Case No. 111105

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,

Plaintiffs / Appellees,

v.

BRIAN L. DEBROT, M.D.

Defendant / Appellant.

Appeal from the District Court of Sedgwick County
Honorable Richard Ballinger, Judge
District Court Case No. 09-CV-4710

BRIEF OF THE APPELLEES

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ORAL ARGUMENT REQUESTED

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Nature of the Case

This is a defendant physician's appeal in a medical malpractice suit in which the plaintiffs, the surviving family of the decedent who had been the defendant's patient, obtained a recovery for their wife and mother's wrongful death and survival damages.

The decedent suffered a paralyzing stroke on December 20, 2007, one day after being seen by the defendant, and died after a fall on January 29, 2009. After a 15-day trial, the jury found the defendant was negligent in providing the decedent with medical care, and his negligence caused her stroke and, ultimately, her death. It returned a verdict for the plaintiffs for $1,257.484.64. The trial court reduced that amount under K.S.A. § 60-2003 to $907,484.69 and entered judgment against the defendant for that amount.

The defendant now appeals the trial court's judgment and seeks a new trial.

Statement of the Issues

I. Read as a whole, the jury instructions fairly and reasonably instructed the jury on the law governing the case and did not mislead the jury.

II. The trial court did not abuse its discretion during closing arguments in allowing the plaintiffs' counsel to comment on evidence and reasonable inferences therefrom or in averting improper arguments by defense counsel.

III. The trial court did not abuse its discretion in admitting testimony from the plaintiffs' expert witness defining the standard of care required of the defendant, because the testimony at issue was admitted without objection and a defense expert agreed to that standard without objection. Thereafter, the trial court did not err in allowing the plaintiffs to explore that testimony in cross-examination.

IV. The trial court did not abuse its discretion in: (1) allowing un-objected-to cross examination of the defendant as to an exhibit that ultimately was not admitted into evidence and for which no curative instruction was sought; (2) allowing the plaintiffs to examine witnesses as to an issue that the jury ultimately was not instructed on; (3) allowing cross-examination as to an exhibit that ultimately was not admitted into evidence and for which no curative instruction was sought; (4) allowing the plaintiffs to rephrase a question so as not potentially to violate an order in limine; (5) allowing the plaintiffs to ask the defendant's expert witness whether the defendant's notations and recollections made sense in the context of

his practice of medicine; and (6) allowing the plaintiffs to ask a defense expert about whether his conversations with defense counsel affected his opinions.

V. The trial court did not abuse its discretion in failing to issue curative instructions because, the defendant never requested that relief after his objections were sustained to items he alleged violated orders in limine.

VI. The trial court did not abuse its discretion in admitting the plaintiffs' exhibits C105, C110, C111, C112, C115, C118, C140a, C143, C147, C149, C150, and C151 as learned treatises under K.S.A. § 60-460(cc), because the expert testimony was that these periodicals, treatises, and pamphlets were published, reliable authorities on the subject. The trial court also did not abuse its discretion in admitting the plaintiffs' exhibits C152 and C154 as relevant factual information supporting the plaintiffs' theory in this case, because the expert testimony was that they did support the plaintiffs' theory.

Statement of Facts

The defendant's statement of facts improperly seeks to retry the case below (Brief of the Appellant ("Aplt.Br.") 2-6). Because the jury resolved all facts in the plaintiffs' favor, however, this Court must view the facts and any reasonable inferences therefrom in a light most favorable to the jury's verdict. Stated in that mandatory light, which the defendant does not in any way, the material facts of this case are the following.

A. Background to the Proceedings Below

1. Barbara Castleberry's Background and Initial Medical Visits

In January 2007, Barbara Castleberry, 72 years old, and her husband, Doug, decided to find a new doctor for both of themselves (R. 36 at 171; R. 37 at 121-22; R. 46 at 100). The Castleberrys lived in Wichita, Kansas, had been happily married since 1958, and had three children and five grandchildren (R. 35 at 232; R. 36 at 171; R 37 at 105-06, 112). Together, the extended Castleberry family was cohesive and loving (R. 35 at 237-28). Barbara was the family's "glue" and "peacemaker" (R. 35 at 240; R. 36 at 178).

On January 9, 2007, the Castleberrys met with Dr. Ely Gadalla at the Galichia Medical Clinic in Wichita, who became their primary care physician (R. 47 at 170, 173). Galichia was a full-service medical facility that also included a hospital with an "emergency room adjacent" to the clinic, and to which the clinic had "easy access" (R. 47 at 213). Mr. Castleberry attended all of Mrs. Castleberry's medical appointments (R. 37 at 123). At the first appointment, Mrs. Castleberry had some abdominal pain and high blood pressure, but no other issues (R. 47 at 171-74).

Mrs. Castleberry saw Dr. Gadalla again on January 17, 2007 (R. 47 at 175). Her blood pressure was slightly reduced, but she still complained about abdominal pain (R.

47 at 175-76). After tests showed the abdominal pain was caused by stomach ulcers, Dr. Gadalla advised Mrs. Castleberry not to take aspirin for three months (R. 47 at 181-82).

Mrs. Castleberry returned to the Galichia Clinic for a checkup on March 8, 2007; instead of seeing Dr. Gadalla, however, she saw another physician, Dr. David Kirk (R. 47 at 178). The abdominal pain was gone, but she complained of headaches and stress in her eyes (R. 47 at 181). Dr. Kirk diagnosed hypertension and Barrett's esophagitis (R. 47 at 182). Dr. Kirk next saw Mrs. Castleberry on June 14, 2007 (R. 47 at 184). Her blood pressure was increased and she complained of occasional abdominal pain and numbness in her feet, but she exhibited no other issues (R. 47 at 184-85). Dr. Kirk diagnosed her with a stomach and esophagus inflammation and prescribed medication (R. 47 at 185-86).

Mrs. Castleberry next returned to Galichia on August 10, 2007, due to an insect bite on her left foot, and for the first time saw Dr. Brian DeBrot (R. 47 at 186-88). She initially was examined by DeBrot's nurse, Shawna Dunham, who claimed at trial not to remember Mrs. or Mr. Castleberry (R. 36 at 39; R. 47 at 187). Besides the insect bite and accompanying pain and swelling, Mrs. Castleberry exhibited increased blood pressure and, for the first time, blurred vision and fatigue (R. 47 at 186-88; R. 36 at 67). Neither DeBrot nor Dunham discussed the vision or fatigue or listened for carotid bruits (R. 36 at 67; R. 47 at 190). DeBrot prescribed antibiotics for the insect bite (R. 47 at 190).

On October 9, 2007, Mrs. Castleberry saw DeBrot and Dunham again (R. 36 at 40). Her chief complaint was hypertension and abdominal pain, but she also complained of fatigue, blurred vision, and numbness or tingling in her feet (R. 47 at 191-94). DeBrot only treated the abdominal pain, not any other symptoms (R. 47 at 191-94).

2. Medical Visits Leading Up to Mrs. Castleberry's Stroke

On November 10, 2007, Mrs. Castleberry fell at her son's home; emergency room records stated she had pain in right foot and knee (R. 36 at 172; R. 47 at 197-98). Thereafter, she "just wasn't herself," was tired, and did not do much cooking on Thanksgiving, which was "real unusual" (R. 36 at 178).

Mrs. Castleberry saw DeBrot and Dunham on November 15, 2007, shortly after the fall (R. 36 at 40; R. 47 at 197). Her chief complaint was joint pain but she also again had blurred vision (R. 47 at 197). DeBrot did not address or treat the blurred vision, but instead assessed hypertension, high cholesterol, Barrett's esophagitis, and pain in her right ankle (R. 47 at 198-99). He did not address the cause of the fall and told her to return in five months (R. 47 at 200).

Mrs. Castleberry, though, began experiencing daily numbness and tingling of her left hand, which worsened over time and made it difficult for her to pick things up or turn pages (R. 47 at 202). She also experienced dizziness, fatigue, and blurred vision (R. 47 at 203). These symptoms worried her that she was at risk for a stroke, a worry she decided to raise with DeBrot (R. 37 at 127-28; R. 47 at 239). She saw DeBrot on December 6, 2007, though with a different nurse than Dunham (R. 36 at 95; R. 47 at 200).

At the appointment, Mrs. Castleberry's blood pressure was higher and she informed DeBrot of her left hand difficulties and her neurological symptoms (R. 47 at 202). She asked, "do you think it could be a stroke and he said no. He said, 'I don't think it's that serious.' … 'it's not as serious as a stroke'" (R. 37 at 127). He did not assess or treat her dizziness or blurred vision (R. 47 at 203). Instead, he diagnosed her with carpal tunnel syndrome and referred her to an orthopedic surgeon (R. 34 at 239; R. 35 at 136).

This diagnosis relieved the Castleberrys, especially as to their stroke concerns (R. 36 at 180-81). The orthopedic surgeon also diagnosed carpal tunnel and gave Mrs. Castleberry a splint and medication (R. 34 at 239; R. 35 at 136; R. 36 at 180-82; R. 37 at 128-29). This treatment did not make the hand numbness or tingling any better, though, and Mrs. Castleberry increasingly was fatigued, dizzy, and had blurred vision, so she decided to go back to DeBrot (R. 36 at 180-82; R. 37 at 32-33, 128-29). Before the visit, she was worried about an oncoming stroke, "felt like she might be having something to do with a stroke," and "had done a lot of reading on" stroke (R. 34 at 239; R. 37 at 129).

On December 19, 2007, Mrs. Castleberry again saw DeBrot and Dunham (R. 36 at 40; R. 47 at 203). DeBrot coded the appointment as an "extended visit," meaning multiple issues or complex issues were being addressed (R. 35 at 16). Mrs. Castleberry's blood pressure was much higher than ever before, 166/92, the highest of all her medical reports, at least 20 points higher than any other reading (R. 47 at 204; R. 35 at 24). 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, constipation, and, for the first time, psychological symptoms of nervousness, tenseness, stress, anxiety, personality change, and depression (R. 34 at 244; R. 35 at 20-21; R. 47 at 207). DeBrot noted her left hand was "worse" than before (R. 34 at 243).

At the appointment, Mrs. Castleberry again voiced her concern "directly to Dr. DeBrot" about the possibility of stroke, but he "said that he felt like it was carpal tunnel and it was going to take a while and we needed to give it more time" (R. 37 at 129-30). He neither mentioned nor rechecked Mrs. Castleberry's hypertension, nor did he listen for carotid bruits (R. 47 at 205; R. 50 at 34-35). He never trained Dunham that high

blood pressure readings should be rechecked, nor did he tell her any level considered "high enough" to be rechecked (R. 36 at 52). He made no change in Mrs. Castleberry's hypertension treatment and made no treatment for her blurred vision, psychological issues, or dizziness (R. 47 at 206-07). He did not consult Dr. Gadalla about her taking aspirin (R. 47 at 181-82, 246). Since the early 1980s, it has been commonly known among physicians that aspirin reduces the risk of stroke (R. 34 at 29; R. 47 at 266).

Ultimately, DeBrot advised Mrs. Castleberry she was not going to have a stroke, reassured her she merely had carpal tunnel syndrome, and said "it wasn't that serious and to just go Christmas shopping" (R. 34 at 169; R. 36 at 182; R. 37 at 145-46). DeBrot later admitted he did not recall advising Mrs. Castleberry about the risks of stroke and did not consider the possibility that she may have been experiencing transient ischemic attacks ("TIA"), often described as "mini-strokes" (R. 34 at 169; R. 35 at 143).

3. Mrs. Castleberry's Stroke, Suffering, and Death

The next day, December 20, 2007, one day before her 73rd birthday, Mrs. Castleberry suffered a severe stroke (R. 47 at 204, 211). It caused her to be in acute pain, paralyzed on the left side of her body, unable to walk and only crawl, be weak, and lose muscle tone and endurance (R. 47 at 242). She lost the ability to walk independently, dress herself independently, go to the bathroom by herself, or make food for herself (R. 34 at 67-68). Thereafter, she only "frowned," she "never got her smile back," she "never could talk right," "couldn't eat," and "couldn't get up and do anything" (R. 37 at 18-19). She required round-the-clock attendant care (R. 34 at 74; R. 47 at 243).

Mrs. Castleberry's paralysis and pain were incurable (R. 47 at 243). She required pain medications that made her semi-conscious and unable to communicate with loved

ones, and also caused gastrointestinal upset and constipation (R. 47 at 243-44). These conditions caused her to be mired in depression (R. 35 at 175).

The stroke also caused "catastrophic" suffering to Mrs. Castleberry's family; the cohesive family lost "something special" in terms of how she was part of it (R. 34 at 70; R. 47 at 246). Her husband suffered a "downward spiral" and also fell into depression (R. 36 at 191-92). Ultimately, he had to go live in a retirement home (R. 36 at 192).

After the stroke, among other treatment, Mrs. Castleberry was prescribed Warfarin, which usually is used after ischemic strokes like Mrs. Castleberry's to reduce the risk of suffering another (R. 35 at 174; R. 46 at 130; R. 47 at 209-10). Warfarin also is a blood thinner that causes excess bleeding (R. 46 at 130).

On the evening of January 27, 2009, Mrs. Castleberry fell out of a chair at home; paramedics rushed her to St. Francis Medical Center (R. 46 at 101-04, 108, 110, 112). She exhibited shock and left-sided paralysis, and was unconscious, confused, and lethargic (R. 46 at 111-12). The fall caused her to suffer a subdural hemorrhage; a CT scan revealed multiple contusions, subfalcine herniations, and subarachnoid hemorrhages, and she was given a poor prognosis (R. 46 at 127, 134). Her Warfarin made the hematomas and hemorrhages worse (R. 46 at 135). Mrs. Castleberry passed away at St. Francis on January 29 as a result of this trauma (R. 35 at 219-20).

The effect of Mrs. Castleberry's loss on her family was "devastation" – it "[t]ook away the heart and soul of [the] family" (R. 37 at 18). It caused her family depression – especially Mr. Castleberry (R. 36 at 194-95). It also caused Mr. Castleberry memory problems he had not experienced before and were "a dramatic change in [his] ability to think clearly;" this included mistaking his children's names (R. 36 at 198).

B. Defendant's Failure Caused Mrs. Castleberry's Stroke, Suffering, and Death

At trial, two experts explained how DeBrot violated the standard of care in treating Mrs. Castleberry on December 6 and December 19, how that violation caused her stroke and her ultimate death, and how it caused she and her family damages (R. 34 at 19-269; R. 35 at 8-160; R. 47 at 277-81; R. 50 at 1-42). The defense stipulated that both experts were qualified and expressly waived any objection otherwise (R. 37 at 134).

1. Expert Testimony of Dr. Frank Yatsu

The first expert, Dr. Frank Yatsu, had been a neurologist for 47 years, was a professor of neurology, was the director of the World Heath Organization's Global Stroke initiative, and was "a recognized stroke expert" (R. 34 at 156; R. 50 at 2-4). As he died before trial, portions of his deposition were read into the record (R. 47 at 277-81).

Dr. Yatsu defined the "standard of care" as "the standards of a community of medical practitioners in diagnosis and workup and treatment of disorders" (R. 50 at 13). He explained the "real issue" in this case was whether, under the signs and symptoms present, DeBrot "should have had [the] suspicion" that Mrs. Castleberry was in danger of stroke (R. 50 at 18). He concluded that, with this in mind, "DeBrot departed from the standard of care" during her "two visits in December of 2007" (R. 50 at 24).

Dr. Yatsu explained stroke detection is "very important," and that a doctor should be "more careful" than not in approaching a situation is "basic to medicine" (R. 50 at 32). He said DeBrot instantly should have suspected TIA in Mrs. Castleberry because "there's an indication of numbness to the left hand and tingling" that had "increased over the last few weeks," she had "difficulty picking things up and turning pages" which "[h]appens daily," along with "[d]izziness" (R. 50 at 25). Essentially, "a 72-year-old lady" who

DeBrot already knew was "hypertensive and hyperlipidemic" "comes in" with these symptoms, and he should have known "that she's at risk for coronary or peripheral vascular or cerebral vascular disease," as the "risk factors" are "present" (R. 50 at 25).

Dr. Yatsu was not "impressed with the diagnosis of carpal tunnel," because Mrs. Castleberry's "complaints" of dizziness and blurred vision were "bothersome" symptoms and were not "looked into" (R. 50 at 20). DeBrot did not describe the nature of the blurred vision or dizziness at all, which was below the standard of care (R. 50 at 33). To pass these symptoms off as "due to wrist pain" does not "make sense" (R. 50 at 38).

Rather, DeBrot "should have diagnosed TIA at" the December 6 and 19 visits (R. 50 at 25, 30). He should have listened for carotid bruits, which takes seconds and costs nothing, and should have ordered a carotid duplex study, which is riskless and which, on either date, "would have" revealed Mrs. Castleberry had a stenosis that would lead to stroke (R. 50 at 34-35). It was an "emergency situation" (R. 50 at 40). The tests could have been performed "right away," upon which she could have had surgery, which most likely would have been successful (R. 50 at 34, 40). Even on December 19, there was "adequate time" to perform all of that to prevent her stroke the next day (R. 50 at 34).

Instead, "DeBrot's decision to explain all of Mrs. Castleberry's symptoms on her left hand and disregard her cerebral symptoms of dizziness, blurry vision, anxiety, depression, et cetera, plus her hypertension and dyslipidemia, which are known to provoke atherosclerosis, are inexplicable" (R. 50 at 31). A physician could not analyze DeBrot's "behavior in this matter and find it to be within the standard of care" (R. 50 at 35). Mrs. Castleberry's post-stroke injury and suffering were "caused by the failure to diagnose and treat the stroke on either" December 6 or 19 (R. 50 at 34).

2. Expert Testimony of Dr. William Miser

The second expert, Dr. William Miser, came from a family practice background similar to DeBrot's, but he also was an award-winning medical teacher and author of peer-reviewed journal articles who had testified as an expert witness many times before and was "an expert in the study of" stroke (R. 34 at 25-26, 28-29, 31-37, 50, 135).

As to DeBrot's standard of care, Dr. Miser explained that one of a family physician's hallmarks is "primary prevention" – to prevent disease before it occurs (R. 34 at 30, 36). As such, it is important to document everything relevant a patient says (R. 34 at 38-39). Additionally, an important component of the standard of care is providing and obeying a "margin of safety" (R. 34 at 84, 95-97, 100-02, 129, 236). The standard of care largely is the "safe practice of medicine," and safety is "the number one factor in treating people" (R. 34 at 95, 100-01). Physicians must "err on the side of safety," "provide the best safest care for th[e] patient," and "advocate for the safety of the patient" (R. 34 at 147, 168, 194, 197, 236). Failing to "provide a margin of safety" "play[s] into [the] analysis of whether or not [DeBrot] deviated from the standard of care" (R. 34 at 130). This is "a safety standard that all physicians are aware of" (R. 34 at 131).

All frontline physicians commonly know that stroke is a common, major problem, that females and persons older than 65 are at a higher risk of stroke, that high blood pressure is a top risk factor for stroke and should be rechecked with stroke in mind, and that being overweight and having high cholesterol also are stroke risk factors (R. 34 at 52-53, 61-64, 114, 119, 146-47, 177-78; R. 35 at 116). Mrs. Castleberry was a female over 65, overweight, had high cholesterol, and had high blood pressure, all of which DeBrot knew, and thus she obviously was at an increased risk of stroke (R. 34 at 146-47;

R. 35 at 116). Under those circumstances, a reasonable physician would use a stroke calculator, which takes 30 seconds, but DeBrot did not (R. 34 at 148-49). This would have shown a 23% increased chance of impending stroke (R. 35 at 150).

Aspirin is an important, affordable treatment for stroke prevention, but DeBrot never recommended it to Mrs. Castleberry (R. 34 at 34, 41-43). Her past ulcers were not a viable reason for this, as aspirin could have been taken with common over-the-counter antacids so as to cut down acid production (R. 34 at 258-59). Control of hypertension also is a primary prevention tool to prevent strokes that cannot be ignored (R. 34 at 34-35, 41-42, 85-86, 95). The proper way to treat it with stroke prevention in mind is to give two blood pressure medications (R. 34 at 98). Mrs. Castleberry's hypertension was stage two, the worst type, but DeBrot only prescribed one medication (R. 34 at 98, 103).

Additionally, there are simple arm tests a physician can perform to see if a person might be having TIA or a stroke, which all physicians know (R. 34 at 64-66). DeBrot did not try all of them (R. 34 at 66). But left hand numbness like Mrs. Castleberry had is not an unusual TIA presentation (R. 35 at 12). It also is important to listen to the carotid artery in the neck – which takes only a few seconds and is basic – to hear whether there may be a blockage, called "bruits" (R. 34 at 82-84). DeBrot did not do this but "absolutely" should have (R. 34 at 84). There was no viable reason not to (R. 34 at 84).

At the same time, there also is a simple, painless, inexpensive test, a carotid doppler study, which determines whether there is a carotid stenosis – a blockage (R. 34 at 183). Had DeBrot ordered that test on December 19, it would have found Mrs. Castleberry's stenosis before she had a stroke (R. 34 at 183). She could have been sent to the hospital and a "clot buster" could have been administered, which likely would have

saved her (R. 34 at 184-87). DeBrot could have consulted – even merely by a phone call – with a specialist at the adjacent, connected Galichia Hospital, to whom he had "immediately available" access (R. 34 at 26-27). "[A]ll Dr. DeBrot needed to do … was to just pick up the phone and punch an intercom number" (R. 34 at 37).

Mr. Castleberry testified that, had DeBrot advised his wife to take aspirin, change her hypertension medication, undergo a carotid doppler study, see a neurologist, or be put under hospital supervision, she would have done so (R. 37 at 146-47).

High blood pressure also can create targeted organ damage, especially to the eyes, which would cause blurred vision (R. 34 at 109). Despite Mrs. Castleberry's presentation of blurred vision, DeBrot did not assess damage in her eyes (R. 34 at 109). Also, when there is a change in mental health, such as Mrs. Castleberry exhibited on December 19, it is important and must be inquired into, but DeBrot did not (R. 34 at 119-20).

Dr. Miser testified it is crucial to recognize warning signs of impending stroke, which include blurred vision, recent personality changes, and neurological symptoms, but DeBrot did not, which was below the standard of care (R. 34 at 153-58). If a patient comes in with a numb hand, as Mrs. Castleberry did, "stroke or TIA" must be put "right at the top" of any suspicions (R. 35 at 140). If DeBrot actually had discussed TIA or a stroke with Mrs. Castleberry at any appointment, he should have noted it down, but he did not, and there was no possible reason not to (R. 34 at 169). This failure made it seem he ruled out the possibility of stroke (R. 34 at 170). Indeed, DeBrot did not give patients educational materials for concerns about TIA, stroke, hypertension, etc. (R. 36 at 58-59).

Dr. Miser concluded that DeBrot's failure either to give aspirin or to treat hypertension with two medications and his overall treatment on December 6 and 19 were

below the standard of care (R. 34 at 100-02, 151). His examination and treatment were inadequate (R. 34 at 111-12). Suspicion of TIA should have been "at the top of the list" of suspicions, and "the minimal thing" would have been to listen for carotid bruits (R. 35 at 112). He failed to consult with her previous physicians (R. 34 at 266). He needlessly endangered her life, which was below the standard of care (R. 34 at 128-29).

DeBrot ignored the necessity of a margin of safety, which was below the standard of care (R. 34 at 129-31). Indeed, Dunham confirmed DeBrot never discussed patient safety and had no patient safety protocols (R. 36 at 55-58, 96, 105-06). This failed to give Mrs. Castleberry "any chance to make life-altering decisions concerning her health" (R. 35 at 154). Under the circumstances, any physician would know to discuss the risks and benefits of not having aspirin, of not modifying blood pressure medication, and of not having a carotid doppler or listening study done (R. 34 at 115, 183). There was "no excuse" for Debrot's failures "that stands up in medicine" (R. 34 at 260).

The defendant suggests Dr. Miser took "the opposite approach" to Dr. Yatsu because Dr. Yatsu "denied that Mrs. Castleberry had carpal tunnel syndrome" and Dr. Miser "was not challenging" the "diagnosis of carpal tunnel syndrome" (Aplt.Br. 5). This is untrue. Dr. Miser testified that whether Mrs. Castleberry had carpal tunnel syndrome was "irrelevant" to whether her symptoms represented a potential TIA, and the carpal tunnel diagnosis need not be considered "one way or another" (R. 34 at 225, 228; R. 35 at 114). This is because a patient can present both TIA and carpal tunnel, and he agreed with Dr. Yatsu that the carpal tunnel diagnosis did not explain the remainder of Mrs. Castleberry's symptoms (R. 34 at 225, 228; R. 35 at 15, 114).

Dr. Miser further explained that DeBrot giving Mrs. Castleberry only one blood pressure medicine instead of two "caused and contributed to the disabilities and death that she suffered," and also "cause[d] and contribute[d] to the damages that she and her family suffered" (R. 34 at 98-99, 107). Earlier treatment would have made a difference (R. 34 at 131). "The failure to control high blood pressure, put her on aspirin," or "look for evidence of blocked carotid arteries" all "led to not making the diagnosis of impending stroke in Mrs. Castleberry and therefore resulted in the pain and suffering damages that she had from her stroke" (R. 34 at 133).

Dr. Miser also explained Mrs. Castleberry's fall in January 2009 equally was caused by her disabilities from the stroke, making her death "directly related" to the stroke (R. 35 at 54-55). As well, the Warfarin she took due to the stroke made the fall trauma worse, which also contributed to her death (R. 35 at 56-57). In short, Mrs. Castleberry's stroke for which DeBrot violated the standard of care in failing to prevent "caused her death" and caused her and her family damages (R. 34 at 71; R. 35 at 57).

C. Proceedings Below

In 2009, Mr. Castleberry filed a medical malpractice wrongful death and survivor action against DeBrot in the District Court of Sedgwick County on behalf of himself, as the administrator of Mrs. Castleberry's estate, and on behalf of his children as her heirs (R. 2 at 15). After a 15-day trial in May and June 2013, the jury unanimously returned a verdict in the plaintiffs' favor and awarded $1,257,484.69 in damages, which the trial court later reduced under K.S.A. § 60-1902 to $907,484.69 (R. 10 at 46-51). DeBrot moved for a new trial, which was overruled (R. 10 at 52-59; R. 48 at 31). He then appealed to this Court (R. 73-79).

Argument and Authorities

I. Read as a whole, the jury instructions fairly and reasonably instructed the jury on the law governing the case and did not mislead the jury.

Standard of Appellate Review

The defendant claims allegations of instructional error are merely "subject to unlimited review" (Aplt.Br. 7). But that is only as to the first step: "whether the instruction was legally appropriate." *Foster ex rel. Foster v. Klaumann*, 296 Kan. 295, 301, 294 P.3d 223 (2013) (citation omitted). If it was not legally appropriate, the Court then "must determine whether the error was harmless …." *Id.* at 301-02 (citation omitted). That is, the appellant has the burden to show that, on the whole record, there is a reasonable probability that the alleged error affected the outcome of the trial. *Id.* at 305 (citation omitted). At the same time, "instructions in any particular action are to be considered together, read as a whole, and where they fairly instruct the jury on the law governing the case, error in an isolated instruction may be disregarded as harmless." *City of Neodesha v. BP Corp. N. Am., Inc.*, ___ Kan.App.2d ___, 334 P.3d 830, 848 (2014).

Our Supreme Court "strongly urge[s] trial courts to instruct the jury by using Kansas' pattern instructions as written, modifying them *only '[i]f the particular facts in a given case* require modification of the applicable pattern instruction or the addition of some instruction not included in PIK.'" *State v. Armstrong*, 299 Kan. 405, 438, 324 P.3d 1052 (2014) (citation omitted) (emphasis added).

* * *

As the defendant concedes, the trial court issued its jury instructions verbatim from PIK-Civil 4th ("PIK") without modification (Aplt.Br. 7, 9), except where the parties had agreed (R. 43 at 15-16). Nonetheless his first issue on appeal argues the court erred

by failing to *modify* PIK by: (1) adding causation language to the standard of care instruction in PIK 123.10 (Aplt.Br. 7-9); and (2) deleting the words "or contributed" from the fault instruction in PIK 105.01 (Aplt.Br. 9-13). He also argues the court erred by instructing the jury that the plaintiffs in this case were not at fault (Aplt.Br.13-15).

The defendant's arguments are without merit. The trial court, which faithfully followed PIK except where otherwise agreed, did not err in instructing the jury.

A. The jury instructions did not mislead the jury that the cause of Mrs. Castleberry's injury somehow was not a question of a medical or scientific nature depending on expert testimony.

The defendant first argues that, though the court "correctly instructed the jury" under PIK 123.10 that only expert testimony could inform them as to the standard of care, it erred in failing to *modify* that instruction by adding that the *cause* of the plaintiffs' injury also only can be decided from expert testimony (Aplt.Br. 7-9). He argues that, because the court simultaneously gave the standard PIK 102.20 instruction that the jury had "a right to use your common knowledge and experience," not identifying causation as a subject of expert testimony was "inherently misleading," as "[r]easonable jurors will inevitably be led to the legally erroneous conclusion that they are free to use their 'common knowledge and experience' in deciding causation" (Aplt.Br. 7-8).

The defendant's argument misses the mark in several ways. First, the "common knowledge and experience" language in PIK 102.20 is not some kind of roving commission. Rather, what Instruction 4 here said, exactly following PIK 102.20, was, "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" (R. 59 at 98) (emphasis added).

This instruction, which the PIK "Committee recommends … be given in every case," PIK 102.20 *Notes on Use*, merely instructs the jury that, *in deciding whether witnesses' testimony is credible and what weight to assign it*, they may use their common knowledge and experience. This reliance on lay experience is a historically crucial component of the jury system. *State v. Fulton*, 292 Kan. 642, 647, 256 P.3d 838 (2011).

Jurors are presumed to have followed the instructions. *State v. Dominguez*, 299 Kan. 567, 583, 328 P.3d 1094 (2014). Thus, following Instruction 4, the jury knew the permission to use "common knowledge and experience" was as to witness credibility and weight determinations. Nothing in the record shows that, unlike any other case, the jury was "inevitably led" to apply Instruction 4's direction to anything else.

Second, Instruction 8, exactly following PIK 123.10, which the defendant argues should have been modified to include his language about causation, does not concern causation. It concerns the standard of care. Because of the order in which the instructions were given, inserting "causation" into it would have been confusing.

Medical malpractice has four elements: (1) the physician "owes the patient a duty of care and a certain standard of care to protect the plaintiff from injury;" (2) he "breached this duty or deviated from the applicable standard of care;" (3) "the patient was injured;" and (4) "the injury proximately resulted from [his] breach of the standard of care." *Puckett v. Mt. Carmel Reg'l Med. Ctr.*, 290 Kan. 406, 420, 228 P.3d 1048 (2010).

Here, as in all medical malpractice cases, separate instructions covered each element. Instruction 7, exactly following PIK 123.01, concerned part of the first element, existence of the standard of care generally, as well as the second element, breach, defining "negligence" for the jury (R. 59 at 101). Instruction 8, exactly following PIK

123.10, told the jury that, as to the first element, it only could decide the standard of care through expert testimony (R. 59 at 102). Finally, Instruction 12, exactly following PIK 105.01, concerned the fourth element, explaining what "fault" means in terms of causation (R. 59 at 107). *That* was the "causation" instruction, not Instruction 8.

The reason the PIK Committee sets these instructions out separately, of course, is to tell the lay jurors what the law is as to each step in their inquiry separately, specifically so as not to confuse them by conflating elements together. *See, e.g.*, *Wilkinson v. Shoney's, Inc.*, 269 Kan. 194, 223, 4 P.3d 1149 (2000). The defendant, though, sought to do exactly that: to insert language about causation (element four) into the standard of care instruction (element one). That unnecessarily would have confused the jury.

Third, the defendant identifies no unique circumstances in this case not present in any other medical malpractice case that would require his particular requested modification of PIK 123.10. But a PIK instruction admitted to be applicable "only" may be modified "if the particular facts in a given case require" so. *Armstrong*, 299 Kan. at 438. Instead, the defendant's real argument is *the PIK Committee* erred in failing to insert his language about causation and expert testimony in PIK 123.10.

Plainly, that is not so. Neither any instruction here nor any other PIK instruction tells jurors they are to judge medical causation by anything other than expert testimony. To the contrary, Instruction 8, precisely tracking PIK 123.10, specifically stated, "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" (R. 59 at 102). This broadly includes any scientific evidence relating to the standard of care, obviously and implicitly including whether the violation of that standard caused the plaintiffs' injuries.

Finally, the defendant also says the jury demonstrably was misled by the lack of his addition to PIK 123.10 because, "[d]uring closing arguments, plaintiffs again urged the jury to rely on their common sense in deciding causation" (Aplt.Br. 8) (citing R. 43 at 67-70). At the outset, the plaintiffs' counsel *did not* urge that; he merely said the jury could use their "common sense when evaluating this case" (R. 43 at 69), which plainly the law allowed the jurors to do – and the defense did not object. Regardless, though, and again, the jury was presumed to follow the instructions, not counsel's arguments. "[W]hile appellate courts presume a jury follows the trial court's instructions … there is no similar presumption relating to arguments of counsel." *Dominguez*, 299 Kan. at 583. This is especially true where, as here (R. 59 at 96), the jury was instructed that counsel's arguments are not evidence or law. *Id.*

B. The jury instructions correctly stated Kansas's longstanding definition of "fault" in negligence cases.

Next, the defendant argues that, in Instruction 12, though "the court instructed the jury" "[c]onsistent with" PIK 105.01 that 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" (R. 59 at 107), it erred in failing to *modify* PIK 105.01 by deleting the words "or contributed" (Aplt.Br. 9). The defendant argues the inclusion of "or contributed" is "inadequate" because it makes the word "caused" irrelevant, "suggests a very low bar" or "a very slight contribution to the occurrence," and is "fatally flawed" (Aplt.Br. 9-13).

This argument is confused in two significant ways. First, the defendant is simply *wrong* that the law of Kansas in any way does not define "fault" as "causing or contributing" to the plaintiff's injury. The defendant alludes to this by noting that the "caused or contributed" standard for fault in Kansas "has some history" because it is

"enshrined in PIK" and our "Supreme Court has incorporated it into its opinions," citing two (Aplt.Br. 12-13). That does not remotely tell the whole story.

Time and time again, our Supreme Court specifically has held that "fault" in all negligence cases, including medical malpractice, is when a party is negligent and that negligence "caused or contributed" to the event that brought about the damages. *See Fisher v. Kan. Crime Victims Compensation Bd.*, 280 Kan. 601, 607, 124 P.3d 74 (2005); *Reynolds v. Kan. Dep't of Transp.*, 273 Kan. 261, 269, 43 P.3d 799 (2002); *Hare v. Wendler*, 263 Kan. 434, 440, 949 P.2d 1141 (1997); *Sharples v. Roberts*, 249 Kan. 286, 295, 816 P.2d 390 (1991) (the plaintiff's duty "in medical malpractice cases" is to prove that the physician's negligent "act caused or contributed to the injury"); *Nirschl v. Webb*, 239 Kan. 90, 94, 716 P.2d 173 (1986); *Allman v. Holleman*, 233 Kan. 781, Syl. ¶ 4, 785, 667 P.2d 296 (1983) ("this Court's task" in medical malpractice wrongful death cases "is to determine if there is evidence" the physician's "actions exhibited a lack of ordinary care and, if so, whether that lack of ordinary care contributed to" the patient's "death"); *Gaulden v. Burlington N., Inc.*, 232 Kan. 205, 211, 654 P.2d 383 (1982); *Miles v. West*, 224 Kan. 284, 289, 580 P.2d 876 (1978); *Union Pac. R. Co. v. Brown*, 73 Kan. 233, 84 P. 1026, 1027 (1906) (causation in wrongful death case is shown by evidence "that the death was caused or contributed to by any wrongful act on the part of the" defendant).

Second, given that, as the defendant admits, our Supreme Court has defined "contributes" as "hav[ing] at least a part in causing the accident" (Aplt.Br. 11) (quoting *Lollis v. Superior Sales Co., Inc.*, 224 Kan. 251, 263, 580 P.2d 423 (1978)), this makes sense. Indeed, in two recent medical malpractice cases, our Supreme Court specifically upheld the use of PIK 105.01's "caused or contributed to" instruction to define "fault" for

the jury. *See Bates v. Dodge City Healthcare Group, L.P.*, 296 Kan. 271, 289-90, 291 P.3d 1042 (2013); *Foster*, 296 Kan. at 303.

As a result, the defendant is wrong that PIK 105.01 "is a fatally flawed statement of the rules of proximate cause" (Aplt.Br. 13). Rather, the instruction correctly gave the jury Kansas's well-established standard of fault in medical malpractice cases to which it had to hold the plaintiff: that "the plaintiff's duty to show causation was" proving "a causal connection between the negligent act and the injury *or that the act caused or contributed to the injury*." *Hare*, 263 Kan. at 440 (emphasis added).

C. The jury instructions correctly informed the jurors that they could not find fault by the plaintiffs or the decedent.

The defendant also argues Instruction 17, which told the jury that, "as a matter of law" the plaintiffs "have no fault in this case and you may not assign any degree of fault to them" (R. 59 at 112), was error because he "offered no evidence of" the plaintiffs' fault and so it was "commentary by the court on the facts of the case" (Aplt.Br. 13-14).

This argument, too, is without merit. First, the defendant did not make this objection before the trial court, and so it is not preserved for review. The plaintiffs' original version of this instruction, at the time numbered 18, sought to instruct the jury that the plaintiffs had no *duties* in the case (R. 43 at 11-13). The defendant objected to the use of the term "duties" (R. 43 at 11-13). The court agreed that would be inappropriate, and so proposed to instruct the jury instead that the plaintiffs had no "fault" (R. 43 at 14). The defendant's only response to that was a "less strenuous objection" that "I don't think you need the instruction at all" and "it's unnecessary," but as long as the instruction did not say "duty" "I have less of a problem with that" (R. 43 at

14, 16). The defendant did not make the argument he now makes in his brief, though, that Instruction 17 would comment on the evidence or be prejudicial (R. 43 at 14-16).

To be preserved for appellate review, an objection to an instruction "must be so stated as to make clear the specific ground of objection." K.S.A. § 60-404. "It is not sufficient simply to lodge an objection in order to preserve an issue; the articulated basis of the objection must be specific to the error asserted on appeal." *State v. Horton*, ___ Kan. ___, 331 P.3d 752, 762-63 (2014). As such, generally objecting to an instruction as "superfluous" or "unnecessary" is insufficient to preserve a more specific argument for appeal. *Id.* Thus, the defendant's objection that the "no fault" instruction – not the original, rejected "no duty" instruction – was "unnecessary" is insufficient to preserve his arguments that it improperly commented on the evidence and was prejudicial. *Id.* As a result, Instruction 18 only can be reviewed for clear error. *Id.* at 763.

Under either mode of review – "clear error" or the ordinary standard of review for alleged instructional error – there was no error in giving Instruction 18. The defendant concedes the jury could "'not assign any degree of fault' against [the] plaintiffs in a case where they were not being asked to assign degrees of fault to anyone" (Aplt.Br. 14). But it is not "inherently pernicious to tell jurors not to do things they should not do." *State v. Williams*, 299 Kan. 1039, 329 P.3d 420, 424 (2014) (citation omitted). As long as the jury truly is not allowed to do something, an instruction that "tells the jury what not to do rather than what to do … would not constitute error." *Id.* (citations omitted).

Instruction 18 was not a comment on any evidence. In this age of well-known comparative fault principles, it simply correctly told the jury that it could not assess fault against the plaintiffs. The Court should affirm the judgment below.

II. The trial court did not abuse its discretion during closing arguments in allowing the plaintiffs' counsel to comment on evidence and reasonable inferences therefrom or in averting improper arguments by defense counsel.

Standard of Appellate Review

The defendant claims the standard of review over the trial court's control of statements in closing arguments is "an issue of law … subject to unlimited review" (Aplt.Br. 15). That is simply not true. Rather, that control is a matter for the district court's sound discretion, and this Court will not disturb a ruling on this issue unless the appellant demonstrates the district court abused that discretion. *Thompson v. KFB Ins. Co.*, 252 Kan. 1010, 1030, 850 P.2d 773 (1993). "Discretion is abused only when no reasonable person would take the trial court's view." *State ex rel. Stovall v. Alivio*, 275 Kan. 169, 173, 61 P.3d 687 (2003). "If reasonable persons could differ as to the propriety of the action …, then it cannot be said that the trial court abused its discretion." *In re Marriage of Welliver*, 254 Kan. 801, 811, 869 P.2d 653 (1994).

* * *

In his second issue on appeal, the defendant first complains the trial court erred in allowing the plaintiffs' counsel to argue to the jury that, "When we establish standards of care in this case, as a jury you'll want to decide if you want safe medicine or unsafe medicine" (Aplt.Br. 17). He argues this was "the *coup de grace*" of a "'Reptile Litigation' strategy," which is "unlawful" because it "scare[s] the jury into reaching a fear based, as opposed to evidence based, verdict" (Aplt.Br. 18-19) (citing Keenan & Ball, REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION (2009)). He argues this "unlawful" strategy involved "Plaintiffs unceasingly beat[ing] the drum of safety," such as by "repeatedly question[ing] witnesses regarding a supposed duty by a physician

to 'err on the safe side'" (Aplt.Br. 19-20).[1] He cites a multitude of testimony about the issue of patient safety and its part in the standard of care (Aplt.Br. 20).

Notably, though, the defendant's second issue does not argue admitting any such testimony itself was error. While he alludes to a denied pretrial motion in limine he filed (Aplt.Br. 16-17), a "ruling on a motion in limine is temporary in nature and is subject to revision at trial in light of the evidence that is actually presented." *State v. Smith*, 46 Kan.App.2d 939, 943, 268 P.3d 1206 (2011). Thus, "when a motion in limine is denied, the moving party must object to the evidence at trial to preserve the issue on appeal." *State v. Clements*, 252 Kan. 86, 89, 843 P.2d 679 (1992) (citation omitted).

At trial, and without objection from the defendant, Dr. William Miser, the plaintiffs' expert, testified at length that an important component of the defendant's standard of care was to provide and utilize a "margin of safety" (R. 34 at 84, 95-97, 100-02, 129, 236). He explained the standard of care largely is premised on the "safe practice of medicine," and "safety" is "the number one factor in treating people" (R. 34 at 95, 100-01). The standard of care requires physicians to "err on the side of safety," "provide the best safest care for th[e] patient," and "advocate for the safety of the patient" (R. 34 at 147, 168, 194, 197, 236). In practicing medicine, "a doctor must provide a margin of

[1] While grandiose criticism of the so-called "Reptile strategy" permeates the defendant's brief (Aplt.Br. 18-24, 27, 33, 40, 48), the defendant's embellished griping makes a mountain out of a molehill. If the "new trial strategy" outlined in REPTILE were simultaneously as "popular," "successful," "improper," and "unlawful" as the defendant claims (Aplt.Br. 18, 21-22), surely some other court would have decided a similar allegation. Remarkably, though, no reported decision from any court anywhere in the United States has considered, weighed, or criticized the strategy, or even *cited* the book. As explained *infra* at 27, the reason no previous losing medical malpractice defendant/appellant has sought on appeal to criticize the mere strategy of the plaintiff concentrating on patient safety is obvious: it makes no sense in the context of medical malpractice litigation and the public policy behind it, especially when the facts have to be viewed in a light most favorable to the injured plaintiff/appellee.

safety" and the failure to do so "play[s] into [the] analysis of whether or not [he] deviated from the standard of care" (R. 34 at 130). This is "a safety standard that all physicians are aware of" (R. 34 at 131). Dr. Miser testified that, cardinally, the defendant ignored and violated the margin of safety in treating Mrs. Castleberry, which was below the standard of care (R. 34 at 129-31). There was no objection to *any* of this testimony.

Thus, while the defendant may believe that "safety" "is essentially meaningless within the context of the practice of medicine and is wholly irrelevant to the legal duty of a physician" (Aplt.Br. 20), the un-objected-to medical expert testimony below entirely disagreed with him. The jury was entitled to believe that testimony and, as a result, the plaintiffs were entitled to comment on it in closing argument.

Indeed, while the standard of care is a factual question from expert testimony, *infra* at 36, the law of Kansas long has emphasized a physician's legal duty is to "protect the patient from injury." *Puckett*, 290 Kan. at Syl. ¶ 5, 435-36. Physicians "are in the best position to protect their patients and, consequently, have a" duty to do so. *McVay v. Rich*, 255 Kan. 371, 377, 874 P.2d 641 (1994) (citation omitted). In other words, their "duty" is "to insure the health and safety of [the] patients …." *Lemuz v. Fieser*, 261 Kan. 936, 946, 933 P.2d 134 (1997). Dr. Miser testified the defendant failed to meet the standard of care required to meet that duty.

Given Dr. Miser's testimony on this issue, the plaintiffs had wide latitude in discussing and commenting on it to the jury, and this latitude lay "largely within the discretion of the trial court." *Skelly Oil Co. v. Urban Renewal Agency of City of Topeka*, 211 Kan. 804, 807, 508 P.2d 954 (1973). The plaintiffs' "[c]ounsel [was] entitled to comment freely upon the evidence … and to state [his] own views concerning the

evidence." *Taylor v. F.W. Woolworth & Co.*, 151 Kan. 233, 98 P.2d 114, 118 (1940). Their counsel's argument that the jury was being asked to decide between safe and unsafe medicine was entirely proper and germane. It certainly cannot be said that no reasonable person could differ that the trial court was *wrong* to allow this comment.

Moreover, even if the expert's and the plaintiffs' counsel's discussion of patient safety to the jury somehow were error, they manifestly were not prejudicial. After trial, five jurors submitted sworn affidavits to the plaintiffs' counsel, which were attached to the plaintiffs' response to the defendant's motion for new trial (R. 21 at 69-83). The law of Kansas allows such affidavits to support or oppose a claim of jury prejudice. *See, e.g.*, *State v. Tyler*, 251 Kan. 616, 638-39, 840 P.2d 413 (1992); *State v. Boan*, 235 Kan. 800, 806, 686 P.2d 160 (1984). Here, all five jurors stated that, during deliberations, the jury did not discuss how its verdict either would impact the future of their healthcare in Wichita or their or the community's safety, sending a message to the community, or their fear of anything (R. 21 at 70-74, 76-77, 79, 81, 83). Counsel's argument of which the defendant complains demonstrably did not affect the jury's verdict.

The defendant's complaint about the comment that Mrs. Castleberry's stroke was during Christmastime has a similar answer. It is well-established that, "[i]n summing up a case before a jury," counsel may draw "reasonable inferences … from the evidence and considerable latitude is allowed in the discussion of it in which he may use illustrations and appeal to the jury with all the power and persuasiveness which his learning, skill and experience enable him to use." *Hudson v. City of Shawnee*, 245 Kan. 221, 235, 777 P.2d 800 (1989) (citation omitted). As such, it is not an abuse of discretion to allow counsel to opine as to a commonsense inference from the evidence.

Here, too, counsel's comments that "Remember, it's December, party time," and "Everybody knows you don't want to go to the hospital on the holidays" merely drew a permissible inference from the evidence. There was considerable evidence that the defendant saw Mrs. Castleberry on December 19, shortly before Christmas, at which time he failed to investigate TIA or an oncoming stroke, and instead advised her to "go Christmas shopping," and the following day she suffered a terrible, paralyzing stroke.

It is a matter of common, ordinary knowledge that Christmastime is a celebratory season. It is no stretch reasonably to infer that, given the defendant failed to provide Mrs. Castleberry with ordinary, standard, quick, inexpensive, harmless tests, and the fact that Christmastime obviously was on his mind both from his mention of it to Mrs. Castleberry and his later, post-stroke appearance in Mrs. Castleberry's hospital room "happy and chipper" and wearing a Santa Claus hat (R. 36 at 204-06), he rushed her through and did so at least in part due to the holiday season. At the very least, as in *Hudson*, 245 Kan. at 235, overruling the defendant's objection cannot be said to be an abuse of discretion. Additionally, the five jurors submitting affidavits all stated the jury did not discuss during deliberations either Christmas parties or the defendant either drinking or "rushing" through Mrs. Castleberry's appointment (R. 21 at 70-74, 76-77, 79, 81, 83).

The defendant also complains about two bench conferences that occurred during his counsel's closing argument. First, he faults the trial court for sustaining an objection to his counsel's phraseology discussing "you and your family" to the jury. As he concedes, though, the court allowed his counsel to rephrase (Aplt.Br. 24-25). References to jurors' families is reversibly prejudicial. *State v. Brown*, 280 Kan. 65, 77, 118 P.3d 1273 (2005). The defendant suggests an improper "golden rule" argument prohibits only

arguments that jurors should place themselves in a *plaintiff*'s position (Aplt.Br. 25). But our Supreme Court has held a "'golden rule' argument is the suggestion by counsel that jurors should place themselves in the position of" *anyone else*, including "a party …." *State v. McHenry*, 276 Kan. 513, 523, 78 P.3d 403 (2003). Defense counsel improperly was asking the jury to put themselves in the defendant's position.

Knowing these principles, the plaintiffs' counsel objected. After a bench conference, the court instructed the jurors to disregard that remark and reminded them their verdict was to be based on the evidence and facts and they found them (R. 43 at 149-50). The court then allowed defense counsel to "rephrase to make the same point," upon which he did so (R. 43 at 150-51). It cannot be said that the trial court abused its discretion in prohibiting the reference to "you and your family," especially as it allowed counsel to rephrase to make the same point. *Infra* at 40.

Finally, the defendant faults the court for allowing a bench conference to hear an objection after his counsel again referred to the jurors and their families, urging them not to be "frightful of whether or not we could have a stroke or someone in our family could have a stroke" (Aplt.Br. 25-26). Though the conference is not transcribed (R. 43 at 153), *the defendant* "had the responsibility to invite the court reporter to record the substance of the sidebar conference." *State v. Moncla*, 262 Kan. 58, 68, 936 P.2d 727 (1997).

Here, the plaintiffs were concerned the defendant improperly would argue that, "with all this evidence there may be injected fear and you may be afraid of strokes and so you might want to do something to make the standard different" (R. 43 at 158). Again, appeals to the jury and their families generally are improper. *Brown*, 280 Kan. at 77. Knowing this, the plaintiffs were concerned and requested a bench conference, the only

outcome of which was the court instructing the jury that its decision was "based on the facts as you find them and the law as I've instructed you" (R. 43 at 153).

Given all this, the only fault the defendant suggests is this "disrupt[ed] the conclusion of [his] closing argument" (Aplt.Br. 26). He suggests the same was reversed in *State v. Plunkett*, 257 Kan. 135, 141-43, 891 P.2d 370 (1995). But *Plunkett* is inapposite. There, in a criminal case, it was *the trial judge* who repeatedly and without warning made disparaging remarks about the defendant and his counsel to the jury, asked witnesses interrupting, slanted questions, commented in open court on the evidence, and interrupted the defense's opening statement without warning. *Id.* at 137-43. The Supreme Court of Kansas reversed on the basis of that cumulative error. *Id.* at 143.

As to even that kind of interruption of the opening statement in *Plunkett*, though, the Supreme Court held that it, "alone, may not have substantially affected [the defendant's] right to a fair trial." *Id.* at 142. *Plunkett* has nothing to do with this case. Indeed, it reinforces that the trial court *did not* abuse its discretion in simply allowing a bench conference over an objection toward the end of the defendant's closing argument.

Moreover, here, and unlike in *Plunkett*, that interruption is *all* to which the defendant can point. Given that his counsel *again* had referred to the jurors and their families after previously having been told *not* to, it cannot be said that allowing a(n) (unrecorded) bench conference outside the jury's hearing was an abuse of discretion. It cannot be said that no reasonable person could differ that the trial court was *wrong* to do so and remind the jury of their duty. Additionally, all five jurors submitting affidavits stated the jury did not discuss any arguments or comments by or between the parties' counsel (R. 21 at 70-74, 76-77, 79, 81, 83).

III. The trial court did not abuse its discretion in admitting testimony from the plaintiffs' expert witness defining the standard of care required of the defendant, because the testimony at issue was admitted without objection and a defense expert agreed to that standard without objection. Thereafter, the trial court did not err in allowing the plaintiffs to explore that testimony in cross-examination.

Standard of Appellate Review

The defendant claims the standard of review for a decision to admit evidence "presents an issue of law and as such is subject to unlimited review" (Aplt.Br. 27), citing *Burnett v. Southwestern Bell Tel., L.P.*, 283 Kan. 134, 136, 151 P.3d 837 (2007)). But *Burnett* had nothing to do with the admission or exclusion of evidence. Rather, it held the standard for "questions certified to [the Supreme Court of Kansas] by a United States District Court" "is unlimited." *Id.* Instead, it is well-established that

> the admission of evidence lies within the sound discretion of the trial court. An appellate court's standard of review regarding a trial court's admission of evidence is abuse of discretion. An abuse of discretion must be shown by the party attacking the evidentiary ruling, and "exists only when no reasonable person would take the view adopted by the district court."

Garrett v. Read, 278 Kan. 662, 667, 102 P.3d 436 (2004) (internal citations omitted).

At the same time, "The district court cannot be accused of abusing its discretion" in admitting evidence "when [the appellant] failed to object and thereby give the district court an opportunity to exercise its discretion on the matter. Issues not raised before the trial court cannot be raised on appeal." *Wentland v. Uhlarik*, 37 Kan.App.2d 734, 740, 159 P.3d 1035 (2007).

* * *

In his third issue on appeal, the defendant alleges the trial court erred in admitting evidence that the defendant's standard of care required him "to take the 'safest'

approach" (Aplt.Br. 27). When alleging error in admitting evidence, an appellant must "identify the evidence complained of …." *State v. King*, 190 Kan. 825, 830, 378 P.2d 147 (1963). At no point in the argument over his third issue does the defendant specifically identify any evidence he is talking about. His only citations to the record in his third issue are to places where he allegedly made some objections (Aplt.Br. 28).

This is likely because the defendant *did not* object to the plaintiffs' medical expert, Dr. William Miser, testifying at length that the defendant's standard of care included obeying a "margin of safety" and "erring on the side of patient safety" (R. 34 at 84, 95-97, 100-02, 129-31, 147, 168, 194, 197, 236). The defendant claims he objected during Dr. Miser's testimony, citing R. 34 at 128-29. That objection came after Dr. Miser *already* had testified repeatedly and *without* objection that the standard of care encompassed the defendant having to take "safety steps," "safety" was "the number one factor in treating people," the standard of care required the defendant to have "really good reason" "to deviate from the safety rules" and fail to obey "safety features," and "the safe practice of medicine" was "the standard of care" (R. 34 at 84, 95-97, 100-02).

While the defendant previously had objected during the plaintiffs' opening argument to the statement that the "rule is a physician is never allowed to needlessly endanger a patient" (R. 46 at 10), he never lodged any grand, standing objection to any and all mentions of erring on the side of patient safety as being a component of his standard of care, let alone stated the specific argument now made in his third issue.

Under K.S.A. § 60-404, however, "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). Thus, an

evidentiary "objection must be contemporaneously renewed during trial or preserved through a standing objection." *State v. Inkelaar*, 293 Kan. 414, 421, 264 P.3d 81 (2011). The defendant did not do this. As a result, his third issue is not preserved.

Moreover, the objections the defendant lodged at R. 34 at 128-29 were "as to form" of the questions, "Do you believe DeBrot needlessly endangered Barbara Castleberry," and "A doctor must err on the side of safety?" which the trial court *sustained* (R. 34 at 128-30). "[A] jury will be presumed to have disregarded evidence about which an objection was sustained," which ruling cannot be error on appeal. *Fitzpatrick v. Allen*, 24 Kan.App.2d 896, 901, 955 P.2d 141 (1998) (citation omitted).

When the plaintiffs then changed course and asked Dr. Miser whether "a doctor must provide a margin of safety," and the failure to do so "played into [his] analysis of evaluating whether [the defendant] deviated from the standard of care," and Dr. Miser agreed because he did not "see any margin of safety involved in the care of Mrs. Castleberry," the defendant *did not object at all* (R. 34 at 130-31).

Dr. Miser then went on to testify *without objection* that part of the standard of care is physicians must "err on the side of safety," "provide the best safest care for th[e] patient," and "advocate for the safety of the patient," and the defendant ignored and violated the necessity of a margin of safety in treating Mrs. Castleberry, which was below the standard of care (R. 34 at 129-31, 147, 168, 194, 197, 236). One of the defendant's experts also testified on cross-examination, and without objection, that the standard of care encompassed requirements "to advocate for the safety and well-being of the patient," "err on the side of safety," and "provide a margin of safety" (R. 40 at 8-10, 32, 81, 109).

Nonetheless, the defendant *now* complains the trial court then erred in allowing the plaintiffs to ask two other questions of his own experts about patient safety (Aplt.Br. 28) (citing R. 39 at 172-73; R. 41 at 97-98). In the first, the plaintiffs were allowed to rephrase without objection (R. 39 at 172-73). In the second, the court overruled objections to questions asking the expert whether he agreed whether he "had to err on the conservative, safe side" and "provide a margin of safety" (R. 41 at 97-98).

But Dr. Miser's un-objected-to testimony about erring on the side of safety and providing a margin of safety already was in evidence. "[A] great deal of latitude should be afforded in the cross-examination of witnesses," "the trial court is vested with discretion in determining the scope thereof," and "its rulings on objections interposed to questions asked on cross-examination will not be disturbed in the absence of a showing that its discretion has been abused." *Frame v. Bauman*, 202 Kan. 461, 465, 449 P.2d 525 (1969). The defendant's expert testified he had read Dr. Miser's testimony (R. 41 at 161). Given he testified about the standard of care, and Dr. Miser's and the defendant's previous expert had testified at length about the impact patient safety has on the standard of care, the plaintiffs were entitled to cross-examine him as to how a margin of safety, erring on the side of safety, and advocating for safety play into the standard of care.

Not until the end of the trial, during the instructions conference, did defense counsel actually raise his theory as to the plaintiffs using a "Reptile" strategy, and certainly not as to the admission of any testimony (R. 43 at 162-63). The defendant allowed the largely unidentified testimony of which he now complains to come into evidence without objection – certainly without the contemporaneous "timely and specific

objection" the law of Kansas requires "in order to preserve the evidentiary question for review." *King*, 288 Kan. at 348. The defendant's third issue is waived.

Even if it were preserved, the defendant's argument would fail on the merits. His argument comes down to a notion that the experts' references to keeping patients safe being part of the standard of care is "an attempt to create a new 'legal' standard in the minds of the jury" that was "in conflict with the actual law" (Aplt.Br. 28). He says this is because the "legal duty" in "a medical malpractice case" is "that degree of learning and skill ordinarily possessed by members of his profession and of his school of medicine in the community in which he practices, or similar communities" (Aplt.Br. 28).

That is, of course, a general description of the legal duty at issue, and on which the jury was instructed (R. 59 at 101-02). While "whether a duty exists is a question of law," "[t]he standard of medical … care that is to be applied in any given case is not a rule of law, but" a question of *fact* "to be established by the testimony of competent medical experts." *Nold v. Binyon*, 272 Kan. 87, Syl. ¶¶ 6-7, 31 P.3d 274 (2001).

All parties agreed on the legal duty. Dr. Miser and the defendant's first expert testified without objection that erring on the side of patient safety, obeying a margin of safety, and advocating for the safety of the patient were part of the standard of care required to *meet* that legal duty. Dr. Miser testified that the defendant's failure to do so *violated* the standard of care and *caused* Mrs. Castleberry's injury and damages. This was not a new legal standard, but rather un-objected-to fact testimony from fact witnesses on a factual question. And, regardless, the five jurors submitting affidavits stated this was not part of the jury's deliberations (R. 21 at 70-74, 76-77, 79, 81, 83). Even if the defendant's third issue were preserved, it is without merit.

IV. The trial court did not abuse its discretion in: (1) allowing un-objected-to cross examination of the defendant as to an exhibit that ultimately was not admitted into evidence and for which no curative instruction was sought; (2) allowing the plaintiffs to examine witnesses as to an issue that the jury ultimately was not instructed on; (3) allowing cross-examination as to an exhibit that ultimately was not admitted into evidence and for which no curative instruction was sought; (4) allowing the plaintiffs to rephrase a question so as not potentially to violate an order in limine; (5) allowing the plaintiffs to ask the defendant's expert witness whether the defendant's notations and recollections made sense in the context of his practice of medicine; and (6) allowing the plaintiffs to ask a defense expert about whether his conversations with defense counsel affected his opinions.

Standard of Appellate Review

The defendant says he "believes" his claim of "erroneous evidentiary rulings" is "subject to unlimited review" (Aplt.Br. 30). As before, *supra* at 32, the reality is 180-degrees different. A decision to admit evidence lies within the trial court's sound discretion and will not be reversed absent an abuse of discretion. *Supra* at 32. If the appellant failed to object to the evidence, an argument that its admission is erroneous is waived on appeal. *Supra* at 32.

* * *

The defendant compresses into his fourth issue on appeal six separate alleged errors in admitting evidence (Aplt.Br. 30-38). Each is demonstrably without merit.

A. No abuse of discretion in allowing un-objected-to cross examination of the defendant as to an exhibit that ultimately was not admitted into evidence and for which no curative instruction was sought.

Citing only foreign decisions, the defendant first argues the trial court erred in allowing him to be cross-examined as to a denial he made to a request for admission (Aplt.Br. 30-32). That is, at trial, he testified Mrs. Castleberry expressed concerns about a stroke at her December 6 visit but not on December 19, while he previously had denied

a request for admission that she had done so on either date, and the plaintiffs sought to question him about this inconsistency (Aplt.Br. 30).

While the defendant initially did object to this, which was overruled (R. 38 at 250), he made no objection to the question from the plaintiffs' counsel to which he points in his brief (Aplt.Br. 31) (citing R. 38 at 252). Moreover, as the defendant concedes, the court ultimately "denied plaintiffs' offer of the request for admission into evidence" (Aplt.Br. 31) (citing R. 38 at 271-72). The defendant never requested any curative instruction regarding any part of the discussion of the request for admissions.

The defendant's argument is not preserved for appeal. First, 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." *King*, 288 Kan. at 348, 204 P.3d 585. Thus, an evidentiary "objection must be contemporaneously renewed during trial or preserved through a standing objection." *Inkelaar*, 293 Kan. at 421, 264 P.3d 81. If, like the defendant, he fails to do so, the issue is not preserved for appeal.

Second, where a party elicits improper testimony from a witness, and the trial court later agrees, the "injection of" the improper testimony "may be cured by limiting instructions." *Unruh v. Purina Mills, LLC*, 289 Kan. 1185, 1199, 221 P.3d 1130 (2009). If the complaining party does not request such an instruction, his allegation of error as a result of the testimony is not preserved for appeal because any "error 'was obviously induced by [his] counsel's failure to file a motion for such relief." *Id.* (citation omitted).

The defendant's argument also fails on the merits. Kansas courts never have held a party cannot be cross-examined as to conflicting statements between his testimony admitting a fact and his prior denials of a request for admission of that fact. K.S.A. § 60-

236(a)(4)'s language requiring a "specific denial" indicates this is not so. Nonetheless, even the defendant's foreign law holds that, as long as the request for admissions itself ultimately is not admitted into evidence, any error from questioning as to their contents is "harmless." *Gutierrez v. Mass. Bay Transp. Auth.*, 772 N.E.2d 552, 567 (Mass. 2002).

The defendant failed to object to the question of which he complains in his brief (R. 38 at 252). He lodged no continuing or standing objection after his previous objection had been overruled (R. 38 at 250). When the court later sustained his objection to admitting the request for admissions itself into evidence, he sought no curative instruction for the previous testimony about it (R. 38 at 271-72). As a result, his allegation of error is not preserved for appeal. *King*, 288 Kan. at 348; *Inkelaar*, 293 Kan. at 421; *Unruh*, 289 Kan. at 1199. Even if it were, any error would be "harmless," because the request for admissions itself was not admitted. *Gutierrez*, 772 N.E.2d at 567. This is compounded by the fact that the five jurors submitting affidavits stated neither the defendant's character nor his honesty were part of the jury's deliberations in any way (R. 21 at 70-74, 76-77, 79, 81, 83).

B. No abuse of discretion in allowing the plaintiffs to examine witnesses as to an issue that the jury ultimately was not instructed on.

The defendant next argues the trial court erred in allowing the plaintiffs to question two witnesses on the subject of "informed consent," because he previously had been granted summary judgment on any informed consent claims and no such claim appeared in the pretrial order (Aplt.Br. 32-33).

Once again, this does not tell the whole story. While the plaintiffs sought to ask Dr. Gadalla, "What is informed consent," and the defendant objected on the basis that this was not an issue in the case, the trial court neither sustained nor overruled the

objection, but instead directed the plaintiffs to rephrase (R. 47 at 266). The defendant thereafter did not object to the rephrased question (R. 47 at 266-67). Similarly, the plaintiffs referred to an article on "informed consent" when questioning Dr. Miser, the defendant made this same objection, and, though it was overruled after an un-transcribed bench conference, the plaintiffs did not proceed with that line of questioning (R. 34 at 114-15).

Nothing in the jury instructions mentioned informed consent. None of the plaintiffs' ten claims of negligence the jury was being asked to decide involved informed consent (R. 59 at 104-05). Instead, the instructions stated what negligence is, the legal duty involved, that expert testimony was required to prove the standard of care, the definition of fault, and the measure of damages (R. 59 at 98, 101-02, 107-10).

Allowing the rephrasing of a question is not error, especially where there is no objection after rephrasing. *State v. Jones*, 47 Kan.App.2d 512, 525, 276 P.3d 804 (2012). And because "a 'jury is presumed to follow the instructions given to it,' [this Court] presume[s] the jury decided the case by applying the trial court's instructions to the facts as it found them." *State v. Wade*, 45 Kan.App.2d 128, 140, 245 P.3d 1083 (2010).

Here, the trial court allowed the plaintiffs to rephrase their "informed consent" question to Dr. Gadalla, without further objection. The plaintiffs ultimately did not question Dr. Miser as to "informed consent." And the instructions did not instruct the jury that "informed consent" was a claim the jury was to be weighing. Indeed, it never was explained to the jury exactly what "informed consent" was. Plainly, the conduct of which the defendant complains cannot be an abuse of discretion.

C. No abuse of discretion in allowing cross-examination as to an exhibit that ultimately was not admitted into evidence and for which no curative instruction was sought.

The defendant next argues the trial court improperly allowed the plaintiffs to cross-examine his expert as to the contents of a letter written by the author of a study on which the expert had relied, because the letter "was hearsay and constituted an undisclosed expert report" (Aplt.Br. 33). The defendant's expert had cited the article to support one of his opinions, but the letter showed he was misconstruing it (R. 40 at 181-83). The use of the letter generally was permissible because of the wide, discretionary latitude granted in cross-examination. *Infra* at 42. As the defendant concedes, though, ultimately his objection was sustained and "the letter itself was not admitted into evidence" (Aplt.Br. 33). He never then requested a curative instruction (R. 40 at 183).

Where a party elicits improper testimony from a witness, and the trial court later agrees, the "injection of" it "may be cured by limiting instructions." *Unruh*, 289 Kan. at 1199. If the complaining party does not request one, his allegation of error as a result of the testimony is not preserved for appeal because any "error 'was obviously induced by [his] counsel's failure to" do so. *Id.* (citation omitted). Because the defendant failed to do so here, he cannot now complain about the testimony as to the letter. *Id.*

The defendant also claims the court erred in allowing the plaintiffs to cross-examine that expert witness as to the standard of care because his direct testimony was only to "neurology issues" (Aplt.Br. 34-35). This is untrue. The expert testified the defendant had made a "common," "correct diagnosis," there were no stroke- or TIA-associated symptoms reported in December 2007, and suspecting stroke would have been "uncommon" (R. 40 at 153, 160-63, 166-67, 171-72).

"[A] great deal of latitude should be afforded in the cross-examination of witnesses," "the trial court is vested with discretion in determining the scope thereof," and "its rulings on objections interposed to questions asked on cross-examination will not be disturbed in the absence of a showing that its discretion has been abused." *Frame*, 202 Kan. at 465, 449 P.2d 525. Here, the plaintiffs' questioning was to impeach the expert's above testimony implicating the standard of care. It was relevant, probative, and *did* contradict that testimony (R. 40 at 183-84). The trial court did not abuse its discretion.

D. No abuse of discretion in allowing the plaintiffs to rephrase a question so as not to violate an order in limine.

The defendant next argues the plaintiffs' expert, Dr. Miser, improperly was allowed to testify to his personal practices as a physician, which was barred by an order in limine (Aplt.Br. 35-36) (citing R. 34 at 221-22). All that actually occurred, though, was the defendant objected, the court allowed the plaintiffs to rephrase, and the defendant did not object to the rephrased question and answer (R. 34 at 221-22). That cannot ever be an abuse of discretion. *Supra* at 40. Moreover, the five jurors submitting affidavits stated this was not part of the jury's deliberations (R. 21 at 70-74, 76-77, 79, 81, 83).

E. No abuse of discretion in allowing the plaintiffs to ask the defendant's expert witness whether the defendant's notations and recollections made sense in the context of his practice of medicine.

The defendant next argues the trial court improperly allowed the plaintiffs to cross-examine his expert as to the weight and credibility of the defendant's testimony (Aplt.Br. 36-37). While the plaintiffs used the word "believe" several times – as in whether the expert "believed" the defendant's record notations (R. 39 at 48, 54-55) – they never actually questioned the expert as to whether the defendant was credible.

Instead, the expert had testified the defendant obeyed the standard of care because the defendant's notes said he had discussed stroke with Mrs. Castleberry on December 6 but not on December 19, which the defendant previously had testified was because she did not voice that concern on December 19 (R. 39 at 47). Because the expert's testimony rested on that, the plaintiffs were entitled to impeach it, casting doubt on it by noting that this "was because Dr. DeBrot says so. Right?" (R. 39 at 47). The obvious inference is that, if the defendant's notes were incorrect, when there was evidence Mrs. Castleberry *had* raised the issue of stroke on December 19 (R. 37 at 129), the expert would be wrong.

That proper impeachment under the wide latitude of cross-examination is a far cry from asking whether the defendant was a liar, as in the decisions he cites (Aplt.Br. 37). Rather, the plaintiffs merely sought to draw out a negative inference that, if the defendant's notes were wrong, the expert's testimony as to the standard of care would be wrong. This only went to the basis of the expert's opinion. As well, the five jurors submitting affidavits stated this was not discussed during deliberations. *Supra* at 28-29.

F. No abuse of discretion in allowing the plaintiffs to ask a defense expert whether his conversations with defense counsel led him to change an answer.

Finally, and citing no case law, the defendant alleges the trial court improperly allowed the plaintiffs to "invade privileged conversations" his expert had with defense counsel, in violation of K.S.A. § 60-226(b)(5) (Aplt.Br. 37-38).

This is without merit. Section 226(b)(5) has nothing to do with attorney-client privilege at trial. It certainly does not create a trial evidentiary privilege between an expert witness and the lawyer who retained him. Instead, it goes merely to the scope of what is discoverable of an expert. The statute expressly limits its terms to "Discovery scope and limits" in "trial preparation" involving "experts." § 226(b).

The *actual* statute for attorney-client privilege at trial, K.S.A. § 60-426, does not mention expert witnesses. Instead, it bars "communications found by the judge to have been between an attorney and such attorney's *client*," *id.* at (a), and does not define "client" to include expert witnesses. *Id.* at (c)(1). Still, when there is a break in a deposition, opposing counsel *always* is allowed to ask *even an actual client* what was discussed with counsel during the break. "[C]ommunications between the client and counsel during breaks in an ongoing deposition, other than to discuss a privilege, are not privileged. … [C]ourts allow the deposing attorney to question the deponent about the contents of the discussion to determine if any witness-coaching occurred." *Ngai v. Old Navy*, No. 07-5653, 2009 WL 2391282 at *5 (D.N.J. 2009) (internal citation omitted).

That is all that occurred here. After testifying on direct examination the previous day, the expert's cross-examination began the next morning (R. 40 at 3-4). During it, he sought to clarify comments he had made the previous day as to a chart, stating he had "thought about that chart and how it would apply to this case," and volunteered without objection that the thought "came to [him] after [he] met with" defense counsel the previous evening in his hotel room (R. 40 at 40-41).

Just as he would have done after a break in a deposition, the plaintiffs' counsel then asked the expert the circumstances of this possible witness-coaching to which he, himself, had opened the door without objection. Only then did the defendant object (R. 40 at 41). When it was overruled, the defendant did not lodge any further objections to this line of questioning, and certainly did not cite the obviously inapplicable § 226(b)(5) (R. 40 at 41-42). The defendant's argument is not preserved for appellate review and, even if it were, the trial court did not abuse its discretion. *Supra* at 33-34.

V. The trial court did not abuse its discretion in failing to issue curative instructions, because the defendant never requested that relief after his objections to items he alleged violated orders in limine were sustained.

Standard of Appellate Review

The defendant says that "[r]ulings involving motions in limine have traditionally been subject to review for abuse of discretion," but that, here, citing no authority, the rulings at issue "are subject to unlimited review" (Aplt.Br. 39). This is untrue.

In reviewing a ruling on an alleged violation of an order in limine, this Court first examines whether the order actually was violated. *City of Mission Hills v. Sexton*, 284 Kan. 414, 436, 160 P.3d 812 (2007). If so, it then determines whether the violation caused substantial prejudice to the party against whom the evidence erroneously was admitted, and on whom the burden to prove substantial prejudice rests. *Id.* The trial court's ruling is a matter of its discretion. *Id.* Its decision will not be disturbed on appeal unless "no reasonable person would take the view adopted by" it. *Garrett*, 278 Kan. at 667, 102 P.3d 436.

* * *

Incredibly, the defendant's fifth issue on appeal alleges error in the trial court *sustaining* three objections to testimony that he argued violated orders in limine. The first was to a mention in the plaintiffs' opening argument that "100,000 people … are killed by medicine each year" (Aplt.Br. 39) (R. 34 at 51-52). The second was to testimony by Mrs. Castleberry's son alluding to what other healthcare providers may have told him about the cause of his mother's stroke (Aplt.Br. 41-42) (R. 36 at 249-51). The third was to an unanswered question about the "working relationship" between the defendant and his nurse (Aplt.Br. 44) (R. 40 at 116-17).

As the defendant concedes, the trial court *sustained* his objections to all three items (Aplt.Br. 40, 42, 44). One wonders, then, what his issue is. Obviously, "a party has no right to complain on appeal of an order in his favor." *Carter v. Dep't of Social Welfare*, 189 Kan. 688, 689, 370 P.2d 1019 (1962). As well, a "jury will be presumed to have disregarded evidence about which an objection was sustained," such that a sustained objection cannot be the basis for an allegation of error on appeal by the party who successfully objected. *Fitzpatrick*, 24 Kan.App.2d at 901, 955 P.2d 141.

In his brief introduction, the defendant alludes to what his real problem with the rulings sustaining his objections is: that the court "did not instruct the jury to disregard" the argument or testimony at issue (Aplt.Br. 39). Notably, though, he *did not request* any curative instructions as to any of these arguments or testimony after his objections were sustained (R. 34 at 52; R. 36 at 251; R. 40 at 117).

This seems to be a theme: the defendant objects to argument or testimony, sees the objection sustained, fails to ask for any curative instruction, but then complains on appeal about the lack of a curative instruction. *Supra* at 38-39, 41. The law of Kansas, though, forecloses that sort of argument. *Supra* at 38-39, 41. Trial courts have no duty to give a curative instruction *sua sponte*. *Unruh*, 289 Kan. at 1199. Rather, failing to request one waives allegations of error on appeal because any such "error 'was obviously induced by … counsel's failure to [request] such relief." *Id.* (citation omitted).

The defendant alludes to requesting a mistrial (Aplt.Br. 45). He did not request a mistrial after the first two items of which he now complains in his fifth issue on appeal (R. 34 at 52; R. 36 at 251). He only did so a while after the third item: the question about Nurse Dunham's and the defendant's "working relationship" (R. 40 at 127).

As a result, any request for a mistrial as to the first two is waived on appeal. *State v. Carr*, ___ Kan. ___, 331 P.3d 544, 685 (2014). Moreover, the five jurors submitting affidavits stated that neither the number of people annually killed by medicine nor what Scott Castleberry could not testify to played any part in the jury's deliberations (R. 21 at 70-74, 76-77, 79, 81, 83).

As to the third sustained objection, the defendant argues his substantial rights to a fair trial totally were infringed by the plaintiffs' lone question about "the working relationship" of the defendant and his nurse, which no witness ever even answered (Aplt.Br. 44) (citing R. 40 at 117). From the eight words in the question, the defendant claims "any reasonable observer" would have believed "there was also another type of relationship," – i.e., a romantic affair – and that, "in the middle of trial, the occurrence of the affair was suddenly brought to the jury's attention" (Aplt.Br. 45-47).

Nonsense. There is no evidence the plaintiffs' counsel intended the reference to a "working relationship" to mean anything to do with an extramarital affair. Rather, Dunham had testified the defendant never discussed patient safety with her, and there were no patient safety protocols at the Galichia Medical Center (R. 36 at 55-58, 96, 105-06). She also testified the defendant never had trained her to recheck certain high blood pressure readings, nor did he tell her any level that would be considered "high enough" to be rechecked (R. 36 at 52). The plaintiffs' expert then explained these failures were part of the defendant's breach of his standard of care (R. 34 at 62-64, 100-02, 151). The plaintiffs' counsel's question to the defense expert about the defendant's and the nurse's "working relationship" plainly went to *that* relationship – their "working relationship," just as counsel stated, not any other sort of relationship.

The jurors did not glean the defendant's suggested inference, either. Each of the five jurors submitting affidavits were emphatic that whether the defendant was having an extramarital affair with Dunham or anyone else was not discussed during deliberations and played no part in the jury's verdict (R. 21 at 70-74, 76-77, 79, 81, 83).

Even if the intent behind the question somehow were to refer to an extramarital affair about which there was *no* evidence introduced at trial, the trial court stopped it. Out of 15 days of trial proceedings, the eight words in the plaintiffs' question did not – and could not – *automatically* mean that the jury was inexorably tainted by suddenly believing the defendant and his nurse were having a romantic or sexual affair. The trial court, who *did have* the ability to hear "body motions and voice inflections" (Aplt.Br. 45), cannot be said to have abused its discretion in determining that the intangible effect of these eight unanswered words did not mean the jury "necessarily ha[d] to infer from the comment" that there was an extramarital affair at issue, rather than the actual evidence at trial of the defendant's and his nurse's "working relationship."

VI. The trial court did not abuse its discretion in admitting the plaintiffs' exhibits C105, C110, C111, C112, C115, C118, C140a, C143, C147, C149, C150, and C151 as learned treatises under K.S.A. § 60-460(cc), because the expert testimony was that these periodicals, treatises, and pamphlets were published, reliable authorities on the subject. The trial court also did not abuse its discretion in admitting the plaintiffs' exhibits C152 and C154 as relevant factual information supporting the plaintiffs' theory in this case, because the expert testimony was that they did support the plaintiffs' theory.

Standard of Appellate Review

Citing no authority, the defendant claims "unlimited review should apply to" the "admission of learned treatises" under K.S.A. § 60-460(cc) (Aplt.Br. 47). In reality, "the determination of reliability requisite to admission into evidence of learned treatises rests in the sound discretion of the trial court." *Gobin v. Globe Publ'g Co.*, 229 Kan. 1, 5, 620

P.2d 1163 (1980). "Considerable judicial discretion is in order in determining what works are, and what works are not, for one reason or another, sufficiently worthy of trust to be considered as substantive evidence." *Zimmer v. State*, 206 Kan. 304, 309, 477 P.2d 971 (1970). Thus, the admission of learned treatises will not be reversed absent an "abuse of discretion …." *Gobin*, 229 Kan. at 5. "An abuse of discretion" in an "evidentiary ruling … 'exists only when no reasonable person would take the view adopted by the district court.'" *Garrett*, 278 Kan. at 667, 102 P.3d 436.

* * *

In his final issue on appeal, the defendant argues the trial court erred in admitting the plaintiffs' exhibits C105, C110, C111, C112, C115, C118, C140a, C143, C147, C149, C150, C151, C152, and C154 under the "learned treatise" hearsay exception in K.S.A. § 60-460(cc) because they "failed to meet the definition of a learned treatise" and were irrelevant "to the specific medical issues in the case" (Aplt.Br. 48-49).

This argument is without merit. First, the last two exhibits of which the defendant complains, C152 and C154, expressly were not offered as learned treatises (R. 35 at 47-49). Rather, both were admitted as relevant factual evidence supporting the testimony of the plaintiffs' expert, Dr. Miser (R. 35 at 47-49). Because the defendant only objected to those exhibits as not being "learned treatises" (R. 35 at 46, 49), he has waived any other ground. *State v. Reed*, ___ Kan. ___, 332 P.3d 172, 183 (2014) (citing K.S.A. § 60-404).

The other exhibits at issue were admitted under the "learned treatise" exception in § 60-460(cc), which provides the following is not hearsay: "A published treatise, periodical or pamphlet on a subject of … science … to prove the truth of a matter stated therein, if … a witness expert in the subject testifies, that the treatise, periodical or

pamphlet is a reliable authority in the subject." Under the statute, a treatise, periodical, or pamphlet "becomes admissible when a proper foundation has been laid – establishment of its reliability … by means of … the attestation of an expert witness." *Zimmer*, 206 Kan. at 309. As long as an expert testifies the treatise, periodical, or pamphlet is: (1) published; (2) "on a subject of science;" and (3) "a reliable authority in the subject," the court does not abuse its discretion in admitting it. *Gobin*, 229 Kan. at 5.

Here, Dr. Miser specifically testified that each of the exhibits at issue were published treatises, periodicals, or pamphlets on a subject of science to which he was testifying, and that each was a reliable authority thereon (R. 34 at 73, 75; R. 35 at 36-37, 39, 41, 43). The defendant cites no Kansas decision reversing the admission of learned treatises in which there was testimony meeting § 60-460(cc), because none exists.

The law of Kansas is Dr. Miser's expert testimony as to each of the exhibits satisfies the statute's terms. The trial court cannot have abused its discretion in agreeing.

Conclusion

The Court should affirm the trial court's judgment.

Respectfully submitted,

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