No. 14-111105-AS

IN THE SUPREME COURT OF THE STATE OF KANSAS

DOUGLAS L. CASTLEBERRY,
individually and as the administrator of the
ESTATE OF BARBARA MAE CASTLEBERRY, deceased, and
on behalf of SUSAN M. KRAFT and SCOTT CASTLEBERRY,
adult heirs at law of BARBARA MAE CASTLEBERRY, deceased,

Plaintiffs / Appellees,

v.

BRIAN L. DEBROT, M.D.,

Defendant / Appellant.

Appeal from the District Court of Sedgwick County
Honorable Richard Ballinger, District Judge
District Court Case No. 09-CV4710

BRIEF OF THE APPELLEES IN RESPONSE TO THE APPELLANT'S SUPPLEMENTAL BRIEF

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Argument and Authorities

I. This Court's review is limited to the three issues for which the defendant sought review in his petition, not any of the others he now attempts to re-inject into the case, which were omitted from his petition.

In the Court of Appeals, the defendant raised six issues and eleven sub-issues. In his petition for review, however, he only alleged that the Court of Appeals erred in three ways (Petition for Review ("Pet.Rev.") 1).

The defendant phrased his first issue for review as "Whether the PIK recommended instructions on causation are fundamentally flawed, in that they do not correctly state the law of proximate cause?" (Pet.Rev. 1). He then restated his challenge to the the legal sufficiency of PIK-Civ. 4th 105.01 in this wrongful death case, arguing that the phrase "or contributed" should have been omitted and the Court of Appeals should not have concluded either that no separate causation instruction should be given or that PIK-Civ. 4th 106.01 sufficed (Pet.Rev. pp. 2-8). He now argues this again (Defendant's Supplemental Brief ("Supp.Br.") 1-15). The plaintiffs respond *infra* at 4-19.

The defendant phrased his second and third issues as: "Whether the Court of Appeals erred by failing to address the prejudicial impact of plaintiffs' improper 'Reptile Litigation' arguments in light of the overall theme of plaintiffs' case and applied the wrong legal standard?" or "incorrectly upheld the trial court in allowing expert witnesses to redefine the legal duty of a physician?" (Pet.Rev. 1). He then restated his challenge to the district court allowing the plaintiffs' experts to testify how erring on the side of patient safety was part of the defendant's standard of care he violated, and then erred in allowing the plaintiffs' counsel to comment on that in closing argument (Pet.Rev. 9-15). He now argues this again (Supp.Br. 16-20). The plaintiffs respond *infra* at 20-25.

Besides stating these three issues in his petition, the defendant did not identify any additional issues he wished to have decided if this Court granted review.

But the defendant now re-briefs a host of other issues that are absent from his petition for review. He argues that PIK-Civ. 4th 123.10 was "misleading in failing to extend the requirement of expert testimony to causation" (Supp.Br. 15-16). He attacks the Court of Appeals' conclusion about a closing argument referring to his "partying" (Supp.Br. 17). He presents arguments as to a variety of "evidentiary issues" (Supp.Br. 20-24).

The defendant apparently believes it proper to re-brief the Court on issues external to his petition because "the issues to be reviewed will be considered on the basis of the record and briefs previously filed with the Court of Appeals" (Supp.Br. 1) (quoting Rule 8.03(h)(2)). What he misses is that Rule 8.03(h)(2) simply states *how* the Court will review the issues properly before it. It does not govern *which* issues are to be reviewed.

The defendant is mistaken: in civil cases, Rule 8.03(h)(1) limits the issues for review in this Court to those identified in the petition for review under Rule 8.03(a)(4)(C), either as issues for which review specifically is sought or which the petitioner wishes to be determined if review is granted. Rule 8.03(h)(1) provides that when this Court grants review, "the issues before [it] include **all issues properly before the Court of Appeals *which the petition for review … allege[s] were decided erroneously by the Court of Appeals***." *Id.* (emphasis added).

While the Rule goes on to state that, "In civil cases, the Supreme Court may, but need not, consider other issues that were presented to the Court of Appeals ***and that the parties have preserved for review***" in this Court (emphasis added), this Court has held that

> this preservation depends on the requirement that "[i]n a civil case, the petitioner [filing a petition for review] shall also list, without argument, additional issues decided by the district court that were presented to, but not decided by, the Court of Appeals, which the petitioner wishes to have determined if review is granted."

Law v. Law Co. Bldg. Assocs., 295 Kan. 551, 566, 289 P.3d 1066 (2012) (quoting Rule 8.03(a)(4)(C)).

Either way, review is limited to the issues identified in the petition. *Id.* They can be issues the petition argues the Court of Appeals decided erroneously, or that it says the district court decided that were presented to, but not decided by, the Court of Appeals. *Id.* But there is no review of issues *wholly absent* from the petition for review: "The court will not consider issues not presented or fairly included in the petition." Rule 8.03(a)(4)(C).

Here, the defendant did not identify his argument about PIK-Civ. 4th 123.10 (Supp.Br. 15-16), about "partying" (Supp.Br. 17) or any of his "evidentiary issues" (Supp.Br. 20-24) anywhere in his petition for review. So, those arguments are "not properly before this Court." *State v. Dull*, 302 Kan. 32, 39, 351 P.3d 641 (2015). "One can only speculate on whether this court would have granted review on" them "if [they] had been presented or fairly included in the petition," and the defendant's "omission of" them "from the petition for review denied the [plaintiffs] an opportunity to challenge the propriety of [the Court's] granting review on" them. *State v. Johnson*, 297 Kan. 210, 227-28, 301 P.3d 287 (2013).

Therefore, only the three issues identified in the defendant's petition for review properly are before this Court. The plaintiffs will respond substantively to his supplemental brief as to those three issues only.

II. The district court properly instructed the jury that a party is at fault in a wrongful death medical malpractice case when he is negligent and that negligence caused or contributed to the event which brought about the claims for damages. Causing or contributing to cause the injury is Kansas's longstanding, uniform standard for causation-in-fact in all negligence cases, wrongful death or otherwise.

Standard of Appellate Review

The defendant's supplemental brief does not state any standards of appellate review. As to his challenge to Instruction 12, his brief in the Court of Appeals merely alleged the standard was "unlimited review" (Brief of the Appellant ("Aplt.Br.") 7). In response, the plaintiffs explained how that was insufficient, and fleshed out the full standard, including its harmless error component (Brief of the Appellees ("Aple.Br.") 17).

Whether a district court erred in issuing a jury instruction is subject to a three-step test: (1) "the court uses an unlimited review to determine whether the instruction was legally appropriate;" (2) "the court determines whether there was sufficient evidence, viewed in the light most favorable to the party requesting the instruction, that would have supported the instruction;" and (3) the "court must determine whether the error was harmless, using the test, degree of certainty, and analysis set forth in" *State v. Ward*, 292 Kan. 541, Syl. ¶¶5-6, 256 P.3d 801 (2011). *Foster ex rel. Foster v. Klaumann*, 296 Kan. 295, Syl. ¶1, 294 P.3d 223 (2013).

* * *

The defendant's first issue on review ultimately challenges the district court's use of "contributed to" in Instruction 12, which he acknowledges it took verbatim from PIK-Civ. 4th 105.01 (Supp.Br. 1-15).

First, the defendant challenges the Court of Appeals' reasoning on a similar instructional challenge in *Burnette v. Eubanks*, 52 Kan.App.2d 751,

379 P.3d 372 (2016), another wrongful death medical malpractice case presently before this Court on review (Supp.Br. 1-6). The defendant in *Burnette* is represented by the same counsel as the defendant here. This section of the defendant's supplemental brief *here* appears primarily aimed at shoring up the *Burnette* defendant's supplemental brief, rather than addressing *this* case.

Next, the defendant attacks the Court of Appeals' suggestion that *no* separate fault instruction should have been given (even though it was he who asked for one), and instead the language in PIK-Civ. 4th 106.01 should have been given alone (Supp.Br. 6-8). *See Castleberry v. Debrot*, No. 111105, 2016 WL 1614018 at *8 (Kan. App. 2016) (unpublished). He says this suggestion is incorrect because while 106.01 refers to "fault," it does not instruct on proximate cause itself – i.e., what "fault" is (Supp.Br. 6-8).

Finally, the defendant argues the Court of Appeals used the wrong standard for "harmless" error in holding that even if using a 105.01 instruction was error (because no definition of fault should have been given at all, *see Castleberry*, 2016 WL 1614018 at *8) (Supp.Br. 8-15), any error was harmless. He says the burden-shifting prejudice standard for *constitutional* errors in *criminal* cases should have been applied (Supp.Br. 10-15).

But the actual crux of the defendant's argument that "the PIK recommended instructions on causation … do not correctly state the law of proximate cause" (Pet.Rev. 1), because 105.01 contains "or contributed" language that the wrongful death statute does not include, is mentioned only briefly on just one page of his lengthy discussion (Supp.Br. 3). He argues that "the Kansas legislature, in adopting K.S.A. [§] 60-1901, expressly limited wrongful death actions to circumstances in which a wrongful act *caused* death, as opposed to those in which it *caused or contributed* to it," and that in

stating otherwise the district court here, the PIK Committee, or the Court of Appeals in *Burnette* "rewr[ote] the wrongful death statute" and "rewr[ote] the basic requirements of proximate cause in all tort actions" (Supp.Br. 3).

The defendant's simplistic reading of § 60-1901 is wrong. His notion that in non-death negligence cases, the defendant is at fault when his negligence "caused or contributed to" the plaintiff's injury, but in a wrongful death case it is only when it "caused" the decedent's death, without any notion of contribution, has no basis in either the law of Kansas or Anglo-American law in general. (***And he did not raise it below***. *Infra* at 18.)

The law of Kansas is that if a defendant negligently harmed a victim, the standard is the same regardless of whether his negligence merely injured the victim or, as here, killed her. The PIK instructions on causation properly follow the law, and the jury was correctly instructed on the definition of fault here. The Court should affirm the Court of Appeals' judgment that affirmed the district court's judgment.

A. In a wrongful death case based on a negligence claim, the question of causation for the jury is and always has been whether the defendant's negligence caused or contributed to the event which brought about the claims for damages, just as in a regular, "non-death" negligence case.

The jury's role in assessing fault in any negligence case, wrongful death or otherwise, ***always*** has been to determine whether the defendant's negligence "caused or contributed to the event which brought about the claims for damages." Kansas's wrongful death statutes do not and never have changed this.

"At common law no cause of action existed for wrongful death. In 1846 in England a wrongful death act was enacted, commonly known as Lord Campbell's Act, [the Fatal Accidents Act, 1846, 9 & 10] Vict., ch. 93."

Davidson v. Denning, 259 Kan. 659, 669, 914 P.2d 936 (1996). The point to this statute was to allow for the recovery of damages when a person dies due to another's tort, rather than merely is injured, which at common law made recovery unavailable. *Mason v. Gerin Corp.*, 231 Kan. 718, 720, 647 P.2d 1340 (1982).

That is, the new statute allowed that "an action could be brought on behalf of the heirs if the decedent would have been entitled to maintain an action and recover damages for the injuries if death had not ensued." *Id.* While the heirs' damages in a wrongful death case are different, the legal standards for a given wrongful death claim are the same as those for the tort on which it is predicated. *Id.* at 720-21. Wrongful death simply extends the benefits of tort law to the dead victim's heirs, rather than limiting it to a living victim. *Id.*

Kansas enacted its first wrongful death statute in 1859, two years before statehood. Michael D. Moeller, *Punitive Damages in Wrongful Death Actions: How Will Kansas Respond?* 39 U.KAN.L.REV. 199, 201 (1990). Modeled on Lord Campbell's Act, it specifically provided that the fault standards from ordinary tort law transferred to the wrongful death action:

> whenever the death of a person shall be caused by wrongful act, neglect or default, ***and the act, neglect or default is such as could, if death had not ensued, have entitled the party injured, to maintain an action and recover damages in respect thereof***, then, and ***in every such case***, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured ….

1859 Kan. Sess. L. ch. 1. (emphasis added).

This fundamental principle has remained unchanged for the nearly 160 years since that 1859 enactment. The present version of the statute,

K.S.A. § 60-1901(a) (the section on which the defendant relies here), likewise provides,

> If the death of a person is caused by the wrongful act or omission of another, an action may be maintained for the damages resulting therefrom ***if the former might have maintained the action had such person lived***, in accordance with the provisions of this article, against the wrongdoer, or such wrongdoer's personal representative if such wrongdoer is deceased.

(Emphasis added).

Contrary to the defendant's argument, this does not and never has *changed* the ordinary standards of negligence, causation, fault, or any other substantive portion of a tort action. Instead, the plain language of both the 1859 and 2017 versions of the statute takes the action that the deceased "could have" (1859) or "might have" (2017) maintained against the defendant had he not died, and gives it to his heirs. It does not limit it further.

In a negligence action, even when comparative fault is not at issue, the standard for whether the defendant is at fault *always* has been at the outset whether his action caused *or contributed* to cause the injury:

> The plaintiff bears the burden of proving the necessary causation and normally in medical malpractice cases, this court has described the duty in general terms, merely stating there must be a causal connection between the negligent act and the injury or that the act caused or contributed to the injury. In a medical malpractice action, … 1. "**A party is at fault when he is negligent and his negligence caused *or contributed* to the event which brought about the injury or damages for which the claim is made**." … 2. "A negligent act is the proximate cause of an injury only when the injury is the natural and probable consequence of the wrongful act."

Sharples v. Roberts, 249 Kan. 286, 295, 816 P.2d 390 (1991) (quoting *Allman v. Holleman*, 233 Kan. 781, Syl. ¶¶4-5, 667 P.2d 296 (1983)) (emphasis added) (internal citations omitted).

In *Sharples* and *Allman*, no comparative fault was at issue, but this still was the law. This is because it *always* has been the law in negligence cases from the very earliest common law, even in the days long before comparative fault: "It is only such negligence as ***caused or contributed to the injury*** complained of in the petition that makes the defendant liable; and even this will not render the defendant liable unless it is the kind of negligence complained of by the plaintiff …." *Leavenworth, Lawrence & Galveston R.R. Co. v. Rice*, 10 Kan. 426, 428 (1872) (emphasis added).

And because the wrongful death statute merely transfers over these principles from ordinary negligence cases involving living victims without changing their substance, these principles always have been the law of Kansas in wrongful death cases, too. *See, e.g.*:

- *Puckett v. Mt. Carmel Regional Med. Ctr.*, 290 Kan. 406, Syl. ¶8, 420-21, 228 P.3d 1048 (2010) (outlining application of ordinary negligence causation principles to wrongful death case, without change);
- *Zak v. Riffel*, 34 Kan.App.2d 93, Syl. ¶2, 101, 115 P.3d 165 (2005) (in medical malpractice wrongful death case, "[a] party is at fault when he or she is negligent and that negligence ***caused or contributed*** to the event which brought about the injury or damages");
- *Reynolds v. Kan. Dept. of Transp.*, 273 Kan. 261, 805, 43 P.3d 799 (2002) (in wrongful death case alleging negligence in not repairing fence, allowing cow to enter road and be struck by car, "the jury was correctly instructed that '[a] party is at fault when he or she is negligent and that negligence ***caused or contributed*** to the event which brought about the injury or damages for which claim is made'");
- *Rogers v. Omega Concrete Sys., Inc.*, 20 Kan.App.2d 1, 7, 883 P.2d 1204 (1994) (in wrongful death case alleging that defendant's failure to

maintain private road caused fatal accident, evidence had to prove "road defects which ***caused or contributed*** to the accident in question"; no comparative fault at issue);

- *Smith v. Printup*, 254 Kan. 315, 345-48, 866 P.2d 985 (1993) (in wrongful death case involving collision with truck, truck driver only could be at fault from negligence in using alcohol, violating safety regulations, or driving while fatigued if these conducts "***caused or contributed*** to the accident"; no comparative fault at issue);
- *Hammig v. Ford*, 246 Kan. 70, 74-75, 785 P.2d 977 (1990) (in wrongful death case involving vehicle collision, plaintiff had to prove defendant's "action or inaction ***caused or contributed to cause*** the fatal collision"; no comparative fault at issue);
- *Allman*, 233 Kan. at 781, Syl. ¶4, 785 (in wrongful death case, "[a] party is at fault when he is negligent and his negligence ***caused or contributed to*** the event which brought about the injury or damages for which the claim is made;" approving of a jury instruction stating so; no comparative fault at issue);
- *Hendrix v. City of Topeka*, 231 Kan. 113, 123, 643 P.2d 129 (1982) (in wrongful death action against police officer, plaintiff had to establish that officer's "breach of some special duty owed decedent ***caused or contributed to*** his death"; no comparative fault at issue);
- *Lindquist v. Ayerst Labs., Inc.*, 227 Kan. 308, 319, 607 P.2d 1339 (1980) (in wrongful death product liability action against drug manufacturer, jury correctly was instructed that to find manufacturer liable it had to find the "defect ***caused or contributed to*** the death of" the decedent; no comparative fault at issue);

- *Hendren v. Ken-Mark Airpark, Inc.*, 191 Kan. 550, 557, 382 P.2d 288 (1963) (in wrongful death case stemming from plane crash, whether plaintiff's claims of airport's negligence "***caused or contributed to*** the death" were "issues for determination by the jury"; predates Kansas's 1974 adoption of comparative fault);
- *Duran v. Mission Mortuary*, 174 Kan. 565, 572, 258 P.2d 241 (1953) (in wrongful death case against police officer for fatal automobile collision, jury was correctly instructed to find "whether any act of [the defendant] ***caused or contributed to cause***" the incident); and
- *Union Pac. R.R. Co. v. Brown*, 73 Kan. 233, 84 P. 1026, 1027 (1906) (in wrongful death case against railroad after decedent fell from train, plaintiff had to prove "death was ***caused or contributed to*** by any wrongful act on the part of" railroad – that "fault … in the running or management of the train … ***caused or contributed to*** the accident").

Simply put, the defendant's notion that "K.S.A. 60-1901, expressly limited wrongful death actions to circumstances in which a wrongful act *caused* death, as opposed to those in which it *caused or contributed* to it" (Supp.Br. 3) ***is wrong***. It has no basis in the law of Kansas or anywhere else.

B. "Whether the defendant's negligence caused or contributed to the event which brought about the claims for damages," *is* "but-for" causation, and is the question for the jury; whether there was sufficient evidence of "proximate cause," or "legal cause," is a question of law for the court, which the defendant has not raised because he cannot meet it.

Drilling down a bit further into the standards for negligence, which § 60-1901(a) and its predecessors port over to a wrongful death case stemming from a negligence claim, it is easy to see just *why* the defendant is wrong.

The defendant's argument is that the "or contributed" language in Instruction 12 functionally eliminated the requirement that the jury find "but-for" causation because "or contributed" encompasses causes that merely contributed to, but did not proximately cause, the death (Supp.Br. 2, 4-5, 8).

The defendant's argument is confused. Negligence that "caused or contributed to cause" the victim's injury or death ***is*** but-for causation. Temporally, there were many "causes" of Mrs. Castleberry's death. It was she, after all, who had the physical conditions that led to her stroke, without which she obviously would not have had the stroke.

But that is not the question in but-for causation. Rather, the question is whether, *but for* the defendant's negligence in failing to diagnose or treat Mrs. Castleberry's impending stroke when any reasonable physician obeying the standard of care would have, would she have suffered the stroke and died? That is, was the defendant's negligence a ***contributing cause*** of her death? As in all the cases discussed *supra*, that is what the jury had to be instructed on here, and what the district court did instruct. And plainly, viewing the evidence in the light most favorable to the jury's verdict, the defendant's negligence *did* cause or contribute to cause her death.

To succeed on a claim for wrongful death due to medical malpractice, a plaintiff must establish: "(1) [t]he health care provider owed the patient a duty of care and was required to meet or exceed a certain standard of care to protect the patient from injury; (2) the provider breached this duty or deviated from the applicable standard of care; (3) the patient" died; "and (4) the [death] ***proximately resulted*** from the breach of the standard of care." *Drouhard-Nordhus v. Rosenquist*, 301 Kan. 618, 623, 345 P.3d 281 (2015).

Proximate cause is "a cause that 'in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without

which the injury would not have occurred, the injury being the natural and probable consequence of the wrongful act.'" *Id.* (citation omitted). There are two components of proximate cause: (1) "***causation in fact***" (or "but-for" causation) – as indicated by the language "produces the injury and without which the injury would not have occurred;" and (2) "***legal causation***" – as indicated by the language "the injury being the natural and probable consequence of the wrongful act." *Id.* (emphasis added).

First, the language "produces the injury and without which the injury would not have occurred" goes to "but-for" causation, or "cause-in-fact," a question for the jury. "To establish cause in fact [*sic*], a plaintiff must prove a cause-and-effect relationship between a defendant's conduct and the plaintiff's loss by presenting sufficient evidence from which a jury can conclude that more likely than not, ***but for defendant's conduct, the plaintiff's injuries would not have occurred***." *Id.* (emphasis added). In other words, "[i]f the harm would not have occurred 'but for' [the] action, cause-in-fact exists." Steven Plitt & Steven J. Gross, CLAIM ADJUSTER'S AUTO. LIAB. HANDBOOK § 8:4 (West: Sept. 2016).

This easily is illustrated by applying the "but-for" test to the following hypothetical:

> If a child asks her mother to drive her two blocks to school because it is cold outside, and while doing so the mother's car slides into another car on the ice, the child could be said to be the "cause" of the accident. ***The accident would not have happened if the child had not made the request.***
>
> While there was nothing improper about the child requesting a ride to school, "***but for" the request, the accident may not have occurred***. The child's request is, therefore, the "cause-in-fact" of the accident.

Id. (emphasis added).

From this hypothetical, there plainly ***always*** will be more than one "cause-in-fact" for any injury. "But for" the ice, the accident would not have occurred. "But for" the child having been born, allowing the child to make the request, the accident would not have occurred. "But for" the mother deciding to grant the child's request and drive the car, the accident would not have occurred. "But for" the other driver also deciding to drive an automobile at the same time and place, the accident would not have occurred.

This is why the law ***also*** requires a plaintiff to establish "legal cause": to avoid exactly the problem the defendant seems to fear here, that the defendant could be found to be at fault for any infinitesimally small "contribution," however minute or remote. "For purposes of proximate cause, … the inquiry must go beyond this 'but for' analysis; the damages sustained must also be an ordinary and natural consequence of the wrongful conduct." *Zimmerman v. Brown*, 49 Kan.App.2d 143, 157, 306 P.3d 306 (2013) (same).

"To prove legal causation, the plaintiff must show it was foreseeable that the defendant's conduct might create a risk of harm to the victim and that the result of that conduct and contributing causes was foreseeable." *Drouhard-Nordhus*, 301 Kan. at 623, 345 P.3d 281 (emphasis added).

> Legal cause limits the scope of liability to the consequences of the actor's conduct that ***bears a reasonable relationship to the risk***. Therefore, even when "but-for" causation is present, negligence cannot exist unless the actor's conduct is also the legal cause of plaintiff's injuries. A legal cause analysis is narrower in scope than "cause-in-fact" or "but for" causation. …
>
> Legal cause is not determined by a set of bright line rules. ***It is fact specific and is determined by mixed considerations which include logic, public policy, common sense, state law precedent, and justice***. One court has explained "legal cause" serves to place limits upon the liability that flows from negligent conduct. The scope of legal cause represents a policy decision by which it is determined how far removed an effect

> may be from its "cause in-fact" and still be considered the proximate cause of injury.

Plitt & Gross, *supra* at § 8.4.

Legal cause "stems from policy considerations that serve to place manageable limits upon the liability that flows from negligent conduct." 57A AM.JUR.2D *Negligence* § 411. It is "primarily a [question] of law," ***not fact***, "depend[ing] essentially on whether the policy of the law will extend the responsibility for the negligent conduct to the consequences which have in fact occurred." *Id.* at § 412. It requires "that ***the injury was foreseen, or that it reasonably should have been foreseen, as the natural and probable result of the negligence***." And it "is a limitation the law imposes upon the right to recover for the consequences of a negligent act." *Id.* at §§ 413, 415. Therefore, where an injury is too "remote" or "separated from the negligence in time, place, or sequence of events," the defendant is not liable even if it "would not have occurred" but for his negligence. *Id.* at § 416.

"***The law does not require that negligence of the defendant must be the sole cause of the injury*** complained of … all that is required is that the negligence in question shall be ***'a'*** proximate cause of the injury." *Id.* at § 417 (emphasis added). "[A] defendant's negligence does not have to be the sole proximate cause of the plaintiff's injury; instead, the plaintiff must prove that defendant's negligence was ***at least one of the proximate causes of the injury***." 65 C.J.S. *Negligence* § 219 (emphasis added).

So, in determining "but-for" causation, the jury must determine whether the defendant is at fault because his negligence is ***the*** cause or is ***one of*** the causes (a contributing cause) of the injury, and then award damages accordingly. As the Court of Appeals studiously put it in *Burnette*, just like in any other negligence case "[a] party who contributes to a wrongful

death is a cause of that death as contemplated by the wrongful death statute," and "a contributing cause is a cause as the term is used in the wrongful death statute …." 52 Kan.App.2d at 751, Syl. ¶1, 759, 379 P.3d 372.

Then, as a safeguard against the jury holding the defendant liable for an infinitesimally small contribution that could not be a legal cause, it is a question of law whether the evidence of the defendant's contribution to the injury was sufficient to prove that it also was a legal cause of the injury: that the injury was "an ordinary and natural consequence of the wrongful conduct." *Zimmerman*, 49 Kan.App.2d at 157, 306 P.3d 306. This is a question for the courts as to the sufficiency of the evidence. *Id.*

Here, the defendant never argued before the Court of Appeals, and does not argue now, that there was insufficient evidence either that his negligence caused or contributed to cause Mrs. Castleberry's death, or that he should have been granted a directed verdict or JNOV because the evidence of his contribution to Mrs. Castleberry's death was insufficient to prove a legal cause. This is, of course, because viewing the evidence in a light most favorable to the verdict, the evidence supported that his failure to test for or diagnose Mrs. Castleberry's obviously impending stroke ***was*** both a cause-in-fact and legal cause of her death.

So, the defendant has it backwards. Whether his conduct "caused or contributed to cause" Mrs. Castleberry's death *is* "but-for" causation, and as in every prior wrongful death case analyzing this in the history of Kansas, the jury properly was instructed on its role to determine that.

If the defendant wanted to argue that his contribution was insufficient to constitute legal cause, he could have. He did not, because he could not.

Instead, the defendant attempts to obtain a drastic change in Kansas law, overruling over a century of precedent, in the guise of a statutory-

interpretation argument. This is without merit. Today, just as in 1859 when the Territorial Legislature passed the first Kansas wrongful death statute, just as in 1906 when this Court in *Brown* first analyzed negligence fault principles under it, and just as in 1983 when this Court in *Allman* held directly that in a wrongful death case involving no comparative fault "[a] party is at fault when he is negligent and his negligence ***caused or contributed to*** the event which brought about the injury or damages for which the claim is made," the law of Kansas is, always has been, and from § 60-1901's plain language must be that this principle of ordinary negligence applies equally to a wrongful death action based on a claim of negligence.

This is the uniform law of Kansas, without deviation over the state's entire history. The defendant's overly simplistic request to change it cannot stand. His attempt to make it harder for the plaintiffs to prove fault for his having killed Mrs. Castleberry than if he merely had paralyzed her must fail.

C. Both PIK and the instructions in this case correctly state the law of causation governing the jury's verdict.

Given Kansas's uniform law of causation in wrongful-death negligence cases, the answer to the question the defendant's first issue on review poses – "Whether the PIK recommended instructions on causation are fundamentally flawed, in that they do not correctly state the law of proximate cause" – must be a resounding "No." His underlying challenge to the giving of Instruction 12, the 105.01 instruction, in this case, likewise must fail.

PIK-Civ. 4th 123.01 defines the duty at issue in a medical malpractice case and what constitutes negligence in that context:

> A [physician] has a duty to use the learning and skill ordinarily used by other members of that same field of medicine in the same or similar communities and circumstances. In using this learning and skill, the [physician] must also use ordinary care and diligence. ***A violation of this duty is negligence.***

This was given here as Instruction 7 (R.59 at 101) (emphasis added).

Next, PIK-Civ. 4th 123.10 refines this further by explaining the standard to be used in determining whether *the physician* violated his duty, instructing the jury that the standard of care depends on expert testimony. This was given here as Instruction 8 (R.59 at 102).

Next, PIK-Civ. 4th 106.01, which "must be given in every case" and must be "adapted to fit the issues in a particular case," *Notes on Use*, addresses the plaintiff's burden to prove his claim of negligence, listing out the plaintiff's claims and his burden to prove they are more probably true than not. This was given here as Instruction 10 (R.59 at 104-05).

Finally, on the defendant's suggestion, the parties agreed the jury also should be instructed on the meaning of "fault" in 106.01, that is, on causation (R.42 at 146-52). PIK's only definition of this is in 105.01: "A party is at fault when he or she is negligent and that negligence caused or contributed to the event which brought about the claim(s) for damages." Indeed, it was the defendant who first suggested using 105.01 (R.42 at 151).

The defendant merely objected to 105.01's use of "contributed." His counsel stated, "I will, as in every case I've tried, object to the inclusion of the word 'contributed,' because … it implies to the jury that any slight connection is adequate, and that's simply not the law" (R.42 at 149, 155). ***He did not make an argument that § 60-1901 disallowed it in wrongful death cases***, merely that *no* negligence case should use it. The court overruled the objection and issued the exact language from 105.01 as Instruction 12, below a notation that negligence was defined in Instruction 7 (R.59 at 107). The defendant's actual argument on appeal is not preserved.

Regardless, the defendant simply is wrong. *Supra* at 6-17. He ***was*** at fault if his negligence caused ***or contributed*** to the stroke that led to Mrs.

Castleberry's death. *Supra* at 11-17. If his concern is that the contribution the evidence showed was a slight connection to the injury that was legally inadequate, he could have tried to argue that to the district court, the Court of Appeals, and this Court. He did not, because the evidence that Mrs. Castleberry's death was the natural and foreseeable cause of his negligence in failing to treat her obviously impending stroke was overwhelming.

The defendant also briefly says that PIK-Civ. 4th 191.11, which he says "contains the PIK Committee's illustrative instructions for medical malpractice," supports his argument because its version of 106.01 uses a phrase that contains the word "caused" without the word "contributed" (Supp.Br. 6-7). But 191.11 *is not* an "illustrative set of instructions" for ***all*** medical malpractice cases, but instead expressly only is for *comparative fault* medical malpractice cases with "two defendants" and an allegation that the plaintiff comparatively was at fault because he "was negligent in failing to follow medical advice." *Id.* As the defendant states repeatedly, this case did not involve comparative fault. So, 191.11 simply does not apply.

The PIK instructions applicable to medical malpractice cases correctly state Kansas's longstanding, uniform law of negligence and causation that applies equally in both ordinary negligence cases where the patient survived the physician's tortious conduct and wrongful death negligence cases where, as here, the physician killed his patient. And as the defendant is forced to admit (Aplt.Br. 9), the instructions issued in this case followed PIK verbatim.

Instruction 12 was entirely proper. The district court did not err in any way. This Court should affirm the Court of Appeals' judgment that affirmed the district court's judgment.

III. The Court of Appeals correctly found Dr. Debrot failed to preserve his argument that the district court should have prevented the plaintiffs' expert from discussing the importance of patient safety as a component of the standard of care, and it correctly affirmed the district court's discretion to allow expert witnesses to state the physician's standard of care and counsel to comment to the jury on that testimony in closing argument.

Standard of Appellate Review

The defendant's second and third issues are really one. The third (Supp.Br. 18-20) restates his challenge to the plaintiffs' medical expert's testimony that adhering to a margin of patient safety, erring on the side of patient safety, and not needlessly endangering the patient all were components of the standard of care the defendant had to obey, he breached those aspects of it in treating Mrs. Castleberry, and those breaches injured her (Aplt.Br. 27-28). The second issue (Supp.Br. 16-18) rehashes his challenge to the district court allowing the plaintiffs' counsel to make one comment to the jury on this evidence (Aplt.Br. 17).

The defendant's supplemental brief does not suggest any standard of appellate review for these issues – indeed, he does not cite any authority at all for either issue. In the Court of Appeals, however, and citing no applicable authority, he insisted that both the district court's control of statements in closing arguments and its decision to admit evidence are questions of law "subject to unlimited review" (Aplt.Br. 15, 27). The plaintiffs explained in response, citing decisions on-point, that these issues were reviewed only for the "reasonable person" prong of abuse of discretion review – that is, that "no reasonable person would take the view adopted by the district court" (Aple.Br. 25, 32) (citations omitted).

* * *

A. The defendant's third issue – challenging the expert witnesses' statements of how safety margins were a component of the defendant's standard of care – is not preserved because he failed to object timely and did not lodge a standing objection.

In his "third issue" – his challenge to the district court allowing the plaintiffs' expert, Dr. Miser, to testify as to how a margin of patient safety was part of the defendant's standard of care, which the defendant breached as to Mrs. Castleberry, injuring her – the defendant omits entirely that the Court of Appeals held it was not preserved in the first place.

The plaintiffs explained this at length in their brief (Aple.Br. 32-36). And the Court of Appeals agreed:

> Although the defendant cites to six specific objections he made at trial regarding comments and testimony relating to "safety" or whether a physician's actions must be within "a margin of safety," ***the record reflects numerous other occasions where similar evidence was introduced into evidence without objection. Indeed, Dr. Miser testified repeatedly, without objection, that the standard of care required the defendant to take "safety steps," that safety was "the number one factor in treating people," that the standard of care required the defendant to have good reason to "deviate from these safety rules" and fail to obey "safety features," and that the standard of care involved "the safe practice of medicine***." We find no evidence in the record to suggest that the defendant lodged a standing objection at trial to any and all evidence indicating that patient safety may be a component of the defendant's standard of care. And the defendant appears to concede that defense counsel was not completely consistent in making objections at trial. As a result, the ***defendant's claim that he suffered prejudice as a result of the specific testimony about which he now complains is disingenuous given the volume of similar evidence that was admitted without any objection***.

Castleberry, 2016 WL 1614018 at *14 (emphasis added).

On the day he testified, Dr. Miser referred to "safety" as part of the standard of care at least ***28 times***, with nothing more than an occasional,

sporadic "objection as to form" from the defendant (R. 34 at 84, 89, 95, 97, 129-31, 147, 195-97, 235-36). In fact, he did not even ***mention*** his suspicion of a so-called "Reptile" strategy or object to the discussion of "safety" before or during the parties' cases-in-chief (R. 48 at 23-24). Instead, he raised this issue for the first time at the instructions conference ***after*** the close of all evidence (R. 43 at 162-63).

The law of Kansas does not allow this. *State v. King*, 288 Kan. 333, 348, 204 P.3d 585 (2009); *State v. Inkelaar*, 293 Kan. 414, 421, 264 P.3d 81 (2011). Accordingly, as the Court of Appeals observed, the defendant waived his challenge to this evidence on appeal.

B. The plaintiffs' expert did not "redefine the legal duty of a physician;" he testified as to the standard of care, a pure question of fact for expert testimony.

If the defendant's challenge to the experts' testimony somehow is preserved, then it is without merit, just as the Court of Appeals held. He complains that the plaintiffs' experts "attempt[ed] to create a new "legal" standard in the minds of the jury" that "it is the duty of a physician to take the 'safest' possible approach to any medical issue" (Supp.Br. 18).

This is untrue. First, no expert testified a physician has a "duty to take the safest possible approach to any medical issue," nor does the defendant point to any such testimony (Supp.Br. 18-20). Instead, one expert, Dr. Miser, testified that a family practice physician like the defendant "must provide a margin of safety" as part of his standard of care, the defendant should not have skipped a particular step because it was "a safety step," certain guidelines could not have been ignored "if you're having safety as the number one factor in treating people," "you have to have a really good reason" to "deviate from [the] safety rules," certain guidelines were a "safety feature,"

and "a doctor may never needlessly endanger a patient" (R. 34 at 84, 95, 96, 97, 129). Dr. Miser testified the defendant violated the standard of care by needlessly endangering Mrs. Castleberry's life, not using "any margin of safety," and because early treatment of a possible stroke, which the defendant failed, was part of the "safety standard" (R. 34 at 129, 130-31).

That is a far cry from saying, "a physician has a duty to take the safest possible approach." And if the defendant had the concern that this is what the physician was suggesting, and that was not supported by medical expertise, he could have asked Dr. Miser about that in cross-examination. He did not (R.35 at 64-137, 155-56, 158-59).

Second, and as the Court of Appeals recognized, *Castleberry*, 2016 WL 1614018 at *15, the standard of care – what Dr. Miser was testifying about regarding safety and not needlessly endangering a patient – was a question of *fact* that was entirely the purview of expert witnesses, ***not*** a legal standard. While "whether a duty exists is a question of law," "[t]he standard of medical … care that is to be applied in any given case is not a rule of law, but" one of *fact* "to be established by the testimony of competent medical experts." *Nold v. Binyon*, 272 Kan. 87, Syl. ¶¶6-7, 31 P.3d 274 (2001).

Effectively, what the defendant *really* wanted was a directed verdict that the applicable standard of care did not have anything to do with patient safety or not needlessly endangering a patient. But so long as an expert is willing to testify that something is or is not part of the standard of care, a directed verdict on that question always is improper:

> A central issue in a medical malpractice action is the standard of care against which the medical professionals' alleged negligence is judged. It is the plaintiff's burden to prove by a preponderance of the evidence that the defendant deviated from the standard of care. Of course, this requires proof of the

> applicable standard of care. A deviation from the standard of care constitutes professional negligence, which must be proved by expert testimony. [W]hether a medical professional deviated from the standard of care is a question of fact for the jury.

Hardy v. Cordero, 399 Ill.App.3d 1126, 1131, 929 N.E.2d 22 (2010).

So, when an expert testifies the standard of care involves X, it "create[s] questions of fact for the jury to resolve as to what the exact standard of care was … and whether [the defendant] violated the standard of care." *Id.* A district court cannot direct a verdict on this issue. *Id.* If the defendant's expert could rebut Dr. Miser's testimony, so be it. Who to believe would be a question for the jury. *Id.* But it was not up to the court. *Id.*

Eight federal district courts have heard arguments about a supposed "Reptile" strategy like the defendant's argument here and, largely echoing the concerns of the Illinois Appellate Court in *Hardy*, ***uniformly denied them all***. *See Brooks v. Caterpillar Global Mining Am.*, No. 4:14CV-00022-JHM, 2017 WL 3401476 at *8 (W.D.Ky. Aug. 8, 2017) (denying as to "safety"); *Bostick v. State Farm Mut. Auto. Ins. Co.*, No. 8:16-cv-1400-T-33AAS, 2017 WL 3123636 at *2 (M.D.Fla. July 21, 2017); *Phillips v. Dull*, No. 2:13-cv-384-PMW, 2017 WL 2539759 at *3 (D.Utah June 12, 2017); *Randolph v. QuikTrip Corp.*, No. 16-1063-JPO, 2017 WL 2214932 at *4-5 (D.Kan. May 18, 2017); *Turner v. Salem*, No. 3:14-CV-289-DCK, 2016 WL 4083225 at *2-3 (W.D.N.C. July 29, 2016); *Cameron v. Werner Enters.*, No. 2:13-CV-243-KS-JCG, 2016 WL 3030181 at *5 (S.D.Miss. May 25, 2016); *Coleman v. Home Depot U.S.A., Inc.*, No. 1:15-cv-21555-UU, 2016 WL 4543119 at *1 (S.D.Fla. Feb. 9, 2016); *Hensley v. Methodist Healthcare Hosps.*, 13-2436-STA-CGC, 2015 WL 5076982 at *4-5 (W.D.Tenn. Aug. 27, 2015).

If the defendant's argument is in any way preserved, this Court should do the same here.

C. The plaintiffs' counsel had wide latitude in discussing the unobjected-to evidence that the defendant violated the standard of care by needlessly endangering Mrs. Castleberry in failing to perform simple tests to diagnose and treat her stroke symptoms, causing her injury.

The defendant complains that the district court overruled his objection to the plaintiffs' counsel stating, "When we establish standards of care ***in this case***, as a jury you'll want to decide if you want safe medicine or unsafe medicine" (Aplt.Br. 16-17) (emphasis added).

The problem with his argument is that, given Dr. Miser's unobjected-to testimony that the defendant violated the standard of care in this case in part by practicing unsafe medicine on Mrs. Castleberry, the plaintiffs had wide latitude in discussing and commenting on it to the jury, and this latitude lay "largely within the discretion of the trial court." *Skelly Oil Co. v. Urban Renewal Agency of City of Topeka*, 211 Kan. 804, 807, 508 P.2d 954 (1973). Their "[c]ounsel [was] entitled to comment freely upon the evidence … and to state [his] own views concerning the evidence." *Taylor v. F.W. Woolworth & Co.*, 151 Kan. 233, 98 P.2d 114, 118 (1940).

Counsel's argument that the jury was being asked to decide between safe and unsafe medicine ***in this case*** was entirely proper and germane, given the evidence. He was not arguing to the jury that they somehow were the arbiters of whether all physicians would practice safe or unsafe medicine in the future. And it certainly cannot be said that no reasonable person could take the district court's view in allowing this comment.

Conclusion

The Court should affirm the Court of Appeals' judgment, which affirmed the district court's judgment.

Respectfully submitted,

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Certificate of Service

I certify that, on August 20, 2017, I electronically filed the foregoing with the Clerk of the Court by using the electronic filing system, which will send notice of electronic filing to the following, that I mailed two true and accurate copies of the foregoing to the following, and that I e-mailed a true and accurate Adobe PDF copy of the foregoing to the following:

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