*, 122 S.W.3d 554 (Ky. 2003) (citing Lawson, The Kentucky Evidence Law Handbook (3d Ed.1993) § 4.10).

"The basic issue is whether the evidence relates to a 'collateral' matter." *Id.* Although Crusenberry cites to case law pertaining to admissibility of evidence to show bias, interest, or motivation, she fails to sufficiently demonstrate how the testimony of Dr. Stacy was either not a collateral matter or demonstrated bias, interest, or motivation which would otherwise affect his credibility as a witness. Although Crusenberry claims the purpose of this "impeachment" was to assist the jury in weighing the credibility of Dr. Stacy's testimony, whether he experienced vision loss was wholly irrelevant to the issues of the case at hand.

Additionally, Crusenberry mischaracterizes Dr. Stacy's testimony stating that he testified "it was reasonable for Dr. Bathina to ignore the Levaquin **WARNING** that it not be prescribed to patients with low potassium or taking other QT prolonging medications." (Emphasis in original). Dr. Stacy testified that Kali had neither low potassium nor prolonged QT interval at the time of discharge; therefore, the warning was inapplicable. Given the totality of the circumstances, the trial court did not err in finding this line of questioning irrelevant and intended to unduly embarrass the witness in violation of KRE 611.

Issue 7: Whether Kali was unfairly prohibited from cross-examining defense expert Dr. Harold Helderman regarding a so-called learned treatise. Crusenberry contends that she should not have been limited from reading from or cross-examining Dr. Helderman—Dr. Bathina's nephrology expert—on an article produced at his deposition from a Mayo Clinic medical journal. At trial, Crusenberry's counsel conceded that the article at issue was attached to Dr. Helderman's deposition because it was in his file as an item reviewed in association with this case, having been referred to by Dr. Tisdale in his deposition. Crusenberry now mischaracterizes Dr. Helderman's trial testimony stating he "confirmed that he relied upon the Mayo Clinic journal article and considered it reliable." Crusenberry misconstrues the extent to which Dr. Helderman relied upon the article. At trial, he never confirmed that he relied upon

the article; he merely testified that the Mayo Clinic usually produced reliable materials. However, it is unclear how Crusenberry was, in fact, limited as review of the record reveals that her counsel read multiple highlighted portions of the article into the record and asked several questions prior to defense's objection. Moreover, Crusenberry points to no questions or testimony submitted by avowal for our review.

Nonetheless, Crusenberry unsuccessfully attempted to introduce the article into evidence as an exception to hearsay under KRE 803(18) for learned treatises.

> To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, *established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.* If admitted, the statements may be read into evidence but may not be received as exhibits.

Id. (emphasis added). Dr. Helderman could not establish the article as reliable as a nephrologist because the research at issue pertained to the field of cardiology and was outside his expertise. *See* KRE 702; *Heilman v. Snyder*, 520 S.W.2d 321, 323 (Ky. 1975) ("We now adopt the Uniform Rules of Evidence that publication by experts should be admitted in evidence to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the

treatise, periodical, or pamphlet is a reliable authority on the subject."); *Harman v. Commonwealth*, 898 S.W.2d 486, 491 (Ky. 1995)—another case in which sufficient foundation was laid. As such, the trial court did not err in its ruling.

Issue 8: Whether Kali was unfairly prohibited from cross-examining Baptist's designated corporate representative Nurse Paige Harbin.

Crusenberry asked Nurse Harbin on cross-examination how many times she had rehearsed her testimony, and the trial court sustained Baptist's objection to this line of questioning asserting that such testimony was covered by the attorney work-product doctrine. We agree with the trial court's ruling but disagree with the privilege which applies in this scenario. The Supreme Court of Kentucky has held:

> [T]he attorney-client privilege and the work-product doctrine are different, differing in what each covers, when and how applied, and whether protected communications are absolutely protected as in the former but not in the latter. In fact CR 26, which codifies the work-product doctrine, specifically exempts communications protected by the attorney-client privilege from its disclosure provisions. In short, attorney-client privileged communications do not fall within the ambit of CR 26, and are not discoverable even when the information is essential to the underlying case and cannot be obtained from another source.

The St. Luke Hosps., Inc. v. Kopowski, 160 S.W.3d 771, 777 (Ky. 2005) (internal footnotes omitted). The attorney-client privilege is codified in KRE 403 and applies to the testimony at issue.

Nevertheless, Crusenberry claims that this issue is similar to impeachment of the hospital's corporate representative in *Humana of Kentucky, Inc. v. McKee,* 834 S.W.2d 711 (Ky. App. 1992). However, in that case, counsel for the hospital submitted an affidavit prior to trial which directly contradicted the representative's testimony at trial about how frequently she had interacted with counsel. Consequently, examination regarding the meetings between counsel and the representative was held proper in that case because the representative had presented herself as an unbiased witness by indicating that she had not discussed her testimony with counsel since the trial had begun, when in fact she had met with counsel regularly prior to trial. Additionally, the representative was evasive and unresponsive even after the court's admonition to her to answer the questions. Opposing counsel was eventually permitted to read from the affidavit, impeach the witness, and explore the representative's bias.

By contrast, here, Nurse Harbin was introduced to the jury at the beginning of trial, she sat at Baptist's defense table, there was no prior inconsistent testimony concerning her interactions with Baptist's counsel, she was not portrayed as a disinterested witness, and she was neither evasive nor unresponsive during questioning. Consequently, the trial court acted within its discretion in excluding her impeachment as such testimony would have been collateral.

Crusenberry also contends that she was denied inquiry as to any statements made by Nurse Harbin close in time to Kali's cardiac event—namely during Baptist's investigation into the matter. The trial court also sustained Baptist's objection to this line of questioning. We agree with the trial court's ruling excluding this line of questioning as seeking to divest privileged attorney-client communication from Nurse Harbin. We also note that Crusenberry's counsel agreed to the limitation of only asking about whether Nurse Harbin had made a written or otherwise recorded statement prior to and during trial and Crusenberry asked this question—or some variation thereof—repeatedly at trial; therefore, Crusenberry was not confined beyond her own request and the trial court did not err in any alleged limitation on this issue.

Issue 9: Whether Kali was unfairly precluded from mentioning defense experts not called at trial. Crusenberry contends that she was improperly prevented from mentioning defendants' failure to call Baptist's consulting causation witness, Dr. Ilan Wittstein, and Dr. Bathina's life expectancy expert witness, Dr. Anthony Milano.

It is well-established:

> [t]he general rule is that the unexplained failure of a party to produce a witness under certain circumstances is a fit subject for fair comment and may justify an inference unfavorable to the party in default, but this was written in a case where it was reasonably presumed that an agent of a principal who was in the courtroom and was not called,

> might have enlightened the court on a disputed question of agency. *Monohan v. Grayson County Supply Co*., 245 Ky. 781, 54 S.W.2d 311. The rule would hardly apply here. In *Helton v. Prater's Adm'r*, 272 Ky. 574, 114 S.W.2d 1120, we suggested the rule above stated, but held it error to comment on the defendant's failure to introduce any witness, when nothing in the record showed that a witness possessing knowledge of any material facts not proven was not introduced.

Chappell v. Doepel, 301 Ky. 622, 627, 192 S.W.2d 809, 811 (1946).

Dr. Wittstein is an expert on Takotsubo Syndrome whom Crusenberry contacted to review her case. Dr. Wittstein indicated that he had previously reviewed the case for Baptist; however, he was never disclosed as an expert witness by Baptist. Instead, Baptist later disclosed Dr. John Miller as its causation expert. Crusenberry contends that she should have been permitted to comment on Baptist's failure to call Dr. Wittstein as its expert witness, alleging that this "comment" would have assisted the jury in assessing the credibility of Dr. Miller and Baptist. Following the long-established precedent set forth in *Chappell*, *id*., we disagree. In light of the abundant evidence produced from each party concerning causation, the trial court did not err in disallowing Crusenberry to comment on Baptist's failure to call Dr. Wittstein as a causation witness at trial.

Dr. Milano was Dr. Bathina's retained life expectancy expert disclosed pursuant to CR 26.02(4). Although the trial court granted the motion *in limine* preventing Crusenberry from any mention of, or questioning regarding, Dr.

Milano, it also specifically reserved its ruling as to Dr. Katz, Baptist's retained life expectancy expert, and indicated that Crusenberry was able to confront Dr. Katz with the disclosed deposition testimony and opinions of Dr. Milano. Additionally, "[i]n the usual run of cases it is customary for the plaintiff to introduce attending doctors in order to establish the extent of injuries and impairment to earning power. It [is] not incumbent on defendants to build up this feature of plaintiff's case." *Chappell*, 192 S.W.2d at 811. Similarly, it was not Dr. Bathina's duty to prove Crusenberry's damages. Moreover, proof of damages was presented at trial, rendering Dr. Milano's testimony unnecessary. Furthermore, any alleged error in prohibiting Crusenberry from commenting on Dr. Bathina's failure to call Dr. Milano as a witness at trial was of no consequence as this issue pertains to damages, an issue not even reached by the jury. Therefore, the trial court did not err in its ruling, and any potential error was harmless.

II. ADMISSION OF EVIDENCE

As noted, above, the standard of review concerning a trial court's evidentiary rulings is for abuse of discretion. *Tumey*, 437 S.W.2d at 205. "The test for an abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound reasonable principles." *Penner*, 411 S.W.3d at 779-80 (citation omitted).

Issue 10: Whether the trial court unfairly allowed Dr. Bathina to give expert testimony on the standard of care where Kali claims she was deprived of the right to discover such opinions, or the bases therefor, and to prepare for such testimony at trial. Dr. Bathina was deposed on April 8, 2015. On October 15, 2016, Baptist identified Dr. Bathina as an expert witness pursuant to CR 26.02(4) concerning opinions formed using information he personally observed during his treatment of Kali and why neither he, nor Baptist, violated the applicable standard of care. Because Dr. Bathina was testifying from firsthand knowledge of his medical treatment of Kali, his testimony was also admissible under *Charash v. Johnson*, 43 S.W.3d 274 (Ky. App. 2000), without disclosure as an expert otherwise required by CR 26.02(4). These issues were also fully explored during Dr. Bathina's deposition; therefore, Crusenberry's argument that she was prevented from discovering Dr. Bathina's opinions on these topics is without merit. Further, at the bench conference discussing Crusenberry's motion *in limine* on this issue, Crusenberry's counsel cut short the argument on this issue, and when the trial court asked counsel to repeat the question, counsel responded, "I'm writing denied." Although the trial court incorporated this notation into its written order that followed, it is disingenuous to now claim that the trial court deprived Crusenberry of some right.

Moreover, to the extent Crusenberry vaguely alleges deprivation—failing to cite to a single objection made at trial to Dr. Bathina's testimony or a single certified question from his deposition—we will not search the record to construct Crusenberry's argument for her, nor will we go on a fishing expedition to find support for her underdeveloped arguments. "Even when briefs have been filed, a reviewing court will generally confine itself to errors pointed out in the briefs and will not search the record for errors." *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979).

Additionally, to the extent that Dr. Bathina's testimony went beyond what was personally observed in his treatment of Kali—namely his one-word answer that he would treat his daughter the same way—such error was unpreserved by Crusenberry's failure to object, and was harmless. A single error alone does not necessarily require reversal, and our court is bound to review the error for possible harmlessness. *See* CR 61.01. In a similar case the Supreme Court of Kentucky held:

> [u]ltimately, this was an eight-day trial, about which the Appellee complains only of a single five-word sentence. Such an isolated remark, especially when balanced against more fully developed testimony from other experts, can have little if any prejudicial effect. If Dr. Johnstone had made more than this innocuous statement—for example, by giving more substantive or explicit testimony—then this case might have presented a different story. But in light of what actually occurred here—a vague, isolated statement improperly admitted in

> a case with substantial other proper expert proof (on both sides)—this Court cannot say the error was prejudicial or had any real effect on the verdict. *Cf. Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009) (holding that the standard for non-constitutional evidentiary harmless error even in criminal cases is whether "the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error."). Thus, although the trial court's abuse of discretion introduced error into the case, this Court determines that such error was harmless under CR 61.01.

Hashmi v. Kelly, 379 S.W.3d 108, 114-15 (Ky. 2012). Likewise, the case at hand was tried before a jury for eleven days with substantial proof presented by each party. Reviewing the totality of the circumstances, we hold that any error in admission of expert testimony from Dr. Bathina beyond that otherwise permitted by CR 26.02(4) or *Charash*, 43 S.W.3d 274, was harmless under CR 61.01.

Issue 11: Whether the trial court unfairly allowed undisclosed expert testimony from Drs. Richard Katz and George Stacy. Crusenberry contends that the trial court erroneously: (1) allowed Dr. Katz to offer new and undisclosed cost of care opinions based on information from a search he did the day preceding his testimony to tailor cost of care specifically to the location; and (2) allowed Dr. Stacy to express a new and undisclosed opinion that he disagreed with a portion of a written report interpreting Kali's ultrasound images based on his first review of the images just prior to trial. Dr. Stacy admitted in his deposition on January 5, 2017, that he had not yet viewed the echocardiogram

films and stated he would do so before trial. Dr. Stacy testified that his disagreement with the written report was only a "semantic" word choice that neither changed his opinion nor the interpretation of the information contained in the report. We here point out the irony that Crusenberry's causation expert, Dr. Bruce Charash, had not reviewed the echocardiogram films at the time of his deposition but later viewed them prior to trial. We further point out that any potential error as a result of this testimony was harmless because it pertained to causation or damages; neither of those issues was reached by the jury in rendering its verdict.

Crusenberry cites *Clephas v. Garlock, Inc*., 168 S.W.3d 389 (Ky. App. 2004), a case that is distinguishable from the one at hand, for the proposition that the new and undisclosed testimony of Drs. Katz and Stacy was inadmissible. In *Clephas*, the expert witness was not made available for deposition prior to trial, not given any materials to review until very close in time to the commencement of trial, and "acknowledged that he did not formulate a medical opinion relating to [the plaintiff's] physical condition and/or its causation until a few hours before his trial testimony." *Clephas*, 168 S.W.3d at 393. By contrast, both Dr. Katz and Dr. Stacy were deposed prior to trial, and their opinions were disclosed and explored at length. Further, the testimony was not precluded from being discovered prior to trial, not critical to their opinions, did not substantially changed their testimony,

and did not prejudice Crusenberry. As such, any error in admission of this testimony was harmless.

III. JURY INSTRUCTION

Issue 12: Whether the trial court's jury instruction limited Baptist's legal duties and potential liability to "nursing staff" conduct only.

The Supreme Court of Kentucky identified two types of errors involving jury instructions in *Sargent v. Shaffer*, 467 S.W.3d 198 (Ky. 2015), *as corrected* (Aug. 26, 2015).

> The first type of instructional error is demonstrated by the claim that a trial court either (1) failed to give an instruction required by the evidence, or (2) gave an instruction that was not sufficiently supported by the evidence. . . The second type of instructional error is represented by the claim that a particular instruction given by the trial court, although supported by the evidence, was incorrectly stated so as to misrepresent the applicable law to the jury.
>
> The trial court must instruct the jury upon every theory reasonably supported by the evidence. "Each party to an action is entitled to an instruction upon his theory of the case if there is evidence to sustain it." *McAlpin v. Davis Const., Inc.*, 332 S.W.3d 741, 744 (Ky. App. 2011) (*quoting Farrington Motors, Inc. v. Fidelity & Cas. Co. of N.Y.*, 303 S.W.2d 319, 321 (Ky. 1957)) . . . So, with respect to the first type of instructional error, in deciding whether to give a requested instruction the trial court must decide "whether the evidence would permit a reasonable juror to make the finding the instruction authorizes."
>
> . . .

When the question is whether a trial court erred by: (1) giving an instruction that was not supported by the evidence; or (2) not giving an instruction that was required by the evidence; the appropriate standard for appellate review is whether the trial court abused its discretion.

. . . A decision to give or to decline to give a particular jury instruction inherently requires complete familiarity with the factual and evidentiary subtleties of the case that are best understood by the judge overseeing the trial from the bench in the courtroom. Because such decisions are necessarily based upon the evidence presented at the trial, the trial judge's superior view of that evidence warrants a measure of deference from appellate courts that is reflected in the abuse of discretion standard.

However, when it comes to the second type of instructional error—whether the text of the instruction accurately presented the applicable legal theory—a different calculus applies. Once the trial judge is satisfied that it is proper to give a particular instruction, it is reasonable to expect that the instruction will be given properly. *Martin v. Commonwealth*, 409 S.W.3d 340, 346 (Ky. 2013). The trial court may enjoy some discretionary leeway in deciding what instructions are authorized by the evidence, but the trial court has no discretion to give an instruction that misrepresents the applicable law. The content of a jury instruction is an issue of law that must remain subject to *de novo* review by the appellate courts.

In summary, a trial court's decision on whether to instruct on a specific claim will be reviewed for abuse of discretion; the substantive content of the jury instructions will be reviewed *de novo*.

Sargent, 467 S.W.3d at 203-04 (internal footnotes omitted). Interestingly, Crusenberry argues that her issue with the jury instruction given—that the content or wording of the jury instruction was erroneous—falls into the second category while her rationale—that the trial court failed to give an instruction concerning the hospital's independent negligence which she believes was required by the evidence—indicates the alleged error, if any, would fall within the first category.

Crusenberry's argument is similar to one presented in *Hamby v. Univ. of Kentucky Med. Ctr.*, 844 S.W.2d 431, 435 (Ky. App. 1992). In *Hamby*, as well as in the case here, the plaintiff contended that it was clear that the hospital's own rules and procedures were not enforced, and then claimed that was sufficient evidence to create a jury issue, citing *Williams v. St. Claire Medical Center*, 657 S.W.2d 590 (Ky. App. 1983). In *Williams*, the hospital had actual knowledge that the policies were being broken but failed to enforce them. Unlike *Williams*, there was no evidence in either *Hamby*, or the case at bar, to indicate that the hospital had any knowledge that its staff was not acting in accordance with its policies. There was no specific evidence that the hospital in either *Hamby*, or this case, was guilty of any independent negligence; consequently, there is no reversible error on this issue.

ISSUES RAISED IN BAPTIST'S CROSS-APPEAL

Baptist's two arguments on cross-appeal are that the trial court erred in denying its motion for directed verdict on the bases of: (1) proximate cause, and (2) ostensible agency. The standard of review of a trial court's denial of a motion for directed verdict is well-established.

> Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'"

Lewis v. Bledsoe Surface Mining Co., 798 S.W.2d 459 (1990). "[O]ur review is independent of the grounds relied on or stated by the trial court to deny the directed verdict motion. Rather, we must make our own review of the entire record to determine whether the trial court's ruling was clearly erroneous." *Brooks v. Lexington-Fayette Urban Cty. Hous. Auth*., 132 S.W.3d 790, 798 (Ky. 2004), *as modified on denial of reh'g* (May 20, 2004).

With these principles in mind, we reiterate "a directed verdict is appropriate where there is no evidence of probative value to support an opposite result because the jury may not be permitted to reach a verdict upon speculation or conjecture." *Toler v. Süd-Chemie, Inc.*, 458 S.W.3d 276, 285 (Ky. 2014), *as corrected* (Apr. 7, 2015) (internal citations omitted). "[A] trial court should only grant a directed verdict when there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ." *Id.* (internal citations omitted).

I. PROXIMATE CAUSE

The Supreme Court of Kentucky, in *Claycomb v. Howard*, 493 S.W.2d 714, 718 (Ky. 1973), "approved the Restatement 2d sec. 431 substantial factor test as a means by which the jury could find legal cause and therefore fix responsibility for the harm done to the plaintiff." *Deutsch v. Shein*, 597 S.W.2d 141, 144 (Ky. 1980), *abrogated by Osborne v. Keeney*, 399 S.W.3d 1 (Ky. 2012). It is clear from review of the record that Crusenberry presented testimony of at least three expert witnesses that the actions—or rather inactions by failing to administer potassium to Kali counter to Baptist's policies—of Baptist's nurses was a substantial factor which led to and proximately caused Kali's cardiac arrest. Therefore, because there was no "complete absence of proof" on the issue of

proximate cause, we cannot say the trial court acted in clear error in denying Baptist's motion for directed verdict on this issue.

II. OSTENSIBLE AGENCY

"An apparent or ostensible agent is one whom the principal, either intentionally or by want of ordinary care, induces third persons to believe to be his agent, although he has not, either expressly or by implication, conferred authority upon him." *Middleton v. Frances*, 257 Ky. 42, 77 S.W.2d 425, 426 (Ky. 1934). The Supreme Court of Kentucky in *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985), dealt with a similar situation involving an ostensible agency claim against a hospital for the acts of an emergency room physician.

> The realities of the situation calls upon us to interpret ostensible agency as has been done by the courts of sister states, as evidenced by the following quotes:
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> > "Absent notice to the contrary, therefore, plaintiff had the right to assume that the treatment received was being rendered through hospital employees and that any negligence associated with that treatment would render the hospital responsible." *Arthur v. St. Peters Hospital*, 169 N.J.Super. 575, 405 A.2d 443, 447 (1979).
> >
> > "In our view, the critical question is whether the plaintiff, at the time of his admission to the hospital, was looking to the hospital for treatment of his physical ailments or merely viewed the hospital as the situs where his physician would treat him for his problems." *Grewe v. Mt. Clemens General Hospital*,

> 404 Mich. 240, 273 N.W.2d 429, 433 (1978).

Id. at 258.

Baptist cites *Williams v. St. Claire Med. Ctr.*, 657 S.W.2d 590 (Ky. App. 1983), a case in which "[b]y taking no action to give appellant notice otherwise, the hospital "held-out" [nurse] as an employee, thus creating an apparent agency." *Id.* at 596. Baptist also cites *Floyd v. Humana of Virginia, Inc.*, 787 S.W.2d 267, 270 (Ky. App. 1989), a case in which "[t]here was no representation or other action to induce appellant to believe that the physicians were employees or agents of [hospital]; in addition, the admission form which appellant signed specifically indicated same." *Id.* at 270. In those cases, there were no valid arguments that the ostensible agency doctrine would make the hospitals liable.

However, in the case at hand, the language of the admission form, the failure of Kali or her representative to initial the subject page regarding services rendered by providers not employed by Baptist, the Baptist identification badge worn by Dr. Bathina, and the testimony from Dr. Bathina regarding what he often tells patients when introducing himself or when questioned about Apogee, all constituted sufficient proof to preclude granting Baptist's motion for directed verdict on this issue. Therefore, because there was no "complete absence of proof" on the issue of ostensible agency, we cannot say the trial court acted in clear error

in denying Baptist's motion for directed verdict on this issue. Furthermore, there was no procedural bar to this claim as sufficient notice was provided by the language of the iterations of the complaint.

ISSUES RAISED IN APOGEE'S AND DR. BATHINA'S CROSS-APPEAL

Apogee's and Dr. Bathina's two arguments on cross-appeal are that: (1) the trial court should have granted their motion for directed verdict on the issues of standard of care and causation; and (2) the trial court erred in denying their motion to exclude the testimony of Drs. Tisdale, Blond, and Hiestand under KRE 702 and *Daubert*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

I. TRIAL COURT'S DENIAL OF DIRECTED VERDICT PROPER

Crusenberry presented the testimony of at least four expert witnesses that Dr. Bathina breached the standard of care and that such breach was, within a reasonable degree of medical probability, the cause of Kali's cardiac arrest. Therefore, because there was no "complete absence of proof" on the issues of standard of care or causation, we cannot say that the trial court acted in clear error in denying Apogee's and Dr. Bathina's motion for directed verdict on these issues. *Toler*, 458 S.W.3d at 285.

II. TRIAL COURT'S DENIAL OF MOTION TO EXCLUDE TESTIMONY PROPER

"A trial court's determination as to whether a witness is qualified to give expert testimony under KRE 702 is subject to an abuse of discretion standard of review." *Savage v. Three Rivers Med. Ctr*., 390 S.W.3d 104, 116 (Ky. 2012).

The testimony that Apogee and Dr. Bathina now claim was improperly allowed appears to pertain mostly to the issue of causation, one not reached by the jury. To the extent the testimony related to the standard of care, the jury rendered a verdict finding no breach of the standard of care. Therefore, any error in the trial court's rulings permitting expert testimony by Drs. Tisdale, Blond, and/or Hiestand outside the scope of their areas of expertise was harmless.

In conclusion, for the foregoing reasons, the order of the Whitley Circuit Court is AFFIRMED.

ALL CONCUR.

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