NOT DESIGNATED FOR PUBLICATION

No. 111,105

IN THE COURT OF APPEALS 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,
Appellees,

v.

BRIAN L. DEBROT, M.D.,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; RICHARD T. BALLINGER, judge. Opinion filed April 22, 2016. Affirmed.

Steven C. Day and *Christopher S. Cole*, of Woodard, Hernandez, Roth & Day, LLC, of Wichita, for appellant.

Jonathan Sternberg, of Jonathan Sternberg, Attorney, P.C., of Kansas City, Missouri, and *Larry Wall* and *Tina Huntington*, of Wall Huntington Trial Law, of Wichita, for appellees.

Before ARNOLD-BURGER, P.J, GREEN and STANDRIDGE, JJ.

Per Curiam: The surviving family of Barbara Mae Castleberry (plaintiffs) filed a medical malpractice suit against Barbara's physician, Dr. Brian L. DeBrot (defendant), alleging that he was negligent in providing medical care which resulted in Barbara's stroke and, ultimately, her death. A jury awarded damages to the plaintiffs after unanimously finding the defendant was negligent. On appeal, the defendant alleges a multitude of errors that individually and cumulatively require this court to reverse the

jury's verdict. For the reasons stated below, we disagree and therefore affirm the jury's finding that the defendant was negligent.

FACTS

On January 9, 2007, 72-year-old Barbara and her husband, Douglas, met with their new primary care physician, Dr. Ely Gadalla, at the Galichia Medical Center in Wichita. At this appointment, Barbara had high blood pressure and complained of abdominal pain, heartburn, acid reflux, and difficulty swallowing. When Barbara saw Dr. Gadalla again on January 17, 2007, her blood pressure was slightly lower, but she still had abdominal pain. After testing revealed the presence of stomach ulcers, Dr. Gadalla prescribed medication for the ulcers and advised Barbara not to take aspirin or ibuprofen for 2 to 3 months.

On March 8, 2007, Barbara returned to the medical center for a checkup, where she saw another physician, Dr. David Kirk. Barbara's abdominal pain was gone, but she complained of headaches and stress in her eyes. Dr. Kirk diagnosed Barbara with hypertension and Barrett's esophagitis, a condition caused by chronic acid reflux. Dr. Kirk next saw Barbara on June 14, 2007. At this time, Barbara's blood pressure had increased, and she complained of occasional abdominal pain and numbness in her feet. Dr. Kirk diagnosed Barbara with inflammation of the stomach and esophagus and prescribed medication for that and her blood pressure.

On August 10, 2007, Barbara went to the medical center for treatment of an insect bite on her left foot and saw the defendant for the first time. In addition to pain and swelling from the insect bite, Barbara exhibited high blood pressure and complained of blurred vision. The defendant prescribed antibiotics for Barbara's insect bite.

On October 9, 2007, Barbara returned to the medical center and saw the defendant. She complained mainly of hypertension and abdominal pain but also complained of fatigue and numbness or tingling in her feet. The record indicates that the defendant did not assess or treat Barbara's complaints regarding fatigue or foot numbness.

On November 9 or 10, 2007, Barbara fell at her son's house. The emergency room records reflect that Barbara complained of pain in her right foot and knee. Barbara saw the defendant on November 15, 2007, for a follow-up visit, where she complained mainly of joint pain but also of blurred vision. The defendant assessed Barbara's hypertension, high cholesterol, Barrett's esophagitis, and right ankle pain and then advised her to return in 5 months.

But Barbara returned to see the defendant on December 6, 2007, to report that she was experiencing increasing numbness and tingling in her left hand on a daily basis. Barbara also complained of dizziness and difficulty picking things up and turning pages. The medical records reflect that Barbara's blood pressure was high when taken. According to Douglas, Barbara asked the defendant if her symptoms could be related to a stroke, and the defendant responded that the underlying cause of her symptoms were not as serious as a stroke. The defendant diagnosed Barbara with carpal tunnel syndrome and referred her to an orthopedic specialist. It does not appear that the defendant assessed or treated Barbara's complaints of dizziness at this visit.

Barbara went to see an orthopedic specialist as directed. After examining her, the orthopedic specialist confirmed the defendant's carpal tunnel diagnosis and provided Barbara with a splint and medication. Despite this treatment, Barbara did not feel that her condition was improving. In fact, Barbara reported that she continued to experience tingling and numbness in her hand on a daily basis. According to Douglas, Barbara had done a lot of reading about her symptoms and was concerned that "she might be having something to do with a stroke."

On December 19, 2007, Barbara saw the defendant again. Barbara's blood pressure was much higher than it had been at previous appointments. She complained of blurred vision; headache; swelling, numbness, and tingling in her left hand and wrist; pain and joint discomfort in her left hand and wrist; dizziness; and constipation. Barbara also advised that she was experiencing certain psychological issues, including nervousness, tension, stress, anxiety, depression, and personality changes. The defendant noted that Barbara's left hand was "worse" than before. He made no change in Barbara's hypertension treatment and did not assess or treat her blurred vision, dizziness, or psychological issues. According to Douglas, Barbara voiced her concerns about stroke directly to the defendant, who reiterated his belief that it was not that serious, that she was suffering from carpal tunnel syndrome, and that she just needed to give it more time.

The next day, December 20, 2007, Barbara suffered a stroke that caused incurable pain, left side paralysis, weakness, and loss of muscle tone and endurance. As a result of the stroke, Barbara lost the ability to independently walk, dress herself, go to the bathroom, or feed herself. Barbara's pain medications caused gastrointestinal upset and constipation and left her semiconscious and unable to communicate with family.

Over 1 year later, on January 27, 2009, Barbara suffered an accidental fall at her home and was transported to the hospital by emergency personnel. She was given a "very poor" prognosis after a CT scan revealed a subdural hemorrhage. One of Barbara's medications, a blood thinner prescribed to reduce the risk of another stroke, contributed to the seriousness of Barbara's head injury. As a result of this trauma, Barbara passed away on January 29, 2009.

On December 3, 2009, the plaintiffs filed a wrongful death action against the defendant, raising claims of negligence, pain and suffering, loss of chance of recovery and survival, and loss of consortium.

At trial, both parties relied on expert testimony. The plaintiffs called two experts to support their claims that the defendant breached his duty to provide reasonable care in treating Barbara on December 6 and 19, 2007, and that this breach caused her injury and death. The plaintiffs' first expert, Dr. Frank Yatsu, had been a neurologist for 47 years. He was a professor of neurology, the director of the World Health Organization's Global Stroke Initiative, and was "a recognized stroke expert." Dr. Yatsu passed away prior to trial, so portions of his deposition were read into the record for the jury. Dr. Yatsu defined the standard of reasonable care as "the standards of a community of medical practitioners in diagnosis and workup and treatment of disorders." He stated that the issue in this case was whether, given Barbara's symptoms, the defendant should have recognized that she was in danger of having a stroke. Dr. Yatsu concluded that the defendant departed from the standard of care during Barbara's two visits in December 2007. Dr. Yatsu explained that Barbara's complaints of dizziness and increased numbness and tingling in her left hand should have led the defendant to diagnose a transient ischemic attack (TIA), or "mini-stroke," on December 6 or 19, given Barbara's age, hypertension, and hyperlipidaemia. Dr. Yatsu also expressed concern that the defendant did not document or address Barbara's complaints of dizziness, blurred vision, and psychological issues, as it did not make sense to pass these symptoms off as part of her wrist pain. Dr. Yatsu testified that if Barbara had been treated for TIA or stroke on December 6 or 19, 2007, it was more probable than not that the stroke on December 20, 2009, could have been avoided. Dr. Yatsu stated that the defendant could have performed a simple, noninvasive screening test by listening to Barbara's carotid artery for bruits or blockages and ordered carotid duplex ultrasound testing, which would have revealed that she had a stenosis that could lead to stroke. Thereafter, Barbara could have had surgery to remove the blockage, which has a 65 to 75 percent success rate. Had Barbara had these procedures done, Dr. Yatsu believed it was more probable than not that she would not have had the stroke. Dr. Yatsu concluded that the defendant had deviated from the standard of care by not diagnosing Barbara with TIA on December 6 or 19 and that this failure caused her poststroke injury and suffering.

The plaintiffs' second expert, Dr. William Miser, had a background in family practice, was an award-winning medical teacher and author of peer-reviewed journal articles, and was considered an expert in the study of aspirin and stroke. Dr. Miser testified that internal medicine doctors, like the defendant, are aware that stroke is common; that females and individuals older than 65 are at a higher risk of stroke; and that high blood pressure, being overweight, and having high cholesterol are also stroke risk factors. Given that these risk factors were all present in Barbara's case, Dr. Miser believed that Barbara's numb hand should have caused the defendant to suspect TIA or stroke because this is not an unusual symptom for TIA. Dr. Miser believed that whether Barbara had carpel tunnel syndrome was irrelevant to the question of whether her symptoms represented a potential TIA because the remainder of Barbara's symptoms could not be explained by carpal tunnel syndrome. Dr. Miser testified that the defendant could have used a stroke calculator to determine that Barbara had an increased risk of stroke. Dr. Miser also stated that aspirin was an important, affordable stroke prevention treatment that could have been offered to Barbara. In addition, Dr. Miser testified that two types of blood pressure medication can be prescribed as a method of stroke prevention, but the defendant only prescribed Barbara one medication to treat her hypertension. Dr. Miser stated that the defendant also could have easily listened to Barbara's carotid artery or ordered a carotid doppler study to determine whether there was a blockage. Dr. Miser described these tests as simple, painless, and inexpensive. Upon discovery of the blockage, Dr. Miser explained that Barbara could have had a surgical procedure done to remove the blockage and restore blood flow. Dr. Miser concluded that the defendant's overall judgment on December 6 and 19, 2007, including his failure to prescribe aspirin, treat Barbara's hypertension with two medications, or look for evidence of a blocked carotid artery was inadequate and below the standard of care. Dr. Miser further concluded that the defendant's inadequate treatment resulted in his failure to diagnose Barbara's impending stroke which in turn resulted in the pain and suffering damages caused by her stroke. Finally, Dr. Miser testified that Barbara's January 2009

fall was caused by her disabilities from the stroke, making her death "directly related" to the stroke.

The defense also relied on two expert witnesses. First, Dr. Alexander Davis testified that he had spent 30 years in the private practice of internal medicine, where he also taught students and residents. Dr. Davis testified that the defendant appropriately concentrated on Barbara's primary complaint of wrist pain and agreed with the defendant's carpal tunnel diagnosis and referral to the orthopedic specialist. Dr. Davis further stated that nothing in his review of Barbara's symptoms was suggestive of TIA or stroke. Specifically, Dr. Davis testified that dizziness and pain were not symptoms of TIA or stroke. He stated that there was no indication for checking Barbara's artery for blockages or ordering a carotid duplex ultrasound. Dr. Davis testified that although Barbara's blood pressure was high, it did not suggest TIA and that the defendant was within the standard of care by not changing Barbara's blood pressure medication or prescribing aspirin. Dr. Davis concluded that the defendant met the standard of care in all respects relating to his physical examination, diagnosis, and treatment of Barbara.

The defendant's second expert, Dr. Jeffrey Kaplan, was a practicing neurologist. During his residency, Dr. Kaplan's primary focus was on strokes, and he saw a large number of stroke patients in his current practice. Based on his review of Barbara's symptoms of hand numbness and tingling, Dr. Kaplan felt that carpal tunnel syndrome was the correct diagnosis. Dr. Kaplan did not believe that any of Barbara's symptoms, as reported during the two December 2007 office visits, were related to TIA or stroke. Dr. Kaplan noted that Barbara's symptoms were exacerbated by driving or grasping, which was consistent with carpal tunnel syndrome, not TIA. Dr. Kaplan said Barbara's increased pain on December 19 also was consistent with carpal tunnel syndrome, not TIA. Dr. Kaplan further testified that foot numbness, personality changes, and psychological issues were uncommon symptoms for TIA. Dr. Kaplan noted that it would be rare to have TIA on a daily basis that only affected the hand rather than a larger portion of the limb.

Finally, Dr. Kaplan testified that Barbara's dizziness and blurred vision involved a different part of the brain than where the stroke occurred; accordingly, she would not have experienced these symptoms with a TIA.

The defendant also testified. He said that when he saw Barbara on December 6, Barbara complained of numbness and tingling in her hand and mentioned her concerns about stroke. The defendant testified that he performed a wrist-bending test, which indicated to him that Barbara suffered from carpal tunnel syndrome. The defendant said that he considered Barbara's dizziness a general complaint and did not otherwise believe that her symptoms were related to TIA or stroke. The defendant testified that when Barbara returned on December 19, her complaint of wrist pain and numbness was not surprising because the orthopedic specialist gave her an injection that can often cause short-term pain. The defendant noted that pain was also common with carpal tunnel syndrome itself and was not an expected symptom of TIA or stroke. The defendant also testified that Barbara's complaints of dizziness and constipation could have been due to an anti-inflammatory medication prescribed by the orthopedic specialist and her psychological issues seemed to be related to her distress over her wrist and hand. The defendant did not recall discussing stroke at Barbara's December 19 visit but stated that, even if they had discussed it, his treatment would not have changed because he saw no indication of TIA or stroke and did not consider Barbara to be at high risk for stroke. The defendant said he was confident that carpal tunnel syndrome was the correct diagnosis and that is why he scheduled Barbara another appointment with the orthopedic specialist. The defendant denied that aspirin would have been beneficial to Barbara, given her history of stomach ulcers that created a risk of bleeding. Finally, the defendant said that although Barbara's blood pressure on December 19 was high, it was not critically high enough to warrant a change in treatment based on one isolated reading, which he believed was likely related to her stress and pain at the time.

The jury, after hearing all the expert testimony and other evidence presented during a 14-day trial, returned a unanimous verdict in favor of the plaintiffs, awarding them $1,257,484.69 in damages. Consistent with the statutory caps on damages set forth in K.S.A. 60-1903 and K.S.A. 2015 Supp. 60-19a02, the district court reduced the award to $907,484.69. The district court denied the defendant's motion for new trial.

ANALYSIS

The defendant raises the following issues on appeal: (1) The district court erred by providing improper instructions to the jury, (2) the district court erred in several of its rulings during closing argument, (3) the district court erred by allowing the plaintiffs to elicit testimony from its expert witnesses that misstated the standard of care, (4) the district court erred by permitting the plaintiffs to introduce certain testimony into evidence, and (5) the cumulative effect of the alleged errors require reversal of the jury's verdict. We address each of the issues raised by the defendant in turn.

1. *Jury instructions*

When reviewing jury instruction issues, we utilize the following analysis:

> "'(1) First, the appellate court should consider the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review; (2) next, the court should use an unlimited review to determine whether the instruction was legally appropriate; (3) then, the court should determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction; and (4) finally, if the district court erred, the appellate court must determine whether the error was harmless, utilizing the test and degree of certainty set forth in *State v. Ward*, 292 Kan. 541, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012).' [Citation omitted.]" *Foster v. Klaumann*, 296 Kan. 295, 301-02, 294 P.3d 223 (2013).

To establish a claim of medical malpractice, a plaintiff must show: (1) The health care provider owed the patient a duty of care, which required that the provider meet or exceed a certain standard of reasonable care to protect the patient from injury; (2) the provider breached that duty or deviated from the applicable standard of care; (3) the patient was injured; and (4) the injury proximately resulted from the health care provider's breach of the standard of care. *Miller v. Johnson*, 295 Kan. 636, Syl. ¶ 15, 289 P.3d 1098 (2012). Consistent with these elements, the district court instructed the jury, in relevant part, as follows:

"Instruction No. 7

"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 circumstances. In using this learning and skill, the physician must also use ordinary care and diligence. A violation of this duty is negligence."

"Instruction No. 8

"In determining whether a primary care physician used the learning, skill, and conduct required, you are not permitted to arbitrarily set a standard of your own or determine this question from your personal knowledge. On questions of medical or scientific nature concerning the standard of care of a primary care physician, only those qualified as experts are permitted to testify. The standard of care is established by members of the same profession in the same or similar circumstances. It follows, therefore, that the only way you may properly find that standard is through evidence presented by expert witness."

"Instruction No. 12

"Negligence is defined in Instruction No. 7.

"A party is at fault when he is negligent and that negligence caused or contributed to the event which brought about the claims for damages."

"Instruction No. 17

"You are instructed as a matter of law that Barbara Castleberry, Doug Castleberry, Scott Castleberry and Susan Kraft have no fault in this case and you may not assign any degree of fault to them in this matter."

On appeal, the defendant argues the district court erred by (a) failing to instruct the jury that causation may only be established through expert testimony, (b) failing to strike the word "contributed" from the comparative fault instruction provided to the jury, (c) instructing the jury on causation without defining proximate cause, and (d) instructing the jury that, as a matter of law, the plaintiffs were not at fault.

a. *Expert testimony*

At the jury instruction conference, defense counsel requested that the following language be added to Instruction No. 8: "The cause of the injury alleged by the plaintiffs is also a question of medical or scientific nature. Like the standard of care, the only way you may properly reach your decision on the cause of Plaintiffs' claimed injury is through evidence presented by medical expert witnesses." The district court denied defense counsel's request, noting that this language was not included in the relevant pattern instruction, PIK Civ. 4th 123.10; thus, the PIK committee did not believe any additional language was necessary.

Although the use of PIK instructions is not required, it is strongly recommended, as these instructions have been developed by a knowledgeable committee to bring accuracy, clarity, and uniformity to jury instructions. *State v. Acevedo*, 49 Kan. App. 2d 655, 663, 315 P.3d 261 (2013), *rev. denied* 300 Kan. 1104 (2014). Absent the need to modify an instruction based on particular facts, PIK instructions and recommendations should be followed. *State v. Appleby*, 289 Kan. 1017, Syl. ¶ 20, 221 P.3d 525 (2009).

The defendant argues that modification of the PIK instruction was necessary here because expert testimony is generally required not only to establish the accepted standard of care, but also to prove causation. See *Bacon v. Mercy Hosp. of Ft. Scott*, 243 Kan. 303, 307, 756 P.2d 416 (1988). By limiting applicability of this instruction to the standard of care, the defendant claims that this instruction could have misled the jurors into believing that the cause of Barbara's injury was not a question of medical or scientific nature that depended on expert testimony and that they were free to use their common knowledge and experience in deciding causation. In support of this claim, the defendant notes that the district court instructed the jury, pursuant to PIK Civ. 4th 102.20, that it had "a right to use [its] common knowledge and experience." In further support of this claim, the defendant notes that plaintiffs' counsel asked Dr. Kaplan to agree that the jurors had knowledge about key medical issues in the case and that plaintiffs' counsel urged the jurors during closing argument to rely on their common sense in deciding causation. Under our analytical framework for jury instructions issues, the defendant's claim is a challenge under the second step because the defendant alleges the instruction was legally infirm in that it did not fairly and accurately state the applicable law. See *Foster*, 296 Kan. at 301.

But the defendant's suggestion that the jury could have been confused by the "common knowledge and experience" language found in PIK Civ. 4th 102.20 is not well taken. Instruction No. 4 stated: "You must decide whether the testimony of each witness is believable and what weight to give that testimony. In making these decisions, you have a right to use your common knowledge and experience." The PIK Committee recommends that this instruction be given in every case tried to a jury. PIK Civ. 4th 102.20 Notes on Use. Rather than indicating to the jurors that they could use their common knowledge and experience in deciding the issue of causation, Instruction No. 4 specifically instructed jurors that they could use their common knowledge and experience in evaluating the weight and credibility of witnesses. Appellate courts presume that a jury followed the jury instructions. *City of Mission Hills v. Sexton*, 284 Kan. 414, 438, 160

P.3d 812 (2007). Accepting the defendant's argument would require this court to ignore this presumption and to speculate that the jury did not follow the instruction. Further, the defendant mischaracterizes the "common sense" arguments made by plaintiffs' counsel. Counsel merely asked Dr. Kaplan to agree that the average person, including a juror, would know that older people are at risk for stroke, would know that there is a link between hypertension and stroke, and would know the basic symptoms of stroke. And counsel did not urge the jury to rely on its common sense in determining causation; rather, he stated that the jurors could use their common sense "when [they] evaluate this case."

The defendant presents no other support for his claim that the jury could have been misled into assuming that it could use its own common knowledge in evaluating causation. Notably, Dr. Yatsu and Dr. Miser provided expert testimony that the defendant deviated from the applicable standard of care and this deviation caused Barbara's injuries and death. The jury was specifically instructed on expert testimony as follows:

> "Certain testimony has been given in this case by experts. Experts are persons who, from experience, education or training have specialized knowledge on matters not common to people in general. The law permits experts to give their opinions about such matters. The testimony of experts is to be considered like any other testimony and is to be evaluated by the same tests. You should consider it in connection with all the other facts and circumstances. You should give it the weight and credit you determine are appropriate."

Given the facts presented here, the district court did not err in failing to instruct the jury that causation could only be established through expert testimony.

b. *Comparative fault*

Next, the defendant alleges the district court erred by failing to strike the word "contributed" in the comparative fault instruction provided to the jury. The concept of fault consists of two components, negligence and causation. In a medical malpractice case, negligence is the failure of a physician to use the learning and skill ordinarily used by other physicians. The PIK Committee recommends that the negligence component in a case like this be submitted to the jury pursuant to PIK Civ. 4th 123.01, which defines negligence as a health care provider's violation of his or her duty to use the learning and skill ordinarily used by other providers in that field of medicine in the same or similar communities and circumstances.

The PIK Committee recommends that the causation component in a case like this be submitted to the jury pursuant to PIK Civ. 4th 106.01, which is the pattern instruction setting forth the plaintiff's issues and burden of proof. This instruction informs the jury that it can find a defendant to be at fault if it finds that the defendant was negligent and that the plaintiff was injured or damaged due to the defendant's negligence. PIK Civ. 4th 106.01 ("The plaintiff claims [that (he) (she) was injured *due to* the defendant's fault in the following respects: (Set forth concisely the specific grounds of *negligence* that are supported by the evidence.)]" [Emphasis added.]).

Although the Committee recommends that PIK Civ. 4th 106.01 as written be given in every negligence case, a modified version of PIK Civ. 4th 106.01 was provided to the jury in this case. Instead of the pattern language setting forth the negligence and causation components, the jury was instructed only on the negligence component; *i.e.*, the various ways in which the plaintiffs claimed the defendant failed to follow the applicable standard of care. Presumably because the instruction, as modified, omitted the causation component, the parties agreed that the jury should receive some sort of other instruction on the issue. To that end, defense counsel requested the court instruct the jury on

causation under the definition of fault set forth in the pattern comparative fault instruction, PIK Civ. 4th 105.01. The comparative fault instruction states, in relevant part: "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." In the event the court granted his request to instruct the jury on causation as set forth in the pattern comparative fault instruction, defense counsel specifically requested the word "contributed" be taken out. The court ultimately instructed the jury on causation as set forth in PIK Civ. 4th 105.01 but declined to strike the word contributed as requested.

The defendant alleges, as he did below, that using the comparative fault instruction without striking the word contributed was improper. Specifically, the defendant argues that leaving the word contributed in the instruction improperly could have implied to the jury that any slight connection between negligence and damages was adequate to establish the element of causation necessary to prove fault.

In a comparative fault case, the "caused or contributed" language makes sense, given that the jury must decide the case by comparing the fault of the parties. But the present case did not involve comparative fault. Indeed, the jury was instructed, as a matter of law, that it could not assign any degree of fault to the plaintiffs. Because the district court used a definition from a pattern instruction that involved a theory of liability inapplicable to this case, Instruction No. 12 was legally inappropriate, although it is difficult to fault the court given it was the defendant who suggested using the comparative fault instruction in the first place. See *State v. Peppers*, 294 Kan. 377, 393, 276 P.3d 148 (2012) (under invited error doctrine, party may not challenge instruction when there has been on-the-record agreement to wording of instruction at trial).

But even if the district court did err, any error was harmless. An error is harmless unless there is a reasonable probability that the error affected the outcome of the trial in light of the entire record. See K.S.A. 2015 Supp. 60-261; *Foster*, 296 Kan. at 301-02;

Ward, 292 Kan. 541, Syl. ¶ 6. The central issue in the case was whether the defendant's actions (or inactions) caused—not simply contributed to—Barbara's injury. The plaintiffs' experts specifically testified that the defendant deviated from the applicable standard of care in treating Barbara and failing to diagnose stroke, which in turn led to her injury and death. Conversely, the defendant's experts testified that Barbara's symptoms did not support such a diagnosis, that the defendant did not deviate from the applicable standard of care, and that the defendant's actions did not contribute to Barbara's injury at all. Simply put, the question presented to the jury was whether the defendant caused Barbara's injury. There was no other source presented that could have contributed to her injury. As a result, the defendant has failed to show a reasonable probability that the definition of causation given in Instruction No. 12 affected the outcome of the trial.

c. *Proximate cause*

In addition to the above, the defendant also alleges the court erred in denying his request to instruct the jury on proximate cause. On appeal, the defendant alleges, as he did below, that the jury should have been instructed on the traditional definition of proximate cause, or "but for" causation in medical malpractice cases such as the one here. See *Hale v. Brown*, 287 Kan. 320, 322, 197 P.3d 438 (2008) (defining proximate cause as "the cause that in a natural and continuous sequence, unbroken by superceding cause, both produced the injury and was necessary for the injury. The injury must be the natural and probable consequence of the wrongful act"). This is a challenge under the second step of our analytical framework for jury instruction issues because the defendant alleges the instruction was legally infirm in that it did not fairly and accurately state the applicable law. See *Foster*, 296 Kan. at 301.

As previously discussed, the PIK Committee specifically recommends that no instruction defining causation be given to a jury. See PIK Civ. 4th 104.01, Comment. This comment further provides: "Proximate cause is almost, but not quite, obsolete as a

consideration in negligence cases in Kansas." Compare *Reynolds v. Kansas Dept. of Transportation*, 273 Kan. 261, 269, 43 P.3d 799 (2002) ("With the adoption of comparative fault, Kansas has moved beyond the concept of proximate cause in negligence.") with *Hale*, 287 Kan. at 323 ("This court has continued, however, to adhere to the common-law requirement of proximate cause."). Given the PIK Committee's specific recommendation on this point, we conclude the district court did not err in refusing to give the defendant's requested proximate cause instructions.

d. *No fault by the plaintiffs*

The defendant argues the district court erred by instructing the jury that, as a matter of law, the plaintiffs were not at fault in the case and that no degree of fault could be assigned to them. In support of this argument, the defendant points out that he offered no evidence of the plaintiffs' fault at trial; thus, the instruction constituted an improper commentary by the court and a directive that resolved a contested issue of fact.

By way of background, we note defense counsel objected to the original version of this instruction, which sought to instruct the jury that the plaintiffs had no duties in the case. The district court agreed that use of the term "duties" was inappropriate and proposed an instruction that instead stated the plaintiffs had no fault. Defense counsel responded with a "less strenuous" objection, suggesting the instruction was unnecessary but ultimately indicating he had "less of a problem" with that instruction.

Overlooking the fact that the defendant objected to Instruction No. 17 at trial on different grounds than he now raises, we find the district court did not err by issuing this instruction. The parties agree that this is not a comparative fault case and that there was no evidence presented at trial indicating the plaintiffs were in any way at fault. Rather than constituting an improper commentary or directive by the district court, the instruction merely clarified for the jury that it could not assess fault against the plaintiffs

in reaching its verdict. Under the circumstances present here, the instruction was both legally and factually appropriate.

2. *Closing argument*

The defendant challenges certain statements made by plaintiffs' counsel during closing argument. In the context of a civil trial, our Supreme Court has held that remarks of counsel constitute reversible error when, because of them, the parties have been deprived of a fair trial. The trial court is in a better position than an appellate court to determine whether the verdict resulted from misconduct of counsel or from passion or prejudice, and ordinarily its conclusion in the matter will not be disturbed. To constitute reversible error, the party claiming the error must show a likelihood that the improper remarks changed the result of the trial. See *Sledd v. Reed*, 246 Kan. 112, 117, 785 P.2d 694 (1990).

a. *"Golden rule" argument*

The defendant first argues that counsel for the plaintiffs improperly suggested to the jury during closing argument that a verdict in favor of the plaintiffs might result in better medical care for society in general. In order to place the defendant's first argument in context, we note that the defendant filed a pretrial motion in limine relating to "issues that could only be potentially relevant in a punitive damages case." Significant here, the defendant sought to preclude "[a]ny claim or suggestion that a particular verdict in the case, such as a verdict in favor of the plaintiffs, would do some social good, such as improving the quality of medical practice or preventing other alleged acts of negligence." The district court ultimately denied the defendant's motion as moot based on its earlier decision to deny the plaintiffs' motion to seek punitive damages. When the defendant attempted to raise the issue again, the court declined to place any specific limitation on the plaintiffs' questions but advised plaintiffs' counsel not to make any reference to the

standard for punitive damages. Plaintiffs' counsel indicated that he did not intend to make a "golden rule" argument or otherwise argue that the jury should send a message with its verdict.

During the plaintiffs' closing argument, counsel discussed the numerous ways in which the defendant had violated the standard of care and stated, "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." Defense counsel objected, claiming the argument was improper. The district court overruled the objection, noting that the jury had been ordered to follow the instructions. On appeal, the defendant asserts the district court's decision to overrule his objection was reversible error. Specifically, the defendant argues counsel's statement improperly urged the jury to return a verdict in the plaintiffs' favor as part of a societal effort to make the practice of medicine safer instead of asking it to decide whether the jury believed the facts presented supported a finding that the defendant was negligent.

Counsel's comment advising the jurors "to decide if you want safe medicine or unsafe medicine" was arguably a prohibited golden rule argument. This term relates to arguments of counsel that jurors should place themselves in the position of a party, a victim, or the victim's family members. Golden rule arguments are not permitted because they "encourage the jury to depart from neutrality and to decide the case on the improper basis of personal interest and bias." *State v. McHenry*, 276 Kan. 513, 523, 78 P.3d 403 (2003), *disapproved on other grounds by State v. Gunby*, 282 Kan. 39, 144 P.3d 647 (2006).

But even if counsel's comment was improper, the defendant has failed to argue, let alone establish a likelihood, that this improper remark made by plaintiffs' counsel changed the result of the trial. See *Sledd*, 246 Kan. at 117. Accordingly, the defendant is not entitled to relief on this basis.

b. *Comments portraying the defendant as uncaring and rushed*

The defendant's next claim of error occurred when plaintiffs' counsel discussed the December 19 appointment during closing argument. In arguing the case to the jury after the close of evidence, plaintiffs' counsel expressed confusion as to how the defendant could have failed to diagnose Barbara's symptoms as an impending stroke. Thereafter, the following exchange occurred:

> "[Plaintiffs' counsel]: Or is it just somebody rushing somebody through, not paying close attention? Remember, it's December, party time. Everybody in the medical profession, they know that there's a party every night and, you know—
>
> "[Defense counsel]: I'm going to object. That's an improper argument.
>
> "[Plaintiffs' counsel]: That's within the common knowledge of Americans.
>
> "THE COURT: Overruled. Come back to your closing, Mr. Wall.
>
> "[Plaintiffs' counsel]: Everybody knows you don't want to go to the hospital on the holidays. Everybody knows that."

The defendant argues that counsel's comments were improper because there was no evidence in the record that the defendant had been "partying" or that he otherwise was in a rush during Barbara's appointments. He asserts that the comments constitute reversible error because they were designed solely to prejudice the jury by portraying him as uncaring and rushing Barbara out the door because of holiday parties.

Contrary to the defendant's assertion, counsel's comments do not require reversal.

> """In summing up a case before a jury, counsel may not introduce or comment on facts outside the evidence, but reasonable inferences may be drawn from the evidence and considerable latitude is allowed in the discussion of it in which he [or she] may use illustrations and appeal to the jury with all the power and persuasiveness which his [or her] learning, skill and experience enable him [or her] to use."'" *Hudson v. City of*

Shawnee, 246 Kan. 395, 411, 790 P.2d 933 (1990) (quoting *State v. Potts*, 205 Kan. 47, 53-54, 468 P.2d 78 [1970]).

In this case, counsel's comments were preceded by discussion of the defendant's deviation from the applicable standard of care, which was the plaintiffs' theory of the case. Because of this, the plaintiffs argue it was not unreasonable for counsel to draw an inference from the evidence that the defendant's failure to diagnose Barbara's symptoms could have been the result of a hurried and perfunctory examination, especially given the fact that many people, medical providers included, attend holiday parties in the week leading up to Christmas. But we disagree. Black's Law Dictionary 897 (10th ed. 2014) defines the term "inference" as "[a] conclusion reached by considering other facts and deducing a logical consequence from them." But the plaintiffs have pointed to no underlying objective facts in the record from which the jury could logically deduce that the defendant's alleged failure to diagnose Barbara's symptoms were the result of a hurried and perfunctory examination caused, in whole or part, by the fact that the defendant was attending a holiday party every night. For this reason, we find the comments at issue did not fall within the considerable latitude allowed in discussing the evidence during closing argument.

Notwithstanding the impropriety of the argument made by plaintiffs' counsel with regard to a hurried examination and parties every night, the defendant has failed to allege, let alone establish a likelihood, that this isolated and improper remark made by plaintiffs' counsel changed the result of the trial. See *Sledd*, 246 Kan. at 117. In the absence of a likelihood that the result of the trial would have been different had the improper argument not been made, there was no prejudice to the defendant. Accordingly, the defendant is not entitled to relief on this basis.

c. *Bench conferences*

Next, the defendant claims that during closing argument the district court prevented defense counsel from effectively responding to the plaintiffs' argument by granting two "unnecessary" bench conferences and then instructing the jury to disregard a portion of defense counsel's closing argument.

The first bench conference occurred after defense counsel discussed the uncertainties and judgment inherent in the practice of medicine, stating:

> "That's not the way we get to lead life, and that's not the way a doctor practices medicine. And the reality is that there's a lot of uncertainty in life and there's always some uncertainty in medicine. And if that involves you and your family, you don't want that uncertainty. You want a guarantee, and that's understandable."

After these statements, plaintiffs' counsel asked to approach the bench, where an off-the-record conference took place. A later discussion outside the jury's presence indicated that plaintiffs' counsel lodged an objection to what he characterized as a prohibited golden rule argument by defense counsel. Following the bench conference, the district court directed the jurors that "the last remark made by [defense counsel] should be disregarded in [your] deliberations and that your verdict is based on the evidence and the facts as you find them, period." Defense counsel then clarified with the court that he could rephrase his comments "to make the same point." Defense counsel thereafter stated, without objection, that everyone would like to have a guarantee that "nothing bad will happen, but that's not the world we live in."

The defendant argues that by allowing a "lengthy" bench conference to occur and ordering the jury to disregard defense counsel's statement, the district court prevented defense counsel from effectively responding to the plaintiffs' "fear-based litigation strategy" and misstatements of the legal standard.

Given defense counsel's first statement appeared to have actually been a prohibited golden rule argument, we find the district court did not err in allowing the bench conference to take place. See *McHenry*, 276 Kan. at 523. We similarly find no error with respect to the defendant's argument challenging the length of the bench conference because the defendant fails to point us to any evidence in the record to establish how long the conference lasted. See *Friedman v. Kansas State Bd. of Healing Arts*, 296 Kan. 636, 644-45, 294 P.3d 287 (2013) (burden is on party making claim of error to designate facts in record to support that claim; without such record, claim of error fails).

The second interruption about which the defendant complains occurred later during closing argument. Defense counsel was discussing the evidence presented by the plaintiffs regarding the risk of stroke. Defense counsel stated, "And it's natural, it's human that we may be getting a little bit nervous now about the subject of stroke, maybe a little frightful of whether or not we could have a stroke or someone in our family could have a stroke, and that would certainly be understandable." At this point, plaintiffs' counsel asked to approach the bench and another off-the-record conference occurred, during which plaintiffs' counsel apparently alleged that defense counsel was making a "reverse conscious of the community" argument. At the end of the bench conference, the district court judge advised the jury as follows, "I just simply again remind the jury that your decision is based on the facts as you find them and the law as I've instructed you as you apply those facts, and favoritism and all those emotions are not part of what you're supposed to be doing."

The defendant contends that the objection lodged by plaintiffs' counsel was frivolous and the resulting bench conference, which the defendant alleges lasted several minutes, disrupted "the most crucial moments" of his closing argument. He claims counsel should have waited until after closing argument to make the objection. In support of this claim, he cites *State v. Plunkett*, 257 Kan. 135, 891 P.2d 370 (1995), for the

proposition that interruptions to a party's presentation of a case can result in undue prejudice.

Again, it is not altogether clear how long the bench conference lasted or what arguments were made during the bench conference because the conference was not transcribed and no other information regarding its substance or length is in the record on appeal. As a result, we decline to find the district court erred in granting the request for conference or in holding the conference for the amount of time that it did. Moreover, the defendant's reliance on *Plunkett* is misplaced. *Plunkett* is a criminal case that involved a trial judge who repeatedly made disparaging remarks to the jury about the defendant and his counsel, interrupted witnesses by asking questions that were slanted in favor of the State, commented in open court on the evidence, and interrupted defense counsel's opening statement without warning. The Kansas Supreme Court concluded that the trial judge's conduct was prejudicial enough to warrant a new trial for the defendant. 257 Kan. at 143. *Plunkett* provides no support for the defendant's argument, as the circumstances in the present case are hardly comparable.

Based on the discussion above, we conclude the defendant is not entitled to relief based on any of the alleged errors that occurred during closing arguments.

3. *Expert testimony on the applicable standard of care*

The defendant next argues the district court erred in overruling his repeated objections to expert testimony suggesting that a physician has a duty to take the "'safest'" possible approach to a case. The defendant claims these statements were argumentative, irrelevant, and misstated the applicable standard of care.

We apply an abuse of discretion standard when reviewing a district court's decision to admit or exclude opinion testimony under K.S.A. 2015 Supp. 60-456. See

Manhattan Ice & Cold Storage v. City of Manhattan, 294 Kan. 60, 70, 274 P.3d 609 (2012). A judicial action constitutes an abuse of discretion if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106, *cert. denied* 134 S. Ct. 162 (2013).

As a preliminary matter, it is not clear whether the defendant properly preserved this issue for appeal. Under K.S.A. 60-404, "a party must lodge a timely and specific objection to the admission or exclusion of evidence in order to preserve the evidentiary question for review." *State v. King*, 288 Kan. 333, 348, 204 P.3d 585 (2009). 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.

In any event, the defendant argues that any testimony or other evidence suggesting that safety may be a component of the applicable standard of care is inappropriate because legal duties are defined by law, not expert witnesses. The defendant claims such

evidence was irrelevant to resolving questions of fact involving the legally defined standard of care. But the defendant's argument confuses two interrelated concepts: a physician's duty of care and a physician's standard of care. The duty of care owed by all physicians, regardless of the particular medical specialty in which a physician practices, is to exercise reasonable and ordinary care and diligence. This duty is legally defined, and the jury was properly instructed on this definition in Instruction No. 7. But the particular decisions and acts required to satisfy that duty of care vary, *i.e.*, the required skill depends on the patient's situation and the physician's medical specialty, if applicable. What constitutes negligence in a particular situation is judged by the professional standards of the particular area of medicine involved. *Durflinger v. Artiles*, 234 Kan. 484, 490, 673 P.2d 86 (1983), *disapproved on other grounds by Boulanger v. Pol*, 258 Kan. 289, 900 P.2d 823 (1995).

In medical malpractice cases, expert testimony is required to show a deviation from the applicable standard of care if the subject matter falls outside the common, everyday knowledge of the average juror. *Dawson v. Prager*, 276 Kan. 373, 375, 76 P.3d 1036 (2003). The lawsuit in this case does not involve a common knowledge situation. Recognition of and treatment for TIA and stroke symptoms is not within the experience, education, or everyday knowledge of the average juror. Thus, expert testimony on the applicable standard of care—and any failure by the defendant to meet that standard of care—was necessary to prove negligence in this case. See *Nold v. Binyon*, 272 Kan. 87, 103, 31 P.3d 274 (2001) (standard of care in a given case "is not a rule of law, but a matter to be established by the testimony of competent medical experts"); *Chandler v. Neosho Memorial Hospital*, 223 Kan. 1, 5, 574 P.2d 136 (1977) (expert testimony generally required to establish standard of care and deviation from standard).

Notably, the jury in this case was directed in Instruction No. 8 that it must rely on expert testimony to determine whether the defendant had deviated from the standard of care. The plaintiffs relied primarily on the expert testimony of Dr. Miser to set forth the

applicable standard of care and to detail how the defendant deviated from that standard. Specifically, Dr. Miser testified that "err[ing] on the side of safety," obeying a "margin of safety," and advocating for the safety of the patient were part of the standard of care required to meet the legal duty of care. Dr. Miser further testified that the defendant's deviation from this standard of care caused Barbara's injury and death. Viewed in context, Dr. Miser's testimony did not create a new legal standard but instead defined the applicable standard of care, as an expert witness is allowed—and required—to do. Accordingly, we conclude the district court did not abuse its discretion by overruling the six specific objections made by the defendant that challenged expert testimony incorporating the concept of safety in defining the standard of care.

4. *Admissibility of evidence*

The defendant argues the district court erred in permitting the plaintiffs to introduce certain evidence for the jury to consider in reaching its verdict. An appellate court exercises de novo review of a challenge to the adequacy of the legal basis of a district judge's decision to admit or exclude evidence. *State v. Bowen*, 299 Kan. 339, 349, 323 P.3d 853 (2014). To the extent that statutory interpretation is required in this analysis, our review is also unlimited. See *Neighbor v. Westar Energy, Inc.*, 301 Kan. 916, 918, 349 P.3d 469 (2015).

a. *Pretrial request for admissions*

The defendant argues the district court erroneously allowed plaintiffs' counsel to impeach the defendant's testimony with the answer he provided to a pretrial discovery request for admission.

During direct examination at trial, the defendant testified he remembered that Barbara had expressed concerns about stroke on her December 6 visit, but he did not

recall whether she had done so on December 19. On cross-examination, plaintiffs' counsel asked the defendant whether he remembered that in his response to a pretrial request for admissions the defendant had denied that Barbara had expressed concerns about a stroke on either December date. Defense counsel objected, arguing this was an improper use of a request for admission. The district court overruled the objection. Plaintiffs' counsel then asked the defendant why he had denied the plaintiffs' pretrial request for him to admit that Barbara had expressed concern about a stroke at the December 6 and the December 19 visits but had testified on direct examination at trial that he remembered Barbara expressing concern about a stroke at the December 6 visit but did not remember Barbara expressing concern about a stroke at the December 19 visit. In response, the defendant testified that his responses to the pretrial request for admissions was filed early in the case by his attorney and that he had not personally filled out the document. The defendant also noted that, consistent with his trial testimony on direct examination, he stated in his deposition that he and Barbara had discussed stroke on December 6 but he could not recall whether they had done so on December 19. At some point, plaintiffs' counsel asked permission to introduce the pretrial request for admissions document into evidence. The district court denied the request.

The defendant contends that the district court erred by allowing plaintiffs' counsel to impeach his trial testimony with his responses to the pretrial request for admissions. The defendant argues that the district court's decision in this regard deprived him of a fair trial because it allowed the jury to believe that he had given inconsistent testimony on an important issue.

K.S.A. 2015 Supp. 60-236 governs requests for admissions and allows a party to serve another party with written requests to admit the truth of certain matters for purposes of the pending action. See K.S.A. 2015 Supp. 60-236(a)(1). The purpose of a request for admission is to narrow the issues for trial by identifying those issues and facts as to which proof will be necessary. Although a matter admitted under K.S.A. 2015 Supp. 60-236 is

"conclusively established," there is no statutory language governing the effect of a denial. See K.S.A. 2015 Supp. 60-236(b). Notably, K.S.A. 2015 Supp. 60-232 allows for the use of depositions in court proceedings, and answers to interrogatories "may be used to the extent allowed by the rules of evidence." K.S.A. 2015 Supp. 60-233(c). But the Kansas discovery statutes do not similarly address the admissibility of requests for admission, or denials to these requests, at trial. Moreover, no Kansas court appears to have addressed this issue.

Given the record provided to us on appeal in this case, however, we find it unnecessary to determine whether the evidentiary rules in Kansas would permit a party to utilize another party's denial to a pretrial request for admission to impeach that other party at trial. Specifically, we cannot determine whether the defendant's denial in response to the plaintiffs' request for admission is inconsistent with the defendant's testimony at trial because the defendant failed to supplement the record on appeal with a copy of the defendant's responses to the plaintiffs' requests for admission. Based on discussion of the issue at trial, for example, it is entirely possible that the defendant denied a single request to admit that Barbara had expressed concern about a stroke at the December 6 *and* at the December 19 visits. If that were the case, the defendant's later testimony at his deposition and at the trial stating Barbara had expressed concern about a stroke *only* at the December 6 visit is entirely consistent with him denying the plaintiffs' request that she expressed concern about a stroke at *both* visits. Without a copy of the defendant's responses to the plaintiff's requests for admission to establish the defendant provided a prior inconsistent statement for purposes of impeachment, we are precluded from rendering a decision on the legal issue presented by the defendant because such an opinion would be advisory only under the facts of this case.

Even if the record reflected that the defendant's response to the plaintiffs' request for admission was, indeed, a prior inconsistent statement introduced to impeach the defendant's trial testimony and even if, as a matter of law, utilizing the defendant's denial

in a request for admission for impeachment purposes at trial was error, we would find the district court's decision to allow the plaintiffs to impeach the defendant was harmless error. The erroneous admission of evidence is subject to review for harmless error under K.S.A. 2015 Supp. 60-261. This statute provides:

> "Unless justice requires otherwise, no error in admitting or excluding evidence, or any other error by the court or a party, is ground for granting a new trial, for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." K.S.A. 2015 Supp. 60-261.

Where an error implicates a statutory but not federal constitutional right, the party benefiting from the error bears the burden of proving that there is "no reasonable probability that the error affected the trial's outcome in light of the entire record" in order for it to be deemed harmless. *City of Overland Park v. Lull*, 51 Kan. App. 2d 588, 594-95, 349 P.3d 1278 (2015).

Considering the entire record in this case, we find no reasonable probability that the alleged error affected the trial's outcome. In response to the questioning about his purported inconsistent statements, the defendant explained that the document had been filed very early in the case, that he did not personally fill out the document, and that he had previously provided consistent testimony at his deposition. Thus, even if the district court had erred in allowing the defendant's denial to the request for admission to be used for impeachment purposes, we conclude that the error was harmless.

b. *Informed consent*

The defendant next argues the district court erred as a matter of law in allowing the plaintiffs to question two witnesses on the subject of informed consent. In support of

his argument, the defendant asserts the court had previously granted summary judgment on any claim of informed consent and no such claim appeared in the pretrial order.

According to the defendant, the first instance of alleged legal error occurred during the redirect examination of Dr. Gadalla when plaintiffs' counsel asked him, "What is informed consent?" Defense counsel objected on grounds that informed consent was not an issue in this case, to which plaintiffs' counsel replied, "Oh, yes, there is." The district court did not rule on the objection but instead suggested that counsel rephrase the question, which counsel did. Specifically, plaintiffs' counsel asked the doctor whether he discussed the risks and benefits of aspirin with his patients and whether he had done so in 2007. Without objection, Dr. Gadalla responded affirmatively to both questions.

The defendant argues that counsel's question on informed consent was objectionable because it asked the witness to comment on an issue that was not relevant to the case; thus, the plaintiffs should not have been permitted to introduce any evidence regarding informed consent into the record for consideration by the jury. Based on our review of the record, however, no evidence regarding informed consent was actually introduced into the trial record. True, plaintiffs' counsel briefly responded to the objection by stating he believed informed consent was an issue. But to the extent the defendant alleges prejudice resulting from counsel's statement that informed consent was an issue in the case, the jury was instructed that counsel's statements and arguments are not evidence.

Although testimony and statements made by Dr. Gadalla do constitute evidence, Dr. Gadalla was prevented from answering the question about informed consent after counsel for the defendant lodged his objection. Plaintiffs' counsel then rephrased the question as directed by the court. Notably, the defendant did not object to the question as rephrased. Because the defendant did not object to the rephrased question, any complaints about Dr. Gadalla's testimony in response to that question are not preserved for appellate

review. See K.S.A. 60-404 (timely and specific objection required to preserve evidentiary issue for appellate review).

During Dr. Miser's direct examination, the following exchange occurred:

"Q[Plaintiffs' counsel]. Turn to Exhibit 119. Doctor, this is an article on informed consent.

"[Defense counsel]: Your Honor, I object. Summary judgment was entered on informed consent. This is not relevant to any legal issue in the case."

The district court directed the parties to approach for an off-the-record bench conference, after which the judge overruled the objection, stating, "We'll make a better record at a time when the jury is not present." Plaintiffs' counsel continued questioning Dr. Miser:

"Q. Doctor, explaining the risks and benefits of any proposed treatment to a patient, how long has that been a part of medicine?

"A. Ever since before I was a medical student.

"Q. And you can take the article down now. You understand that—I'll just tell you in this case we don't have a separate claim for informed consent. Do you understand that?

"A. Yes, sir, I do.

"Q. But did you see any evidence in the patient encounter, any documentation by Dr. DeBrot of a discussion with the patient of the risks and benefits of not having aspirin, the risks and benefits of not modifying the blood pressure, the risks and benefits of not having a carotid study done to determine if there was a blockage in the artery? Did you have—did you see any evidence of that?

"A. No, sir.

"[Defense counsel]: Object.

"THE COURT: Overruled. We'll go into it in more detail.

"[Defense counsel]: Just note for the record I didn't have an opportunity to state the basis for my objection.

"THE COURT: Well, you do have an opportunity. Go ahead."

At this point, plaintiffs' counsel began questioning Dr. Miser about other topics.

The defendant argues that the testimony outlined above was improper because it allowed plaintiffs' counsel to communicate to the jury Dr. Miser's opinion that the defendant failed to provide the information necessary to establish informed consent, which implied to the jury that the defendant was rushed and uncaring.

We note, as a preliminary matter, that the district court's decision to overrule the defendant's objection followed an off-the-record bench conference. Although the court stated that a "better record" would be made outside the jury's presence and later indicated that defense counsel would have an opportunity to state the basis for his objection, there is no indication in the record that the parties ever actually addressed this issue again. Because we are left to speculate as to the court's reason for overruling the defendant's objection, we similarly are left to speculate as to whether the court's reason constitutes sufficient legal grounds for allowing the jury to hear and consider Dr. Miser's testimony on the issue of informed consent. See *Friedman*, 296 Kan. at 644-45 (claim of error fails in absence of record supporting that claim).

The defendant, however, argues the court's decision to allow Dr. Miser to testify on the issue of informed consent was error as a matter of law, regardless of the court's reasoning. Again, the defendant asserts the court previously granted summary judgment on the plaintiffs' claim of informed consent and thus the subject of informed consent was irrelevant and inadmissible, as a matter of law, in this case. We disagree. The fact that the plaintiffs' legal claim asserting lack of informed consent was dismissed on summary judgment does not automatically preclude witness testimony regarding the defendant's treatment of Barbara, including whether he had discussed the risks and benefits of certain treatment with her. And prior to this specific questioning, plaintiffs' counsel made clear that there was no claim of informed consent in the case. Because he has failed to establish

the district court erred as a matter of law in allowing Dr. Miser to testify as he did on the issue of informed consent, the defendant is not entitled to relief on this basis.

c. *Letter from article's author*

Next, the defendant argues the district court improperly allowed plaintiffs' counsel to cross-examine his expert, Dr. Kaplan, as to the contents of a letter that was not introduced into evidence. The defendant claims the letter was hearsay and constituted an undisclosed expert report.

During cross-examination, plaintiffs' counsel questioned Dr. Kaplan about his testimony at an earlier deposition in the case. In his deposition, the doctor stated he had relied on an article in the Canadian Journal of Medicine written by Dr. Joe Nemeth to support his opinion that the defendant did not deviate from the standard of care by failing to listen to Barbara's carotid artery at either December appointment. After confirming this earlier testimony, plaintiffs' counsel asked Dr. Kaplan if he believed that Dr. Nemeth was suggesting in his article that carotid duplex doppler exams should not be used. In response, Dr. Kaplan said, "No," and went on to say that he often used these exams on patients who displayed symptoms related to carotid artery disease. Plaintiffs' counsel proceeded to mark as an exhibit a letter from Dr. Nemeth. Defense counsel objected, claiming the letter was hearsay and constituted undisclosed expert opinion. The district court overruled the objection.

Given the objection was overruled, plaintiffs' counsel went on to quote the following one sentence from Dr. Nemeth's letter: "[My] article suggests use of duplex or doppler exams in suspected ischemic cerebrovascular situations." Thereafter, plaintiffs' counsel offered Dr. Nemeth's letter into evidence. Defense counsel objected to its admission on the basis that it was a nondisclosed expert report. The district court sustained that objection, and the letter was not admitted into evidence. Plaintiffs' counsel

went on to ask Dr. Kaplan whether he agreed with Dr. Nemeth's opinion that the doppler examination is a vital component to proper investigation of a patient presenting with symptoms suggestive of an ischemic cerebrovascular event, including a TIA or stroke, and that physicians should immediately investigate signs and symptoms suggestive of a TIA. Dr. Kaplan agreed.

The defendant argues the district court erred in allowing the jury to hear plaintiffs' counsel read the one sentence excerpt from Dr. Nemeth's letter because the letter constituted an inadmissible nondisclosed expert witness report and, therefore, the one-sentence excerpt from the letter constituted inadmissible hearsay. The defendant asserts he was prejudiced by the district court's erroneous decision because the hearsay statements improperly permitted the plaintiffs to suggest to the jury that a scholar was critical of the defendant's actions or inactions in treating Barbara.

Contrary to the defendant's argument, we are not persuaded that Dr. Nemeth's letter constitutes a nondisclosed expert report. There is no question here that Dr. Kaplan relied on an article in the Canadian Journal of Medicine written by Dr. Joe Nemeth in forming his opinion. An expert witness may base his or her own expert opinion upon knowledge gleaned from articles, books, and treatises written by other experts in the field. In fact, reference to and introduction of these materials at trial does not violate the rule against hearsay if the predicate expert testimony establishes its reliability and relevancy. See K.S.A. 2015 Supp. 60-460(cc) ("learned treatise" exception to hearsay rule permitting introduction into evidence of "[a] published treatise, periodical or pamphlet on a subject of history, science or art, 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 in the subject"); see *Casey v. Phillips Pipeline Co.*, 199 Kan. 538, 547, 431 P.2d 518 (1967).

The parties do not dispute that Dr. Kaplan—in his capacity as an expert witness—recognized Dr. Nemeth's article as reliable authority with regard to use of duplex or doppler exams in suspected ischemic cerebrovascular situations. Based on the learned treatise exception to the hearsay rule, then, the court properly permitted the plaintiffs to question Dr. Kaplan about Dr. Nemeth's article. Plaintiffs' counsel elicited testimony from Dr. Kaplan confirming that he agreed with Dr. Nemeth's position as originally stated in the Canadian Journal of Medicine and as later clarified by Dr. Nemeth himself in a letter he wrote to plaintiffs' counsel for that purpose. Thus, the contents of Dr. Nemeth's letter that were read at trial were entirely consistent with both Dr. Nemeth's article published in the Canadian Journal of Medicine and Dr. Kaplan's testimony about his understanding of what Dr. Nemeth was suggesting in the article. Based on the record before us, we are not persuaded by the defendant's argument that the excerpts from Dr. Nemeth's letter, which were read out loud to Dr. Kaplan but not introduced into evidence, constituted inadmissible hearsay. The letter did not reference either the defendant or Barbara or otherwise express an opinion on the defendant's actions in this case. The letter was simply used to question Dr. Kaplan based on his stated reliance on the article to support his opinion that the defendant's failure to listen to Barbara's carotid artery did not deviate from the applicable standard of care.

d. *Cross-examination questioning outside the scope of direct examination*

The defendant argues the district court erred by allowing plaintiffs' counsel to cross-examine Dr. Kaplan regarding whether the defendant deviated from the applicable standard of care. In support of this argument, the defendant asserts the subject matter of the questions posed by plaintiffs' counsel went beyond the scope of the doctor's direct examination, which was limited to his opinions on neurology issues associated with Barbara's carpal tunnel diagnosis.

During Dr. Kaplan's cross-examination, defense counsel objected multiple times to certain questions as beyond the scope of direct examination, claiming that the doctor had only testified as to neurology issues and had not testified as to standard of care. After the district court overruled these objections, plaintiffs' counsel continued to question Dr. Kaplan about the defendant's failure in this case to order a duplex doppler exam, his failure to diagnose TIA or stroke, and the importance of recognizing symptoms of TIA or stroke. Later, at a hearing outside the presence of the jury, the district court judge explained that he had overruled defense counsel's objections because Dr. Kaplan previously had testified about the applicable standard of care. Defense counsel denied asking Dr. Kaplan standard of care questions on direct examination.

The court ultimately ruled that plaintiffs' counsel could continue to question Dr. Kaplan about TIA, the medical records, and the defendant's testimony but could not ask the doctor any questions related to whether the defendant deviated from the applicable standard of care. Thereafter, plaintiffs' counsel asked Dr. Kaplan, "Doctor, I want to make sure no one has misunderstood anything you've said or any of your testimony. I believe that you are not rendering any opinions regarding [the] standard of care of Dr. DeBrot. Is that correct?" In response, Dr. Kaplan stated, "That is correct."

The scope of cross-examination is generally limited to that which has been testified to on direct examination. *Humphries v. State Highway Commission*, 201 Kan. 544, 547, 442 P.2d 475 (1968). More specifically,

> "[w]here [a] general subject matter has been opened up on direct, cross-examination may go to any phase of the subject matter and is not restricted to identical details developed or specific facts gone into on direct examination. Questions asked on cross-examination must be responsive to testimony given on direct examination, or material and relevant thereto. [Citation omitted.]" *State v. Canaan*, 265 Kan. 835, 854, 964 P.2d 681 (1998).

Although the defendant is correct that Dr. Kaplan was never specifically questioned using the words "standard of care" during his direct examination, he did testify on direct that TIA or stroke was an "uncommon" source of Barbara's symptoms, that wrist pain related to a TIA would be "extremely unusual," and that Barbara had no TIA or stroke-related symptoms in December 2007. Dr. Kaplan's testimony that Barbara's symptoms were inconsistent with TIA or stroke was essentially an opinion that the defendant had met the applicable standard of care.

e. *Orders in limine*

The defendant argues the district court erred in deeming certain testimony admissible during trial that the court previously had deemed inadmissible in ruling on a pretrial motion in limine.

In Kansas, the term "motion in limine" has been loosely used in both civil and criminal practice to designate almost any motion filed by a party and ruled on by the court before trial. *State v. Crume*, 271 Kan. 87, 99, 22 P.3d 1057 (2001). An order in limine is intended to assure all parties a fair and impartial trial by prohibiting inadmissible evidence, prejudicial statements, and improper questions by counsel. 271 Kan. at 100. A court's authority to consider a motion in limine in a civil case derives from the broad authority vested in the court to conduct pretrial conferences, to consider such matters as will promote a fair and expeditious trial, and to consider various matters as may aid in the disposition of the action. See K.S.A. 2015 Supp. 60-216. Notably, an order in limine is a temporary protective order and is subject to change during the trial. 271 Kan. at 101.

When a party alleges that an order in limine has been violated, courts employ the following two-part test: (1) whether the order has been violated, and (2) if so, whether the party alleging the violation has established substantial prejudice resulting from that

violation. The burden to show substantial prejudice is on the party alleging a violation of the order in limine. *City of Mission Hills v. Sexton*, 284 Kan. 414, 436, 160 P.3d 812 (2007).

(1) *Questioning expert about personal treatment preference*

Before trial, the district court granted the defendant's motion in limine seeking to exclude evidence of a testifying physician's personal treatment preferences. During Dr. Miser's direct examination, the following exchange occurred:

> "Q[Plaintiffs' counsel]. Typically does the—in your practice, does the doctor or the nurse do the review of systems?
> "A. At our practice the physician does the review of systems.
> "Q. Why is it done that way?
> "[Defense counsel]: Your Honor, I object to what he does in his practice as irrelevant. There's a motion [*sic*] in limine on that too.
> "Q. I'll rephrase.
> "BY [Plaintiffs' counsel]:
> "Q. Is it your opinion that the doctor should do the review of systems?
> "A. It is my opinion that the physician should do the review of systems.
> "Q. And were you critical of Dr. DeBrot in your report about his review of the history and systems of this patient?
> "A. Yes, I was."

The defendant argues the district court erred in allowing Dr. Miser to testify as to his practice of personally reviewing patient systems because such testimony was barred by an order in limine. The defendant claims the offending testimony resulted in the doctor offering his opinion that the defendant acted inappropriately in not doing the same.

It is improper for a doctor to testify regarding his or her own preferred method of treatment in determining whether another doctor deviated from the applicable standard of

care. *Nold v. Binyon*, 272 Kan. 87, 100, 31 P.3d 274 (2001). Although counsel should have avoided asking a question he had reason to know the witness may not be permitted to answer, counsel's actions in this regard do not warrant reversal because the district court sustained defense counsel's objection to the question. A jury is presumed to have disregarded evidence about which an objection was sustained. *Fitzpatrick v. Allen*, 24 Kan. App. 2d 896, 901, 955 P.2d 141, *rev. denied* 264 Kan. 821 (1998).

(2) *Questioning expert about the defendant's credibility*

The district court entered a pretrial order in limine prohibiting expert witnesses from offering opinions on witness credibility or the weight to be given their testimony.

During cross-examination by plaintiffs' counsel, Dr. Davis provided his opinion that the defendant's conduct was well within the applicable standard of care. In support of this opinion, Dr. Davis said he relied on the fact that the defendant testified in his deposition that he had discussed stroke with Barbara during her December 6 appointment. Plaintiffs' counsel asked Dr. Davis whether he believed the defendant's deposition testimony in light of the fact that there was no record in the defendant's December 6 notes to indicate that any conversation about TIA or stroke took place. Defense counsel objected to the question on grounds that plaintiffs' counsel was improperly asking the doctor to resolve a credibility issue. The district court overruled the objection, noting that counsel had the right to question Dr. Davis about the underlying factual information upon which he relied to formulate his expert opinion.

On appeal, the defendant again argues the district court improperly allowed counsel to question Dr. Davis about the defendant's credibility. He alleges this questioning was prejudicial because it suggested that his own expert did not believe him.

But the defendant mischaracterizes the nature of Dr. Davis' testimony. Counsel was not asking Dr. Davis to comment on the defendant's credibility. Rather, he was asking Dr. Davis to confirm that, in forming his opinion, he relied on the fact that the defendant had discussed stroke with Barbara on December 6 despite the fact that the defendant's notes contained no reference to such a discussion. The district court correctly found plaintiffs' counsel was entitled to question Dr. Davis about the underlying facts upon which Dr. Davis relied in forming his opinion that the defendant had met the applicable standard of care.

(3) *Questioning expert on privileged conversation with defense counsel*

Before trial, the district court granted the defendant's motion in limine regarding communications between attorneys and expert witnesses. Relying on K.S.A. 2015 Supp. 60-226, the court ruled at the pretrial hearing on the motion in limine that communications between attorneys and expert witness were inadmissible. Specifically, the court stated, "What they say, how they say, specifics is definitely protected by statute. How long they talked to them is not."

At the beginning of the second day of cross-examination, Dr. Davis unexpectedly told plaintiffs' counsel that he wanted to make further comments about a topic from the previous day's questioning. The topic Dr. Davis wanted to revisit related to an article containing a chart that listed common warning signs for TIA and stroke that Dr. Davis had testified about the day before. Dr. Davis stated that he had "thought about that chart and how it would apply to this case" after he had met for about an hour with defense counsel in his hotel room the previous evening and wanted to supplement his testimony in that regard. Plaintiffs' counsel asked Dr. Davis if he and defense counsel talked about the article during the meeting. Defense counsel objected on grounds that this conversation was privileged. The district court overruled the objection, and Dr. Davis

went on to testify that he told defense counsel the previous night that the list of stroke warning signs in the chart did not apply to Barbara.

The defendant argues the district court improperly allowed plaintiffs' counsel to invade privileged conversations his expert had with defense counsel, in violation of K.S.A. 2015 Supp. 60-226(b)(5) and the pretrial order in limine.

As set forth above, however, an order in limine is a temporary protective order and is subject to change during the trial. *Crume*, 271 Kan. at 101. By allowing Dr. Davis to respond to counsel's question asking whether Dr. Davis and defense counsel talked about the article during their meeting the night before, the district court appears to have superseded its prior order in limine based on the context in which the evidence was introduced at trial. Thus, we are not persuaded that a district court's subsequent decision to permit evidence subject to a pretrial order in limine qualifies as error in and of itself. Thus, we address only that portion of the defendant's argument asserting that the court improperly allowed plaintiffs' counsel to invade privileged conversations his expert had with defense counsel in violation of K.S.A. 2015 Supp. 60-226(b)(5).

When a "district court's decision to admit expert testimony is based upon an interpretation of the statute, the court has de novo review." *Dawson v. Prager*, 276 Kan. 373, 376, 76 P.3d 1036 (2003). The relevant statute at issue here is K.S.A. 2015 Supp. 60-226(b)(5)(C), which governs the scope of protection for communications between a party's attorney and expert witnesses in the course of preparing for trial. This subsection of the statute states as follows:

> "(C) *Trial-preparation protection for communications between a party's attorney and expert witnesses.* Subsections (b)(4)(A) and (b)(4)(B) protect communications between the party's attorney and any witness about whom disclosure is required under

subsection (b)(6), regardless of the form of the communications, except to the extent that the communications:

(i) Relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed." K.S.A. 2015 Supp. 60-226(b)(5)(C).

We find the communication at issue here was not confidential information protected from disclosure by K.S.A. 2015 Supp. 60-226(b)(5)(C). The information alleged by the defendant to be protected from disclosure under the statute was Dr. Davis' testimony that he told defense counsel the previous night that the list of stroke warning signs in the chart did not apply to Barbara. This communication fits under the exception set forth in subsection (C)(ii), which permits disclosure of facts or data that the expert considered in forming the opinion to be expressed. After plaintiffs' counsel asked Dr. Davis what he had learned about the list of stroke symptoms in the article during his conversation with defense counsel, Dr. Davis clarified, "It wasn't me learning. It was me telling them that we needed to make things clearer about this list and how it didn't apply to Mrs. Castleberry." Dr. Davis then went on to discuss the facts upon which he relied in forming his opinion that Barbara's blurred vision was distinguishable from "dimness of vision" that is common in TIA or stroke. In sum, the communication at issue here was not confidential information protected from disclosure by K.S.A. 2015 Supp. 60-226(b)(5)(C).

(4) *Evidence regarding number of yearly deaths due to medical error*

The district court granted the defendant's pretrial motion in limine, which requested the court to exclude at trial any reference to studies concluding that medical errors kill thousands of Americans each year.

Dr. Miser testified on direct examination that he served as an expert witness for more than financial gain. The doctor stated that he considered this work important because "[w]e have to police ourselves some way as professionals, as physicians. I'm sure you've all heard that there are at least 100,000 people that are killed by medicine each year." Defense counsel objected on grounds that this testimony violated the order in limine on this subject, and the district court sustained the objection. During a later hearing outside the jury's presence, defense counsel complained about the order in limine violation, claiming that it was at least the second such violation that had occurred and argued that the testimony should have been stricken from the record. The district court overruled defense counsel's request to affirmatively strike the testimony from the record because it would just bring more attention to the testimony by telling the jury to disregard it. Defense counsel ultimately agreed that nothing would be gained by mentioning the issue to the jury but expressed concern toward the court's "casualness" towards violations of orders in limine.

The defendant argues that Dr. Miser's comment was prejudicial because it led the jury to decide the case based on fear. Although the defendant is correct that Dr. Miser's comment violated the order in limine, the defendant cannot show that he suffered substantial prejudice as a result. The district court sustained defense counsel's objection to Dr. Miser's unprompted testimony. A jury is presumed to have disregarded evidence about which an objection was sustained. *Fitzpatrick*, 24 Kan. App. 2d at 901.

(5) *Questioning witness about upsetting conversations overheard by Barbara*

Although the origins of the defendant's next argument are not entirely clear from the record, it appears that defense counsel became concerned during pretrial depositions that plaintiffs' counsel would attempt to introduce evidence at trial that Barbara had been upset by overhearing some unnamed health care provider state that her stroke could have

been prevented. The defendant sought to have any such evidence be excluded by an order in limine. The district court granted the order on grounds of hearsay and unfair prejudice.

Scott Castleberry, Barbara's son and one of the plaintiffs, testified at trial. The defendant complains about the following portion of Scott's direct testimony:

"Q[Plaintiffs' counsel]. Okay. And then did the doctors come in and tell you what was going on?

"A. Yeah. They said it was evident that she was having a stroke.

"Q. And did they tell you anything else than it was evident she was having a stroke?

"A. I was—I've got some things I can't say.

"Q. Did you learn some things about treatment that you believe you can't tell this jury?

"[Defense counsel]: Your Honor, I'm going to object. I'm not sure where we're going from here.

"[Plaintiffs' counsel]: Well, I'm not either. That's why I'm trying to find out the subject.

"[Defense counsel]: Well, no.

"THE COURT: Do we need to have a hearing outside of the jury?

"[Plaintiffs' counsel]: No. I'll move on, because the jury has been out and I want them to hear this. I don't want to waste their time if I can avoid it.

"THE COURT: Thank you.

"BY [Plaintiffs' counsel]:

"Q. These conversations that you had with these other medical personnel, did they upset you?

"A. Yes.

"Q. On a scale of one to ten, how upset did you get?

"A. Ten.

"Q. Okay. Did your mother hear some of these statements?

"A. Yes.

"Q. How did it affect her?

"A. I'm sure it upset her to a scale of 20.

"Q. Okay. And these people, you couldn't name them or identify them today. Correct?

"A. No. I never knew I was going to have to identify anybody.

"Q. Is there any question you know what you heard?

"A. No.

"[Defense counsel]: Your Honor, I object. This is improper.

"THE COURT: I'm going to sustain that objection.

"Q. Was it a situation where it was a room that was not in chaos and that you could clearly hear?

"A. Yes.

"THE COURT: Let's move on, [Plaintiffs' counsel]."

Defense counsel later argued outside the jury's presence that plaintiffs' counsel had violated the subject of a specific order in limine by asking questions that were "clearly designed to show the jury that there was something bad out there that they were being prevented from hearing." Defense counsel further argued that the resulting prejudice was increased by counsel's continued questioning and clear intent to demonstrate to the jurors that something was being kept from them. In light of the previous violations of orders in limine, defense counsel requested a mistrial. While the district court agreed that the complained-of testimony "shouldn't have been introduced in front of the jury," it made no findings as to whether the order in limine had actually been violated and denied defense counsel's request for a mistrial. The following day, the district court advised that it would consider giving a limiting instruction with respect to the offending testimony, but it does not appear defense counsel requested such an instruction be given.

The defendant argues that counsel violated the order in limine by asking Scott if he had learned "some things about treatment that you believe you can't tell this jury?" The defendant claims this violation was further exacerbated when counsel then proceeded to ask other related questions rather than moving on as he had agreed to do.

But it does not appear that Scott's testimony violated the order in limine related to Barbara overhearing a conversation that her stroke could have been prevented. Scott did not testify about the actual content of any conversation overheard by Barbara or the

family. Scott's testimony indicating that they may have heard some upsetting information while in the hospital, while possibly improper on other grounds, did not violate the specific order in limine at issue here.

(6) *Questioning expert on the defendant's romantic relationship with his nurse*

Before trial, the district court entered an order in limine prohibiting any references to the defendant's romantic relationship with his nurse, Shawna Dunham. At trial, during Dr. Davis' cross-examination, the following exchange occurred:

"Q[Plaintiffs' counsel]. Do you know anything about the office setting of Dr. DeBrot at the time of these examinations?

"[Defense counsel]: Your Honor, I object. This is irrelevant, immaterial and is moving into areas that are precluded.

"THE COURT: If you can answer that. That is a yes-no question.

"BY [Plaintiffs' counsel]:

"Q. Do you know anything about the professional office setting of Dr. DeBrot and his nurse at the time that Shawna Dunham—at the time the care was provided?

"THE COURT: I'm going to sustain the objection to that question.

"BY [Plaintiffs' counsel]:

"Q. Do you know anything about the relationship of Shawna Dunham—the working relationship of Shawna Dunham and Dr. DeBrot?

"[Defense counsel]: Your Honor, this is irrelevant. I object and I'd like to be heard on it later.

"THE COURT: All right. I sustained."

At a later hearing outside the jury's presence, defense counsel complained that plaintiffs' counsel's questions were designed to infer to the jury that the defendant and Dunham had an inappropriate relationship and renewed his motion for mistrial. Following a recess, the district court denied the motion.

The defendant argues that counsel's questions were communicated in a way to suggest to any reasonable observer the existence of an inappropriate relationship between the defendant and Dunham.

But we find counsel's questions did not violate the order in limine prohibiting disclosure of the defendant's personal relationship with Dunham. There is no evidence in the record indicating that counsel's reference to a "working relationship" was calculated to suggest the existence of an inappropriate relationship. But even if it was, there is no reason to believe that counsel's questions would have caused the jury to make this inference. After the exchange at issue, plaintiffs' counsel questioned Dr. Davis about the defendant's working relationship with Dunham by asking whether he knew that the defendant did not train Dunham to recheck blood pressures. Because no violation of the order in limine occurred here, the defendant's argument on this point necessarily fails.

f. *Learned treatise exception to inadmissibility of hearsay*

Several times during the trial, the district court allowed the plaintiffs to introduce into evidence various exhibits under the learned treatise exception to the Kansas hearsay rule, K.S.A. 2015 Supp. 60-460(cc). The defendant argues the admission of this evidence was erroneous because the exhibits failed to meet the definition of a learned treatise or were otherwise misleading, irrelevant to the specific medical issues in the case, or were offered solely to enhance the jury's fear about strokes.

An appellate court exercises de novo review of a challenge to the adequacy of the legal basis of a district judge's decision on admission or exclusion of evidence. *State v. Bowen*, 299 Kan. 339, 349, 323 P.3d 853 (2014).

K.S.A. 2015 Supp. 60-460(cc) states:

> "Evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated, is hearsay evidence and inadmissible except:
>
> . . . .
>
> "(cc) *Learned treatises.* A published treatise, periodical or pamphlet on a subject of history, science or art, 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 in the subject."

Thus, the Kansas learned treatise exception to the hearsay rule permits the admission into evidence of a medical treatise as independent substantive evidence if reliability and relevancy are established. See K.S.A. 60-401(b); *Zimmer v. State*, 206 Kan. 304, 309, 477 P.2d 971 (1970). This exception "requires special vigilance by a trial judge to make certain a 'garbage in' process does not occur or that the jury is left to ferret through learned treatises that the average juror does not understand or may misconstrue." *Wilson v. Knight*, 26 Kan. App. 2d 226, 229, 982 P.2d 400, *rev. denied* 268 Kan. 896 (1999). Application of this hearsay rule must be considered on a case-by-case basis, weighing the probative value of the evidence against its potential prejudicial impact. 26 Kan. App. 2d at 230.

Of the 17 exhibits that the defendant challenges, 2—Exhibits C-152 and C-154—were not admitted into evidence under the learned treatise hearsay exception. Notably, however, these two exhibits were introduced in the context of relevant factual evidence supporting Dr. Miser's testimony. Accordingly, we will not address the defendant's claim as to these two exhibits. After reviewing each of the remaining 15 exhibits objected to by the defendant, we find the district court did not commit reversible error in admitting these exhibits into evidence under the learned treatise hearsay exception.

Eight of the exhibits challenged by the defendant were admitted together in a group of 16 exhibits, over the defendant's objection. Prior to the admission of these

exhibits, Dr. Miser testified that each was reliable, authoritative, valid, and useful for exploring the issues involved in the case. Dr. Miser then testified as to how each exhibit was relevant to the case. Specifically, Exhibits C-104 and C-105 examined use of aspirin in stroke prevention. Exhibits C-110, C-111, and C-112 discussed how aspirin can protect against Barrett's esophagitis and supported Dr. Miser's opinion that this condition should not have prevented Barbara from being prescribed aspirin. Exhibit C-114 detailed the carotid endarterectomy procedure that removes blockages from the internal carotid artery to prevent a stroke. Dr. Miser testified that this procedure would have been available to Barbara if the defendant had listened to her carotid artery. Exhibit C-118 set forth facts regarding high blood pressure and how it can lead to heart disease and stroke. Each of these exhibits was admitted only after Dr. Miser testified as to each exhibit's authority and reliability. Moreover, we find these exhibits were each relevant to a material issue in the case—whether the defendant failed to properly diagnose and treat Barbara's symptoms as consistent with TIA or stroke. The defendant also challenges another exhibit that was admitted among this group—Exhibit C-115, which discussed clinical prediction rules for diagnosing carpal tunnel syndrome. Although it does not appear that Dr. Miser specifically discussed how this exhibit was relevant to the issues in the case, it was arguably relevant, given the defendant's diagnosis of Barbara's symptoms.

The defendant also challenges the admission of seven other exhibits. However, he objected to the admission of only six of these exhibits. As a result, the defendant has waived his challenge to Exhibit C-140a. See K.S.A. 60-404 (timely and specific objection required to preserve evidentiary issue for appellate review). As for the remaining six exhibits, Dr. Miser testified that each was authoritative, reliable, relevant, and provided support for his opinions. Exhibit C-142 is a summary of an article on TIA, published by the National Institute of Neurological Disorders and Stroke (NINDS). Exhibit C-143 is a published summary of a NINDS stroke information page. Exhibit C-147 is literature on ischemic stroke. Exhibit C-149 is a flier listing the warning signs for strokes. Exhibit C-150 lists information on stroke by the American Heart Association and American Stroke

Association. Exhibit C-151 is a summary of NINDS's enactment of a mission to cure and prevent strokes. After reviewing each of these exhibits, we find the district court properly admitted them into evidence under the learned treatise hearsay exception. Each exhibit was admitted only after predicate testimony as required by K.S.A. 2015 Supp. 60-460(cc), and these exhibits were clearly relevant to the material issue in the case. As a result, the defendant's claim of error fails.

5. Cumulative error

Finally, the defendant argues that the jury's verdict should be reversed based on the cumulative effect of the errors alleged above. Cumulative error warrants reversal when the various errors "have so permeated and tainted the entire proceedings that [a party] has been deprived of the fair trial to which every litigant is entitled." *Walker v. Holiday Lanes*, 196 Kan. 513, 520, 413 P.2d 63 (1966). For there to be cumulative error, there must first be individual errors. Based on the preceding analysis, the following errors occurred at trial: (1) The district court improperly provided the jury with a comparative fault instruction to consider in determining causation, (2) plaintiffs' counsel made a prohibited golden rule argument in closing, (3) plaintiffs' counsel violated an order in limine restricting questions about an expert's personal treatment preferences, and (4) an expert witness testified to the number of yearly deaths due to medical error, information that was subject to an order in limine. As detailed above, however, we found each of these errors to be harmless and not reversible error.

Although reversal may be necessary due to cumulative effects of trial court errors even absent a decision that any single error would constitute grounds for reversal, such relief will not be granted where, as here, there is no showing that prejudice resulted from any of the errors that occurred in the case. This case was tried by competent and zealous counsel on both sides. The trial itself took 14 days. Nearly 20 witnesses testified, either live or by deposition. Well over 100 exhibits were introduced into evidence. The record

of this case fills three boxes. In addition to reading the briefs of counsel, we have reviewed the record in its entirety. To that end, we simply are not persuaded that cumulative error deprived the defendant of a fair trial in this matter.

Affirmed.