Case No. 111954

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

EDWARD M. BEREAL,

Plaintiff / Appellant,

vs.

RAVI K. BAJAJ, M.D.,

and

WESLEY MEDICAL CENTER, L.L.C.,

Defendants / Appellees.

Appeal from the District Court of Sedgwick County
Honorable William Wooley, District Judge
District Court Case No. 11 CV 4356

REPLY BRIEF OF THE APPELLANT

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Reply Argument and Authorities

I. The trial court erred in striking and excluding the plaintiff's rebuttal expert witness, Dr. Suzanne Parisian, M.D.

In his first issue on appeal, Plaintiff/Appellant Edward Bereal explained that the trial court erred in striking and then excluding his rebuttal expert, Dr. Suzanne Parisian, M.D., who would have rebutted the defendants' products liability expert, Yadin David (Brief of the Appellant ("Aplt.Br.") 27-39). As the plaintiff explained, K.S.A. § 60-226 gave him the right to have an expert to rebut Mr. David, Dr. Parisian was qualified to do so and would have done so, his disclosure of Dr. Parisian was timely, and Dr. Parisian would not have duplicated the testimony of his medical experts (Aplt.Br. 28-39).

Appellees/Defendants Ravi Bajaj, M.D., and Wesley Medical Center ("WMC") respond in separate briefs, but unhelpfully duplicate nearly identical arguments. As to the plaintiff's first point, they misstate the standard of review and argue that, because the plaintiff's original petition stated products liability claims that were dismissed by the time of expert disclosure, Dr. Parisian's conclusions nonetheless only could come in through an expert-in-chief for the plaintiff (Brief of Appellee Bajaj ("Bajaj Br.") 19-30; Brief of Appellee Wesley Medical Center ("WMC Br.") 23-31).

The defendants' attempt to play word games with § 60-226 and cases interpreting it is without merit. Whether the district court followed § 60-226 in exercising its discretion is subject to unlimited review. By the time of expert disclosure, the plaintiff had no product liability claims at issue in the case. Similar claims only were brought *back* into the case by the defendants through their products liability expert, Mr. David. The law of Kansas and, indeed, the United States, is that the plaintiff had the right to a rebuttal expert to rebut Mr. Davis, and Dr. Parisian properly would have done so.

A. While the trial court had discretion to control expert testimony and admit or exclude evidence, whether it correctly followed § 60-226 or the rules limiting expert testimony in exercising that discretion is subject to unlimited review.

The plaintiff explained that the standard of review for both his first and second issues on appeal is abuse of discretion, stating the Supreme Court's present four-part test for that standard, under which when, as here, the question under the test is whether the trial court's exercise of its discretion was based on an error of law, review is unlimited (Aplt.Br. 27, 40) (citing *State v. Ward*, 292 Kan. 541, Syl. ¶ 3, 256 P.3d 801 (2011)).

The defendants agree that the standard for both issues is abuse of discretion (Bajaj Br. 19, 31; Wesley Br. 23, 32). Both, however, ignore the Supreme Court's current four-part test reserving unlimited review for whether an exercise of discretion was based on an error of law, and instead invoke 25- and 30-year-old respective Supreme Court decisions to suggest that "[j]udicial discretion 'is abused only if no reasonable person would take the view adopted by the trial court'" (Bajaj Br. 19; WMC Br. 23).[1] Both then harp on "reasonableness" throughout their arguments (Bajaj Br. 19-20, 23; WMC Br. 24, 32).

The reason, of course, that the defendants are forced to cite older decisions is that this simple statement is no longer the sole arbiter of abuse of discretion in Kansas. Rather, in 2010, the Supreme Court re-explored the contours of abuse of discretion analysis and held instead that the four-part test the plaintiff explained in his opening brief should be the standard. *State v. Gonzalez*, 290 Kan. 747, 755-56, 234 P.3d 1 (2010). For,

> even under the deferential abuse of discretion standard of review, an appellate court has unlimited review of legal conclusions upon which a

[1] Throughout WMC's brief, it fails to include any Pacific Reporter citations when citing to Kansas authorities. This violates Supreme Court Rule 6.08, which requires that "[c]itation of a court decision *must* be by the official citation" – the Kansas Reports or the Kansas Court of Appeals Reports – "*followed by* any generally recognized reporter system citation" – West's Pacific Reporter. (Emphasis added).

> district court judge's discretionary decision is based. Because '[a] district court by definition abuses its discretion when it makes an error of law … [t]he abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.

Id. at 755 (internal citations omitted). As a result, in *Ward*, the Supreme Court distilled its lengthy discussion in *Gonzalez* down into the present four-part test, which includes unlimited review of whether a trial court's discretionary decision is based on an erroneous legal conclusion (Aplt.Br. 27, 40).

And that is precisely the question in the plaintiff's first two issues. First, did the trial court correctly follow § 60-226 in exercising its discretion to strike and exclude Dr. Parisian's report and testimony? Second, did it correctly follow the rules on expert disclosure when exercising its discretion to allow defense expert Mr. David to testify to conclusions outside those disclosed in his report? The present law of Kansas is that this Court has unlimited review of both questions, and the answer to both is "no."

B. As Dr. Parisian's report was a proper rebuttal report under § 60-226 that contradicted evidence identified solely by the defendant's expert, the statute gave the plaintiff a right to have her testimony heard and the trial court erred in holding otherwise.

Both defendants argue Dr. Parisian's report was improper rebuttal expert evidence because, before trial, the plaintiff had identified products liability issues involving the Avanta, and her report did not solely rebut the conclusions of defense expert, Mr. David (Bajaj Br. 20-27; WMC Br. 24-31). These arguments are without merit.

First, the defendants ignore entirely, as the plaintiff already explained in detail (Aplt.Br. 34-35), that by the time expert disclosure was due, and for *nearly a year* beforehand, the plaintiff *had no* products liability claims involving the Avanta (Aplt.Br. 34). While the plaintiff initially brought products liability claims against Medrad and

Bayer (R. 1 at 79-95), those defendants – and those claims – were dismissed in March 2013 (R. 10 at 6-27; R. 24 at 1-6). As the February 2014 pretrial order makes plain, by then the plaintiff's *only* claims were medical malpractice against Defendants Bajaj and WMC (R. 2 at 53-57). Expert disclosure was due in January 2014 and rebuttal expert disclosure was due on February 3, 2014, more than ten months after the plaintiff dismissed any products liability claims involving the Avanta (R. 24 at 11).

WMC, though, argues that as the plaintiff's claims dismissed nearly a year before had "identified" issues regarding the Avanta, he nonetheless had a duty to *continue* with those claims by procuring experts as to them in his initial expert disclosures (WMC Br. 25). This is untrue. A "plaintiff ha[s] an absolute right to dismiss" a claim, which cannot be reinstated on the other side's request. *Wise v. Brock*, 188 Kan. 252, 254, 362 P.2d 15 (1961). And once a claim is "dismissed," the parties are placed back "in the same position … [they] would have occupied had [it] never been filed." *Loucks v. Farm Bureau Mut. Ins. Co.*, 33 Kan.App.2d 288, 299, 101 P.3d 1271 (2004).

As a result, once the plaintiff dismissed his products liability claims against Medrad and proceeded solely under medical malpractice theories against the defendants, the law of Kansas is that it is as if he never had brought any products liability claims. Neither he nor his experts ever "identified" any, despite questioning about them during depositions (Bajaj Br. 21 – not citing the record, though). Notably, there had been no discovery involving Medrad, and the defendants' discovery did not disclose any products liability claims (Aplt.Br. 34-35). It was not the plaintiff's *theory* that any products liability issue caused his injuries – only that *the defendants' negligence* had done so.

The first injection into the actual case below of any claims that Avanta device defect or malfunction was to blame for the plaintiff's injuries was *by the defendants, through Mr. David,* in their disclosure of him and his report on January 21, 2014 (R. 2 at 97; R. 24 at 13, 15, 24, 48-58). *Only then* did the plaintiff have any inkling of the specific theory *the defendants* would raise at trial in their defense, as well as, crucially, the specific "scientific" reasoning on which their theory rested.

WMC accuses the plaintiff of "know[ing] that the defendant mean[t] to contest an issue that is germane to the *prima facie* case" and therefore attempting through Dr. Parisian to "reverse the order of proof, in effect requiring the defendant to put in their evidence before the plaintiff put in his" (WMC Br. 25) (quoting *Braun v. Lorillard, Inc.*, 84 F.3d 230, 237 (7th Cir. 1996)). But this plainly is not so. Before January 21, 2014, the plaintiff *did not* know that the defendants meant to contest their negligence by pointing to products liability theories against Medrad (Aplt.Br. 34-35).

In response to first discovering that, the plaintiff timely obtained and disclosed Dr. Parisian's report rebutting Mr. David's report. This was entirely proper. As the Florida Court of Appeals explained when discussing that state's nearly identical version of § 60-226 in reversing a trial court striking and excluding a plaintiff's rebuttal expert, "We do not believe that this general rule [trial court has discretion to admit or exclude rebuttal evidence] stands for the proposition that the plaintiff must disprove all anticipated defenses in its main case – that is exactly what rebuttal is supposed to accomplish." *McFall v. Inverrary Country Club, Inc.*, 622 So.2d 41, 44 (Fla. App. 1993).

Here, though, the plaintiff did not even *anticipate* defendants' products liability theory before their disclosure of Mr. David. It was entirely unknown to him. Mr. David

"identified" the issues, and the plaintiff obtained Dr. Parisian to rebut them. Dr. Parisian did not support any existing theory of the plaintiff or any previously known theory of the defendants. She rebutted the new theory that the defendants' expert had identified.

"This is proper rebuttal testimony …." *Whitney v. Buttrick*, 376 N.W.2d 274, 278 (Minn. App. 1985) (reversing exclusion of rebuttal expert called in response to defense's new theory, not to raise new theory for plaintiff or bolster plaintiff's existing theory); *see also 103 Invs. I, L.P. v. Square D. Co.*, 372 F.3d 1213, 1216-18 (10th Cir. 2004) (same); *Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338, 1345-46 (9th Cir. 1987) (same).

Both defendants also argue the trial court properly struck and excluded Dr. Parisian's report and testimony because § 60-226 requires rebuttal experts must be "intended solely to … rebut" a defense expert and Dr. Parisian's report did not "solely" rebut Mr. David's (Bajaj Br. 21-27; WMC Br. 26-31). They argue this is because her report: (1) "supported elements of [the plaintiff]'s case-in-chief;" (2) "vouched for opinions offered by plaintiff's other experts;" (3) "reinforce[d] plaintiff's interpretation of fact witness testimony and documentary evidence;" (4) "offered legal opinions;" and (5) "offer[ed] opinions on evidentiary questions" (Bajaj Br. 22-27; WMC Br. 26-31).

This, too, is without merit. First, this was not part of the trial court's reasoning in striking and excluding Dr. Parisian's report, nor do the defendants argue so. Rather, the trial court held only that, as refuted above, because the plaintiff initially stated products liability theories against Medrad, it knew about that theory and thus had to disprove it with an expert-in-chief, not a rebuttal expert (R. 4 at 21; R. 5 at 20). The defendants did not argue below, and the trial court did not hold, that Dr. Parisian's report was deficient in any other manner, let alone what they now argue.

Second, the defendants' complaints are insubstantial. They merely conflate tiny portions of Dr. Parisian's lengthy report into monstrous-sounding errors. Notably, though, the majority of the defendants' litany is devoid of authority as to how, as a matter of law, Dr. Parisian's report still did not "solely rebut" Mr. David's (Bajaj Br. 22-27; WMC 26-31). As well, the plaintiff already explained in detail how Dr. Parisian's report rebutted Mr. David's conclusions in a way his other experts did not and could not (Aplt.Br. 32-33, 36-39). The defendants do not disagree, as they equally notably do not argue Dr. Parisian *did not* rebut Mr. David. Rather, they merely argue she is disqualified because they believe a few portions of her report did a little more than that.

It is well-established that, per its federal analogue, § 60-226, "allow[s] rebuttal experts to use a different methodology to analyze the same facts considered by the expert in chief." *Scientific Components Corp. v. Sirenza Microdevices, Inc.*, No. 03 CV 1851, 2008 WL 4911440 at *2 (E.D.N.Y. 2008). The plaintiff's expert testifies to the plaintiff's theory as to how the defendant is liable, the defendant's expert testifies in support of his theory as to how the defendant is not liable, and the plaintiff's rebuttal expert shows how, often based on the same facts already discussed, the defendant's expert is wrong and, thus, the defendant remains liable.

So, here, for example, Dr. Parisian would testify that, contrary to Mr. Davis's conclusions, "from the data that is available, there is no evidence that the MedRad device or any of the disposables were defective" and, in fact, "the evidence was to the contrary" (R. 25 at 105). This was proper rebuttal, not simply "a continuation of the [plaintiff's] case-in-chief." *Marmo v. Tyson Fresh Meats*, 457 F.3d 748, 759 (8th Cir. 2006).

Nor do the defendants cite any law that prohibits a rebuttal expert from reviewing the plaintiff's experts-in-chief's reports. To the contrary, "no rule or principle … precludes" rebuttal experts from reviewing "the reports of other experts." *Dixon v. Certainteed Corp.*, 168 F.R.D. 51, 55 (D.Kan. 1996). Nor must "rebuttal testimony … be grounded in knowledge of how to give rebuttal testimony," as "[n]othing in" the law "requires the witness to be an expert in being an expert." *Washington v. Kellwood Co.*, No. 05cv10034, 2015 WL 2258098 at *27 (S.D.N.Y. Apr. 21, 2015).

As Dr. Bajaj ultimately points out, all the pithy issues the defendants have with Dr. Parisian's report easily could have been taken care of with limiting orders, not striking and excluding Dr. Parisian as an expert in her entirety (Bajaj Br. 25-26). As in most any case, the testimony of all the experts below was circumscribed by orders in limine (*See* R. 11 at 4-5 for those pertaining to Mr. David).

If the defendants were concerned that Dr. Parisian might improperly bolster Dr. Fifer and Ms. Harris or offer improper legal conclusions or evidentiary opinions, they could have sought and received orders in limine preventing her from doing so. The plaintiff would not have objected. As defense counsel, seasoned litigators, plainly knew this, this likely is why they did not make any of these arguments to the trial court and, thus, the trial court did not strike or exclude Dr. Parisian on that basis.

As a matter of law, Dr. Parisian's report solely rebutted theories first identified in Mr. David's report. She was qualified and timely disclosed as a rebuttal expert. Under § 60-226, the plaintiff had a right to introduce her testimony. The trial court's conclusion otherwise was error.

II. The trial court erred in allowing Mr. David to testify to conclusions outside the scope of his disclosed report.

In his second issue on appeal, the plaintiff explained that, in contravention of both its own pretrial orders and the law of Kansas as to expert testimony, the trial court erred in allowing defense expert Yadin David to testify to conclusions outside those in his prior disclosed report that wound up being crucial to the defense's theories (Aplt.Br. 40-45).

WMC, but not Dr. Bajaj, initially argues this issue is not preserved for review because the plaintiff did not contemporaneously object to the testimony of which he complains (WMC Br. 37). This is untrue – the testimony to which WMC argues the plaintiff did not object *already* had been objected to by the time that WMC cites.

WMC quotes a slice of two pages of transcript in which Mr. David testifies to a "Venturi effect" causing air to be in the Avanta system, with a mention of what it "seems to him" to mean, to which the plaintiff did not directly object (R. 19 at 65-66). By that point, however, the plaintiff *already* had objected to Mr. David's testimony about external air and its volume as being outside the scope of his report, which the trial court had overruled (R. 19 at 55-60). Moreover, the plaintiff repeatedly objected thereafter to any testimony not about what it "seemed" to Mr. David, but when Mr. David ultimately said he actually concluded a defective PIV was to blame (R. 19 at 75).

The law of Kansas is this was adequate to preserve the issue for appeal, and missing one objection in the course of repeated objections does not undo this. *State v. Winston*, 281 Kan. 1114, 1125-26, 135 P.3d 1072 (2006) ("Although counsel did not make repeated contemporaneous objections each time [allegedly improper] evidence came up, nor did he specifically request a 'continuing objection,' the objections that were

made were obvious attempts to renew the … objection and, therefore, should be considered sufficient to preserve the issue for review").

Both defendants quote this Court's (later reversed) decision in *Foster v. Klaumann*, 42 Kan.App.2d 634, 680-81, 216 P.3d 671 (2009), for the proposition that that "expert disclosures are not meant to disclose every detail of testimony that an expert is going to give" (Bajaj Br. 31; WMC Br. 32). Despite this being dicta in *Foster*, as the Court held the objection to the expert's testimony was not preserved for appeal, and despite the Court in *Foster* not citing any authority for this proposition, certainly, some tiny nitty-gritty that is part and parcel of the expert's disclosed report, as in *Foster*, need not be disclosed. "[S]ome elaboration is allowed" (WMC Br. 33) (quoting *In re Stand 'n Seal Prods. Liab. Litig.*, 636 F.Supp.2d 1333, 1336 (N.D.Ga. 2009)).

By statute, however, expert disclosures *must* "state … the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." § 60-226(b)(6)(B). Even under *Foster*'s dicta, the testimony at issue must be "consistent with [his] expert disclosures and not a new opinion on [the expert]'s part." 42 Kan.App.2d at 681.

Mr. David's testimony at issue here was not mere "elaboration" on what his report concluded, as in *Foster*. To the contrary, they were his *new* opinions first elicited by surprise at trial, which the law of Kansas prohibits. *Id.* The defendants argue that, because Mr. David's report mentioned his conclusion that air had entered the Avanta and this was due to some "defect in the Avanta" he did not identify, his testimony was not outside his report (Bajaj Br. 32-34; WMC Br. 35-34). This is untrue. Nothing in his report mentioned any conclusion as to what any volume of air was or from where it came,

contended that the volume of air was significant, or that it was the PIV that was defective at all (R. 24 at 48-58) – the testimony at issue here.

Both defendants invoke the rule that an expert "also may opine or comment on evidence made known to them at trial" through other witnesses' testimony (Bajaj Br. 32; WMC Br. 33). Both then attempt to excuse Mr. David's testimony outside the conclusions of his report on this basis, too, arguing his testimony about "17 seconds of air" and a defective PIV were supplied by the testimony of Defendant Bajaj (Bajaj Br. 32-34; WMC Br. 35-36).

This is impossible. First, the testimony of any other witnesses, and *especially* Defendant Bajaj, was *not* made known to Mr. David at trial, as he appeared only at one day of the trial, April 9, 2014, out of order due to his schedule, and was not present in the courtroom for any other testimony (R. 19 at 6-7). Moreover this was *the day before* Defendant Bajaj testified (R. 20 at 4). Before Mr. David, *no* witness had testified to any exact volume of air, let alone such a large volume as 10-15 ccs or "17 seconds" as he opined without support, and no witness testified to even a hint of any defective valve. His testimony was the *first* on either subject.

Mr. David's testimony at trial that: (1) there were "17 seconds" of air in the line, which was larger than the amount in a catheter, means "there is external source of air" (R. 19 at 54-55); and (2) that "the only way to reconcile the facts … is by determining the pressure isolation valve was defective" (R. 19 at 75), were outside the conclusions of his expert report, improperly rendered an opinion as to the causation of Mr. Bereal's injury, and unfairly surprised the plaintiff. The trial court's allowing it anyway violated both its own orders and the law of Kansas prohibiting new, undisclosed opinions at trial.

III. The trial court erred in denying the plaintiff judgment as a matter of law on the defendants' six KPLA affirmative defenses of products liability.

In his third issue on appeal, the plaintiff explained that the trial court erred in allowing the defendants' six affirmative defenses of products liability under the Kansas Products Liability Act ("KPLA"), K.S.A. §§ 60-3301, *et seq.*, against Medrad to go to the jury (Aplt.Br. 45-50). He explained this was because the only "evidence" to support them was Mr. David's mere speculation, and even then his speculative conclusions still failed to meet many of the KPLA's requirements for those claims (Aplt.Br. 46-50).

Below, the trial court held that the KPLA governed the defense's products liability comparative fault claims, and thus all jury instructions as to those claims were grounded in the KPLA (R. 2 at 97; R. 8 at 60-64; R. 22 at 192-94). In his opening brief, the plaintiff explained that, as the defendants do not cross-appeal, they cannot now challenge this (Aplt.Br. 35). Nonetheless, both defendants now seek to re-litigate their argument that the KPLA does not apply to their products liability affirmative defenses (Bajaj Br. 38-40; WMC Br. 40-42).

Even if their argument were proper here, it is untenable. The defendants base their argument on the KPLA's use of the words "claim" and "action," which they argue means *only* a *plaintiff's* claim for injury against a defendant, and *not* a defendant's claim that the comparative fault of another caused the plaintiff's injury (Bajaj Br. 38-40; WMC Br. 40-42). But K.S.A. § 60-258a(c) mandates that when *any* party, plaintiff *or defendant*, asserts a comparative fault claim against another, they must prove their claim against that other just as if it were a primary claim.

This applies to medical device defect claims, too. "A defendant who seeks to reduce his percentage of fault by comparing it to the fault of another party has the burden

of proving by a preponderance of the evidence that the party was at fault and that the fault caused or contributed to the injury." *O'Gilvie v. Int'l Playtex, Inc.*, 821 F.2d 1438, 1443 (10th Cir. 1987) (citing *Wooderson v. Ortho Pharma. Corp.*, 235 Kan. 387, 407, 681 P.2d 1038 (1984)). Thus, when a defendant joins additional parties under K.S.A. 60-258a(c), who the defendant claims contributed to the plaintiff's injuries, the defendant has the burden of providing the joined parties' fault by a preponderance of the evidence just as if the joined party were a defendant. *McGraw v. Sanders Co. Plumbing & Heating, Inc.*, 233 Kan. 766, 667 P.2d 289 (1983).

The KPLA applies to *any* claim of products liability "based on strict liability in tort as well as negligence … involving property damage, personal physical injuries and attendant anguish or emotional harm." *Fennesy v. LBJ Mgmt., Inc.*, 18 Kan.App.2d 61, 847 P.2d 1350 (1993). All of the defendants' six products liability claims of strictly liable or negligent defect in design, manufacturing, testing, warnings, training, are covered by it. Because under § 60-258a(C) they bore the same burden against Medrad for these claims as if they were a plaintiff suing Medrad, their affirmative defenses *all* were covered by the KPLA. The defendants' arguments otherwise, based on their peculiar interpretation of language in the KPLA, are untenable.

Neither defendant argues that Mr. David's testimony *was* sufficient under the KPLA. Both merely argue that his testimony was not speculative and their products liability claims can be "inferred" from it (Bajaj Br. 37; WMC Br. 46-49). They base this largely on the fact that the trial court allowed Mr. David to testify as an expert, over the plaintiff's objection (Bajaj Br. 37; WMC Br. 46). But whether Mr. David generally qualified as an expert is irrelevant to the plaintiff's third point. As he explained, but the

defendants ignore, "even where it is 'proper to use expert testimony,' the 'opinion of the expert' must be 'based upon adequate facts and … not based upon evidence which is too uncertain or speculative'" (Aplt.Br. 47) (quoting *Farmers Ins. Co. v. Smith*, 219 Kan. 680, 689, 549 P.2d 1026 (1976)).

Mr. David testified he believed the PIV was "defective" in some way, but was unable to point to any actual defect in it (R. 19 at 68-75, 85). He had not tested an Avanta, could not explain why Medrad's own tests showed no defect, discussed FDA reports that did not mention any device defect, and relied solely on his personal opinion that he believed the cath lab team's deposition testimony that they did not err (R. 19 at 37-38, 68-75, 113-24, 133-40). Even assuming Mr. David was a qualified biomedical engineering expert, these were merely his "rumors, guesses, and assumptions," which are speculation and not evidence. *Olathe Mfg., Inc. v. Browning Mfg.*, 259 Kan. 735, 768, 915 P.2d 86 (1996). His mere personal opinions are not evidence. *Jones v. Hittle Serv., Inc.*, 219 Kan. 627, 633, 549 P.2d 1383 (1976).

As a result, Mr. David's testimony utterly failed to establish the KPLA prerequisites of "identif[ying] what aspect of [the Avanta] was defectively designed," *Jenkins v. AmChem Prods., Inc.*, 256 Kan. 602, 634-37, 886 P.2d 869 (1994), that the Avanta was not "in compliance with legislative regulatory standards or administrative regulatory safety standards," K.S.A. § 60-3304, and that, as to the defendants' failure to warn claim, the users did nto know of any danger from their experience, knowledge, education, and training. K.S.A. § 60-3305.

The defendants failed to introduce sufficient evidence to support any of their affirmative defenses against Medrad. The trial court erred in holding otherwise.

IV. The jury's verdict does not render any of the above errors harmless.

The defendants argue any errors relating to their comparative fault defenses is harmless because the jury found they were not at fault (Bajaj Br. 17-19, 30, 34-36; WMC Br. 21-23, 31). They invoke a supposed "rule" that the jury answering "no" to "Do you find any of the defendants (Bajaj, Wesley) to be at fault" (R. 3 at 1) means no error relating to their defenses is reversible (Bajaj Br. 17-19; WMC Br. 21-23). This is untrue.

Notably, the defendants do not cite any Kansas authority in support of such a rule. Both instead rely on an unpublished Arizona Court of Appeals decision, *E. Valley Fiduciary Servs. v. Iasis Healthcare Holdings, Inc.*, No. 1 CA-CV12-0469, 2013 WL 6507187 (Ariz. App. 2013) (Bajaj Br. 36; WMC Br. 21), but neglect to mention that the same court also has refused to apply that same rule. *See Hardy v. Luthra*, No. 1 CA-CV11-0553, 2012 WL 2798549 at *9 (Ariz. App. 2012).

Whatever some foreign court may hold, the law of Kansas is that prejudice caused by error is assessed "upon the whole record." K.S.A. § 60-2105. So viewed, error only is harmless when there is no reasonable possibility that it affected the trial's outcome. *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011). As Defendant Bajaj points out, in Kansas the defendants' position "that [they were] not at fault (including contending that plaintiff's injuries were caused by device failure …)" was not merely "an affirmative defense," and "challenge[d] the plaintiff's contentions of fault" (Bajaj Br. 18). Had the trial court not erred in precluding a rebuttal expert, allowing the defense expert to testify outside his report report, and sending the detailed device defect allegations to the jury, it is more than reasonable that the jury might have found the other way. Whatever the law of Arizona might be, the law of Kansas is none of these errors were harmless.

Respectfully submitted,

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Certificate of Service

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