

**COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT
DIVISION IV
CASE NO. 11-CI-2391**

MELANIE ROBBINS, ET AL.

PLAINTIFFS

v.

**ST. ELIZABETH MEDICAL
CENTER, M.D. et al.**

DEFENDANTS

**DEFENDANTS' DR. DIANNA PERAZZO AND MILLS, SHERMAN, GILLIAM &
GOODWIN, PSC, MOTION TO FOR NEW TRIAL AND JNOV**

Come now the Defendants, by and through counsel, and move the Court for a Judgment Notwithstanding the Verdict under CR 50.02 and/or New Trial under CR 59.01. The evidence in this case did not support the verdict of the jury. A reasonable jury could not have concluded that Melanie Robbins suffered a thunderclap (sudden onset severe) headache, such that an LP was required by the standard of care. In addition, the jury was not permitted to hear that the injury was caused by the surgery, not the hemorrhage and the subsequent vasospasm. Despite this, the jury concluded that Dr. Perazzo deviated from the standard of care and proximately caused injury to Melanie Robbins. This Judgment must not stand and the trial court should find judgment, instead, in favor of Dr. Perazzo.

Additionally, Plaintiff's counsel on numerous occasions during trial told the jury and the Court at side bar that this case was about a "search for the

truth”. However, the Court, abusing its discretion on numerous evidentiary issues did not allow the jury to hear the truth. The Court erred, almost exclusively to the benefit of the Plaintiff, in excluding evidence that was material, relevant, probative, and consequential to the case. The decision to exclude the same was arbitrary, unconscionable, and unreasonable based on the Court’s faulty reading of the medical record and Facebook messages and improper application of the Rules of Evidence. Moreover, the Court permitted the Plaintiff to ambush the Defense with multiple issues, while foreclosing disclosed opinions by the defense. The reasons for this motion are set forth in the attached Memorandum in Support which is incorporated by reference. In addition, the Offers of Proof are incorporated as well.

Respectfully submitted,

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MEMORANDUM IN SUPPORT:

The Judgment in this matter is not supported by the evidence in this case. First, the evidence was such that a reasonable jury could not have concluded that Ms. Robbins suffered a “sudden onset – thunderclap headache,” and the standard of care only required an LP if a sudden onset headache was present. Moreover, because the significant damage that resulted in Ms. Robbins current condition would have occurred regardless of when the surgery happened, there can be no proximate cause in this case. This evidence, while unmistakable in the medical record, was not permitted to be explained to the jury by the experts, and only the evidence of Dr. Ringer’s testimony about the damage being the result of the hemorrhage was permitted. In fact, on avowal by Dr. McCormick, the Court seemed genuinely surprised yet did not change its decision regarding the admission of the same evidence. Instead, it arbitrarily determined that the expert disclosures were insufficient to permit the evidence to go to the jury.

Additionally, there was no fair trial in this case. The result is an unjust verdict that must be set aside. Dr. Perazzo deserves a new trial and this case must be tried again. A new trial under Civil Rule 59 is required because there was an abuse of discretion regarding admission and exclusion of evidence which prevented a fair trial. Additionally, there was surprise testimony which ordinary prudence could not have prevented or guarded against with regard to life expectancy. Furthermore, the verdict is not sustained by sufficient evidence with regard to the standard of care and causation. Finally, there were

errors of law regarding the admission and exclusion of evidence and jury instructions that were objected to at trial. For all these reasons, and the cumulative nature of the errors and unfair decisions at trial, warrant a new trial.

I. LAW ON MOTION FOR JNOV, NEW TRIAL AND JUDGMENT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE:

Civil Rule 50.02 permits the following:

Not later than 10 days after entry of judgment, a party who has moved for a directed verdict at the close of all the evidence may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; * * * A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed.

Civil Rule 59.01, in pertinent part, provides the grounds for a new trial:

A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:

(a) Irregularity in the proceedings of the court, jury or prevailing party, or an order of the court, or abuse of discretion, by which the party was prevented from having a fair trial. * * *

(c) Accident or surprise which ordinary prudence could not have guarded against. * * *

(f) That the verdict is not sustained by sufficient evidence, or is contrary to law. * * *

(h) Errors of law occurring at the trial and objected to by the party under the provisions of these rules.

On review, an appellate court must give “a great deal of deference” to a trial court’s decision to grant a new trial under C.R. 59.01.¹ A trial court’s granting of a new trial is presumed to be correct.² An “appellate court is more reluctant to reverse an order granting a new trial than one denying it.”³ The Kentucky Supreme Court has stated, “[o]nly if the appellate court concludes that the trial court’s order was *clearly erroneous* may it reverse.”⁴

The Kentucky Supreme Court in *CertainTeed Corp. v. Dexter*, laid out the steps a trial court must follow when faced with a motion for a new trial:⁵

First, the trial court must decide whether one of the grounds laid out in CR 59.01 exists. This is a finding of fact and is thus subject to review for clear error. When reviewing a trial court’s findings under the clear error standard, the appellant court must determine “whether or not those findings are supported by substantial evidence.” *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Though “[s]ubstantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established,” *Am. Rolling Mill Co. v. Pack*, 278 Ky. 175, 128 S.W.2d 187, 190 (1939), it does not mean the evidence must be absolutely compelling or lead inescapably to but one conclusion. Rather, substantial evidence is “[e]vidence that a reasonable mind would accept as adequate to support a conclusion.” *Moore*, 110 S.W.3d at 354 (quoting Black’s Law Dictionary 580 (7th ed. 1999)), or evidence

¹ *Bayless v. Boyer*, 180 S.W.3d 439, 444 (Ky. 2005).

² *City of Louisville v. Allen*, 385 S.W.2d 179, 184 (Ky. 1964) (Clay, Comm’r), overruled on other grounds by *Nolan v. Spears*, 432 S.W.2d 425, 427 (Ky. 1968).

³ *Louisville Mem’l Gardens, Inc. v. Com., Dept of Highways*, 586 S.W.2d 716, 717 (Ky. 1979) (citing *Allen*, 385 S.W.2d at 181).

⁴ *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64, 71 (Ky. 2010) Emphasis by the Court. Quoting *Turfway Park Racing Ass’n v. Griffin*, 834 S.W.3d 667, 669 (Ky. 1992).

⁵ *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64, 72 (Ky. 2010)

that “has sufficient probative value to induce conviction in the minds of reasonable men,” *id.* (quoting *City of Monticello v. Rankin*, 521 S.W.2d 79, 80 (Ky. 1975)).

The Court continues to instruct that once a finding has been made under CR 59.01:

[W]hether to grant the motion for a new trial is always within the trial court’s sound discretion and is entitled to a great deal of deference by an appellate court.” Generally speaking, “[t]he test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945, 46 8 Ky. L. Summary 28 (Ky. 1999). However a court can also “[a]buse its discretion when it relies on clearly erroneous findings of fact.”⁶

II. EXCLUSION OF EVIDENCE AS ABUSE OF DISCRETION

Abuse of discretion is the proper standard of review of a trial court's evidentiary rulings.⁷ The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.⁸ The law in Kentucky supports inclusion of evidence. According to Professor Lawson, “the law of evidence tilts heavily toward admission over exclusion, for there is an inclusionary thrust in the law that is powerful and unmistakable.”

The Kentucky Supreme Court further supports the tenet of inclusion. As stated in *Springer v. Commonwealth*, 998 S.W.2d 439, 449, “Relevancy is

⁶ *Id.* at 72.

⁷ See *Tumey v. Richardson*, Ky., 437 S.W.2d 201, 205 (1969); *Transit Authority of River City (TARC) v. Vinson*, Ky. App., 703 S.W.2d 482, 484 (1985).

⁸ 5 Am.Jur.2d Appellate Review § 695 (1995); *Kuprion v. Fitzgerald*, Ky., 888 S.W.2d 679, 684 (1994).

established by any showing of probativeness, however slight.”

Evidence Rule 103(a) provides:

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and

(1) Objection. If the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. If the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

III. EVIDENCE EXCLUDED UNDER KRE 403 AS BEING UNDULY PREJUDICIAL

The most egregious errors by this Court which did not permit a fair trial were the evidentiary ruling made prior to trial and continued throughout. This Court excluded relevant evidence regarding the use of cocaine and alcohol by Ms. Robbins. While the Court admitted that the evidence was relevant to credibility, it excluded the evidence because it felt that it was not relevant to standard of care, causation or damages. The Court also erred when excluding the testimony and questioning of Plaintiff’s father regarding the Facebook messages shared between he and his daughter prior to September 15, 2010.

KRE 401 provides,

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence.

In addition, KRE 402 provides,

“All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United states and the Commonwealth of Kentucky, by Acts of the General Assembly of the Commonwealth of Kentucky, by these rules, or by other rules adopted by the Supreme Court of Kentucky. Evidence which is not relevant is not admissible.”

Finally, KRE 403 provides,

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.”

While KRE 404 generally excludes evidence of crimes, wrongs or acts to prove the character of a witness in order to show action in conformity with that evidence, if the evidence is “so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party,” it may be admissible.⁹

A trial court's ruling that evidence is unduly prejudicial under KRE 403 will only be reversed if there has been an abuse of discretion.¹⁰ In making a KRE 403 ruling, a trial court must consider three factors: the probative worth of the evidence, the probability that the evidence will cause undue prejudice, and whether the harmful effects substantially outweigh the probative worth. The balancing of the probative value of such evidence against the danger of undue prejudice is held within the sound discretion of the trial judge.¹¹ The

⁹ KRE 404(b)(2).

¹⁰ [*Partin v. Commonwealth, Ky.*, 918 S.W.2d 219, 222 \(1996\)](#); [*Simpson v. Commonwealth, Ky.*, 889 S.W.2d 781, 783 \(1994\)](#).

¹¹ *Rake v. Commonwealth, Ky.*, 450 S.W.2d 527, 528 (1970);

standard of review is whether there has been an abuse of that discretion.¹²

The Supreme Court of Kentucky describes the impact of KRE 403 in *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705. *Ten Broeck* dealt with testimony excluded under the rape shield rule of KRE 412. However the Court recognized that KRE 412 could not be separated from KRE 403 analysis. While the case dealt with the admissibility of past sexual contact, the Court found it should not be excluded as it was relevant to the defense of the case. The Court found that the standard of “undue prejudice” under KRE 403 and “unfair prejudice” under KRE 412 are essentially the same. Thus, analysis of the application of KRE 412 can be instructional in other contexts where evidence is sought to be excluded under KRE 403 as unduly prejudicial. 'Unfair prejudice' means the undue tendency to suggest a decision based on improper consideration; it 'does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence.'¹³ "Evidence is unfairly prejudicial only if . . . it 'appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish,' or otherwise 'may cause a jury to base its decision on something other than the established propositions in the case.'¹⁴ "[U]nfair prejudice is that which is unnecessary and unreasonable."¹⁵ “The probative value of evidence is measured by the strength of its tendency to

¹² *Partin v. Commonwealth*, Ky., 918 S.W.2d 219, 222 (1996).

¹³ *Ten Broeck*, quoting *Doe v. Claiborne County, Tenn. By and Through Claiborne County Bd. of Educ.*, 103 F.3d 495, 516 (6th Cir. 1996) (quoting *United States v. Bonds*, 12 F.3d 540, 567 (6th Cir. 1993)) (emphasis in original).

¹⁴ *Ten Broeck*, citing *Carter v. Hewitt*, 617 F.2d 961, 972 (3d Cir. 1980) (quoting Fe. R. Evid. 403 advisory committee's note).

¹⁵ *Ten Broeck*, citing *Partin v. Commonwealth*, 918 S.W.2d 219, 223 (Ky. 1996) (rev'd on other grounds by *Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008)).

prove one side or the other of a material issue in the case. Direct evidence is often stronger in value than circumstantial, but that which is most convincing, or proves to be the more conclusive, or finally pushes the strength of one's case to a conclusive level on a material issue of fact, is entitled to the strongest probative value.”¹⁶

The Court in *Ten Broeck* ultimately found that the trial court had abused its discretion by excluding the evidence in the plaintiff’s medical records pertaining to her sexual activity. The Court reasoned that the evidence was directly relevant to the jury questions of consent and damages and its exclusion was not unfairly prejudicial. The only prejudice found was to have impacted the defense, as its hands were effectively tied in providing a vigorous defense based on the evidence.

A. COCAINE ABUSE

Similarly, in the instant case, Plaintiff’s medical records were scrubbed of all references to cocaine and alcohol abuse. This Court ruled that any reference to cocaine abuse which are present in the certified medical record and in the non-hearsay statements of Melanie Robbins from Facebook, along with the proposed testimony of Greg Hill, Larry Robbins, Mark McNeese, and Margaret Robbins, were not permitted at trial. In addition, the Court ruled that treating physicians who reference Melanie’s alcohol and cocaine abuse in their records may not comment on the facts and ordered the records to be “washed clean” of any reference. In fact, the records were redacted of any reference to

¹⁶ *Id.* at 21.

alcohol or drugs. Permitting this was an abuse of discretion and resulted in substantial prejudice to the defendants. This evidence should have been permitted.

The definition of the medical standard of care encompasses a duty to use that degree of care and skill which is expected of a reasonably competent practitioner in the same class to which she belongs, acting in the same or similar circumstances.¹⁷

As stated by the Supreme Court of Kentucky in *Baylis v. Lourdes Hosp., Inc.*, 805 S.W.2d 122:

It is beyond dispute that causation is a necessary element of proof in any negligence case. William L. Prosser, Handbook of the Law of Torts, 4th ed. (1971). *Johnson v. Vaughn*, Ky., 370 S.W.2d 591 (1963). It is an accepted principle that in most medical negligence cases, proof of causation requires the testimony of an expert witness. *Jarboe v. Harting*, Ky., 397 S.W.2d 775 (1965); *Johnson v. Vaughn*, *supra*. While evidence of causation must be in terms of probability rather than mere possibility, we have held that substance should prevail over form and that the total meaning, rather than a word-by-word construction, should be the focus of the inquiry. *Walden v. Jones*, Ky., 439 S.W.2d 571 (1968); *Morris v. Hoffman*, Ky.App., 551 S.W.2d 8 (1977).

In *Deutsch v. Shein*, Ky., 597 S.W.2d 141, 143-44 (1980), the Supreme Court adopted the substantial factor test for causation set forth in § 431 of the Restatement (Second) of Torts, which is entitled "What Constitutes Legal Cause." This section states in pertinent part that the "actor's negligent conduct is a legal cause of harm to another if his conduct is a substantial factor in

¹⁷ *Blair v. Eblen*, 461 S.W.2d 370.

bringing about the harm." Comment (a) to § 431 explains what is meant by "substantial factor":

In order to be a legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent. . . . This is necessary, but it is not of itself sufficient. The negligence must also be a substantial factor in bringing about the plaintiff's harm. The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called "philosophic sense," yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.

Despite the Plaintiff's expert testimony and Defense Expert Disclosures to the contrary¹⁸, the Court ruled, in error, that cocaine abuse is not relevant to the standard of care, causation, damages, or credibility in this case and has excluded the same, completely.¹⁹ The disclosures included numerous indications of the standard of care being impacted by the use of cocaine. Moreover, causation and the extent of damages and risks of the surgery were impacted by the use of cocaine. None of this was permitted to go to the jury. The court prohibited discovery and prevented the Defendants from mentioning the same at trial because the Court determined that the cocaine abuse was not recent and the alcohol abuse was speculative.

¹⁸ See Dr. Perazzo Disclosures. See Offer of Proof.

¹⁹ See Order Extending Cocaine Abuse History Revision and Omission.

Instead, Plaintiff's took the position, because they have to, to offer next to nothing about Melanie's life prior to September 15, 2010. In Voir Dire, counsel told the jury that she worked on and off as a bartender, she was assaulted in May 2010, and she was a single mother.²⁰ In Opening counsel added that Melanie was 35 years old and her son was named Tyler.²¹

The Court excluded relevant, truthful, and extremely probative evidence showing Melanie's lifestyle choices put her at an increased risk for subarachnoid hemorrhage and for the subsequent injury and damages. Truthful lifestyle evidence was not information that was provided to Dr. Dianna Perazzo during her care and treatment of Melanie Robbins. It was washed clean from Melanie Robbins background and record. The references to cocaine are rampant, proximate in time, and never disputed in the medical record. The Facebook messages put the use of cocaine, in Melanie's own words at least into August of 2010 when she was still with Greg Hill.²² By excluding the evidence, the Court created a Plaintiff and a patient that did not exist. The Court's error is palpable and clear.

A plethora of documents regarding Plaintiff abusing cocaine is in the medical record, arrest records, and Facebook messages. Larry Robbins specifically denied any knowledge of his daughters drug use in his deposition. The defense was absolutely prevented from presenting any evidence regarding this issue at trial. The Court referenced its belief that the cocaine abuse in

²⁰ Upon recollection of counsel

²¹ See Transcript Day 2.

²² See Offer of Proof.

particular was “**remote**”²³ and referenced the 2007 positive drug test of Plaintiff. The Court did not permit discovery depositions of the individuals involved (Larry Robbins and Greg Hill) in the Facebook messages to discover the true extent of the cocaine abuse. The Court completely ignored the Facebook references to “staying with” Greg Hill because of the drug until August of 2010. The Court erroneously claimed that written statements of Melanie Robbins stating that she stayed with Greg Hill because of the drugs were Hearsay and not admissible—rather than as an admission of a party opponent.²⁴ Moreover, the Court did not permit a subsequent deposition Larry Robbins to investigate the discrepancy between his sworn testimony and the Facebook messages.

The exclusion of this evidence impacted the defense in many ways. The abuse of cocaine on the part of Melanie Robbins impacted expert opinions regarding the standard of care, causation and damages. **See Dr. Perazzo and MSGG Offer of Proof and Expert Disclosures.** Also, since Ms. Robbins and her father denied drug abuse, the Defense was not permitted to cross them and attack each witness’s credibility before the jury on this issue. See *infra*.

B. ALCOHOL ABUSE

Similar to cocaine issue above, the EMS record and ER record from 9/27 demonstrated that Ms. Robbins smelled of alcohol. She is reported as stating she had been drinking until 2:00 a.m. She also was at a court hearing for a

²³ This was an abuse of discretion and was the seemingly sole basis of its decision to not permit the references to cocaine or alcohol, despite not allowing discovery on the same.

²⁴ See Rule of Evidence 801A(b).

DUI when she had her seizure that lead to the ambulance being called for her transport to the hospital. All of this information was prohibited from being shared with the jury based on the Court's pretrial and trial evidentiary rulings. Moreover, it is apparent from the medical and criminal record of Ms. Robbins that she did not adequately explain her alcohol use and the extent of her abuse that is later admitted. This evidence was relevant and should have been known by the jury. This impacted standard of care, causation, and damages- as well as the credibility of Ms. Robbins and Mr. Robbins. None of this was permitted to be mentioned to the jury or asked to experts or lay witnesses.

C. DEPOSITIONS OF LARRY, MELANIE, MARGARET AFTER FACEBOOK DATA RELEASED AND DEPOSITION OF GREG HILL.

After being provided the Facebook messaging between Plaintiff and her family and friends, the drug abuse became more apparent and close in time to the care at issue. Moreover, the extent of the family's frustration with her "three years" of problems made it clear this was ongoing since the 2007 event. As a result, the Defense requested depositions of various friends and family on this issue but the judge refused to allow such discovery impeding our ability to investigate this issue completely.

Melanie Robbins father failed to disclose relevant and truthful information he had sworn to "tell the whole truth" about during his deposition. There is no question as to this fact. He testified:

Q. Did you ever know her to use or abuse illegal drugs of any kind?

A. **I never did.** You know, I even, I just never, like any, all my kids I worry about and in my own way I've checked on them a few times but, you know, in her

case I never could catch her. If she was doing something, I never could find out.

Q. So are you aware whether she's ever used cocaine or marijuana?

A. **I'm not aware of it at all.** She never, I don't do drugs so she never really mentioned it to me if she did.

However, his numerous and contemporaneous comments to his daughter about her drug use in 2010 is plainly apparent in his Facebook messages. Melanie never disputes his allegations, and in fact admits that she needs to get help and is doing so. Larry Robbins would testify, if permitted to be confronted with the Facebook Messages from July and August 2010, that he was concerned for the very life of his daughter because of her cocaine and alcohol abuse and the lifestyle she was living. He would testify that he had tried for years to get her to stop, but to no avail. She only truly stopped once she had the stroke and surgery following her DUI and seizure in Court.²⁵ **See offer of Proof.**

Given the opportunity, it is likely (and an offer of proof was submitted to the Court) Larry Robbins would have testified regarding what he found at the home when he took the police there after his daughter was assaulted. He would state that it confirmed what he already knew from conversations with Melanie, and that he asked Melanie to get help because she had confided that she needed help with drugs, cocaine, and alcohol. While he testified he was unaware of the same, this was untrue.²⁶

Additionally, Larry Robbins would testify that the references to Melanie's

²⁵ See Offer of Proof.

²⁶ See Offer of Proof.

cocaine and alcohol abuse in the medical records at UC and Mayfield were provided by him and Melanie.²⁷ He would testify that this was truthful information that was provided because he was very concerned about how the drug history would affect Melanie and he thought the doctors treating her needed to know the truth.

D. MELANIE ROBBINS

Melanie Robbins' own words show the abuse of discretion in this case. Melanie would have testified, when confronted with the Facebook messages and medical records, that she had a longstanding drug addiction to cocaine and occasional crack use.²⁸ In addition, she was an alcoholic and was seeking help to get sober in the weeks prior to her stroke.²⁹ Moreover, she sought mental health counseling to attempt to be able to overcome her addiction. She would further testify that the only thing that finally stopped cocaine and crack use was her stroke and surgery. All of this information was excluded and the jury was not able to consider it.

In addition, while discovery was not permitted on this information, as the truth of it was denied, Melanie told a friend, Heidi, on Facebook that she was going to counseling on September 19, 2010.³⁰ Based on the medical record, and testimony from the life care planner in this matter, Melanie Robbins had improved dramatically in her presentation, ability to understand, and communicate with others. During her deposition she was sleepy, did not seem

²⁷ See Offer of Proof.

²⁸ See Offer of Proof.

²⁹ See Offer of Proof.

³⁰ See Offer of Proof.

to recall events, and was not cognizant to a degree that makes her testimony reliable. She recalls seeing a male medical doctor on September 15, 2010, not Dr. Perazzo.

This is why a supplemental deposition or the right to cross examine Melanie about her contemporaneous statements in her Facebook posts and subsequent discussions about drug use should have been permitted. Melanie also admitted in correspondence with a friend that she still drinks but does not do drugs anymore. Since a supplemental deposition was not permitted, Melanie should have been permitted to be cross examined about her statements that are contradictory to her sworn deposition testimony regarding cocaine abuse. It was error not to permit the same.

E. INJURY CAUSED BY 9/28/10 SURGERY AND RISKS

The Court erroneously took the position that Dr. Ringer's testimony forestalled any discussion of injury after the hemorrhage at Ms. Robbins' DUI hearing in this case. Dr. Ringer discussed that the risks associated with the surgery on September 28, 2010 were the same risks that would have been associated with the surgery on September 15th, 2010. One of those risks was additional injury which was caused by Dr. Ringer's having to "sacrifice" a major vessel that fed the brain. The Court erroneously determined that the specific terms of the risk was not discussed in the disclosures and therefore precluded the discussion of the same. This was precluded despite the medical record which shows a subsequent "infarct" present after Dr. Ringer's first surgery.

The repair of Plaintiff's aneurysm on 9/28/10 was fraught with risk. This

was testified to by Dr. Close and Dr. Ringer. Each testified that risks were likely to occur on September 16 or September 28. In fact, the defense wished to present evidence from their neurosurgery experts (McCormick & Close) that Ms. Robbins experienced one of those risks, an ischemic stroke following the aneurysm repair as a consequence of the surgery. The Defense was prevented from explaining that the injury that caused the serious problem for Ms. Robbins was the result of the purposeful “sacrificing” of the vessel where the aneurysm started in order to prevent the recurrence of the aneurysm rupture. Dr. McCormick testified on avowal for purposes of Appeal that the major motor injury of Melanie Robbins was not caused by the hemorrhage, but rather by the subsequent ischemic stroke or infarct caused by the cutting of the blood supply to the proximal artery of the Middle Cerebral Artery branch. In fact, when the Court asked a question, it appeared struck by the impact of the testimony it had erroneously excluded. **See Trial Day 14.**

Rough Draft Day 14, (Pages 61:24 to 62:17)

24 Q More words for someone who is not as
25 aware of medicine. So take the correction, what

1 you're saying is even on the 15th, if this surgery
2 had been done, she would had right frontal lobe
3 deficits or injury?

4 A Right. Because when you try to clip
5 reconstruct that aneurysm which is done because you
6 want to keep that vessel open, you're going to
7 sacrifice things. In this case what he was hoping
8 not to sacrifice is that first division, but that
9 was not able to be salvaged. But those deeper
10 perforators, those smaller branches that come off
11 they're not going to be salvaged, and those feed
12 into the deeper structures of the brain where the
13 hemisphere's white matters comes through. So even

14 if the hemisphere wasn't damaged the injury would
15 occur there. So what's really driving the outcome
16 for Melanie is the complexity of that aneurysm, not
17 the fact that it bled.

Also, a second operation was required due to vasospasm and brain swelling following the initial repair, which likely caused additional brain injury to Ms. Robbins. The Court also refused to allow such evidence claiming a lack of disclosed opinions. This was inaccurate, and additionally, Plaintiff's decided not to take the deposition of Dr. McCormick or Dr. Close.

F. DR. SAMSON'S OPINION

Plaintiff's expert neurosurgeon was pulled as an expert during the discovery phase of the case. According to Dr. Samson's written report, he opined Ms. Robbins had a pre-aneurysm rupture risk of serious neurological impairment and death of 25-33%. During trial, the judge prohibited the defense from specifically referencing Dr. Samson's opinion, especially when it was to be used to cross examine Plaintiff's testimonial neurosurgeon Dr. Poffenbarger, who opined the risk to Ms. Robbins was 1-5% the day she was seen by Dr. Perazzo.

G. MAY 8, 2010 CT SCAN & ER CARE

Plaintiff was seen in the SEMC ER on 5/8/10, four months before the care at issue in this case. She had a CT scan of the head that date due to a headache described as 10/10 on the pain scale. The defense was prohibited by the court from presenting evidence of the patient's prior 10/10 headache, which suggested 10/10 was not necessary the worst headache of her life on 9/15. Also, the head CT did not find bleeding in the brain and no lumbar

puncture was ordered; a fact that could have helped demonstrate the standard of care was not to order a spinal tap as suggested by Plaintiff's expert witnesses.

The repeated rulings for Plaintiff's counsel on crucial evidentiary issues cumulatively denied Defendants a fair trial. The failure of the Court to understand critical issues of the medicine caused its evidentiary rulings to be erroneous, unfair, arbitrary and constituted abuses of discretion.

IV. CREDIBILITY EVIDENCE:

"The credibility of a witness may be attacked by any party, including the party calling the witness."³¹ A jury's job is to weigh the evidence and to make credibility judgments. The Court recognizes this in *Tuttle v. Perry*, 82 S.W. 3d 920 (Ky. 2002), and stated, "As a primary responsibility of a jury is to determine the weight of evidence and the credibility of witnesses, KRE 104 declares that the rule does not limit the right of a party to introduce evidence relevant to weight or credibility "including evidence of bias, interest or prejudice.""

Kentucky Court's allow evidence of prior drug use when they are admitted for a purpose that is not clearly to criticize the character of the witness or for other purposes specifically prohibited. Rather, drug use often times is admitted when credibility or bias is at issue, as in this case. Often, as in this case, the evidence of drug use may be relevant for a number of issues, including credibility.

³¹ KRE 607.

The credibility of a witness' relevant testimony is always at issue, and the trial court may not exclude evidence that impeaches credibility even though such testimony would be inadmissible to prove a substantive issue in the case.³²

This is unambiguously the law of Kentucky. And in this case, the cocaine abuse should properly be admitted as to credibility and on substantive issues as well.

In this case, Larry Robbins³³ was not permitted to be discredited with regard to his knowledge of his daughter's cocaine abuse when he utterly denied the same under oath. Moreover, the experts should have all been able to cross examined with the literature which contradicted their opinions during discovery depositions regarding the impact of cocaine on subarachnoid hemorrhage and causation. Each of the experts who acknowledged that cocaine was a risk factor for subarachnoid hemorrhage stated that they were unaware of Ms. Robbins cocaine use. This should have been able to be challenged at trial. Again, to the benefit of the Plaintiff, it was not.

V. APPORTIONMENT OF LIABILITY AGAINST MELANIE ROBBINS

The Court should have permitted the jury to hear evidence about the negligence of Melanie Robbins in failing to disclose her cocaine abuse and truthful alcohol abuse. This was negligent and the jury should have been able to apportion liability against Melanie Robbins. KRS 411.182 states in pertinent part:

³² *Sanborn v. Commonwealth*, 754 S.W.2d 534 at 545 (Ky. 1988) cited with approval by *Ky. Farm Bureau Mut. Ins. Co. v. Rodgers*, 179 S.W.3d 815 (Ky. 2005).

³³ As well as Melanie Robbins.

(1) In all tort actions, including products liability actions, involving fault of more than one (1) party to the action, including third-party defendants and persons who have been released under subsection (4) of this section, the court, unless otherwise agreed by all parties, shall instruct the jury to answer interrogatories or, if there is no jury, shall make findings indicating:

(a) The amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(b) The percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under subsection (4) of this section.

In *Dix & Assocs. Pipeline Contrs. v. Key*, the Kentucky Supreme Court essentially held that the statute on apportionment, KRS 411.182, did away with contribution among joint tortfeasors.³⁴ The Court stated, “apportionment is no longer an option which *may be exercised* where joint tort-feasors are named in the complaint. Apportionment is now *required* upon the request of either of the negligent parties.”³⁵

The Court should have permitted the apportionment instruction against Melanie Robbins. Because the Court did not permit, in error, the fact of the lie Ms. Robbins told to the nurse on September 15, 2010 regarding her illicit drug use, apportionment was not permitted. Based on the knowledge and admissions of Melanie Robbins of cocaine use which contradicted this, the Court, in error, did not permit the issue to be presented to the jury over the

³⁴ *Dix & Assocs. Pipeline Contrs. v. Key*, 799 S.W.2d 24 (Ky. 1990).

³⁵ *Id.* at 28. Emphasis by the Court.

objection of Dr. Perazzo's counsel.

Defendants were not permitted to address these issues at trial and therefore were not permitted to offer an apportionment instruction against Melanie Robbins. The same was proposed in Defendants Perazzo and MSGG's jury instructions and the record reflects that Defendants raised the issue again at the close of the Court's discussion of the Jury Instructions and that the Court acknowledged the same. Plaintiff's negligence in not sharing her drug and alcohol abuse history with Dr. Perazzo on 9/15/10 impacted the care she received and hampered Dr. Perazzo in considering the causes of her headache. Cocaine abuse is a known risk factor for subarachnoid hemorrhage. Denying drug use prevented Dr. Perazzo from considering another cause of the patient's headache. This should have been able to be presented to the jury and submitted as a proper Jury Instruction and Interrogatory.

VI. SURPRISE AT TRIAL

The Court permitted, contrary to the Civil Rules, the Plaintiff to surprise the Defendants on several counts.

[CR 26.02\(4\)\(a\)](#) provides, in pertinent part:

- (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to 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.
- (ii) After a party has identified an expert witness in accordance with paragraph (4)(a)(i) of this rule or otherwise, any other party may obtain further discovery of the expert witness by deposition upon oral

examination or written questions pursuant to Rules 30 and 31.

The Court unfortunately did not demand compliance with this rule nor its own Court orders. When the new opinion was added by Plaintiff (see *infra re: Life Expectancy*), the Court permitted it, however when the court erroneously held that the Defense Disclosures were insufficient to allow discussion about injury caused by Dr. Ringer's surgery and the subsequent vasospasm, the Court did not permit the same. See *Infra*. This was clearly an abuse of discretion which favored the Plaintiff.

A. MEDICAL LITERATURE

Similarly, Plaintiff's Emergency Medicine expert witnesses, Dr. Langdorf and Dr. Godwin relied on no specific literature in their disclosures and depositions. However, at trial, each relied on several texts and articles over objection of the Defense. Dr. Perazzo argued surprise and pointed out the literature was disclosed to each expert by Plaintiff's counsel the night before each testified and although it was provided along with nearly 50 other articles in the Exhibits of Plaintiff, there was no suggestion of reliance by experts. This was a trial by ambush tactic that the Court permitted in error. In fact, the Court had previously ruled that literature not disclosed in discovery would not be able to be referenced (MIL #17 of Plaintiff Ex. D). The Court also sustained Dr. Perazzo's motion to preclude literature being used that was not specifically relied on in deposition. Court's Order October 6, 2016 #2. Exhibit E.

B. LIFE EXPECTANCY

The Plaintiff's made a last minute change with regard to Ms.

Robbins treating PM&R physician. When they provided this information, they stated that the testimony and disclosure would be the same as that proposed by Dr. Crawford. However, at the very last minute a life expectancy opinion was added, that in fact Ms. Robbins would have a normal life expectancy, which was not known prior to the day before Dr. Goddard testified.

During trial, the court permitted Plaintiff's counsel to have Ms. Robbins' new treating PM&R physician, Dr. Mark Goddard to opine on life expectancy. Dr. Goddard's new opinion was that of a normal life expectancy. Such an opinion was not disclosed until after trial had started. This was trial by ambush, particularly when the only other evidence was Dr. Poffenbarger, Plaintiff's expert, who opined that her life expectancy was reduced by 10 years or more, with a little luck.

Moreover, no proper *Daubert* challenge of Dr. Goddard's new opinions was permitted. While a brief deposition was permitted immediately before his testimony, his basis for his opinion (anecdotal evidence) was not seriously even evaluated by the Court in terms of Daubert reliability. The Court, as it did throughout the trial, permitted the evidence when it favored the Plaintiff and was unfairly prejudicial to the Defense.

C. DAMAGES

Plaintiff's counsel surprised Defense Counsel by providing, the day it was presented, evidence of more past damages. They had not proven past medical expenses related to Ms. Robbins' nursing home care during the past five plus

years. In fact, the medical expense billing provided by Plaintiff's counsel as an exhibit, which was permitted to go back to the jury as an Exhibit, suggested Plaintiff had been block billed over the past few years based on Medicaid reimbursement. Despite a lack of evidence in the billing record, the Judge permitted Plaintiff to seek \$225 per day as the rate for the patient's care when the written billing suggested otherwise. As a result, the past medical expenses were substantially more than actually billed and paid to Medicaid.

Again, this was provided during trial and no expert supported the cost per day as a reasonable amount. To permit this surprise and the unfounded evidence without expert testimony was error.

VII. COLLATERAL SOURCE EVIDENCE

Generally, information regarding collateral source payments may not be introduced to the jury.³⁶ The policy reason in support of the doctrine is that "a tortfeasor is not entitled to any credit against what he owes for payments of medical expenses or disability benefits paid by a collateral source to the tort victim pursuant to a contractual obligation owed to the victim from the collateral source. . . ."³⁷

However, the Kentucky Court of Appeals in *Peters v. Wooten* has recognized situations when the collateral source rule does not apply.³⁸ One such exception is the "financial hardship" exception. When the plaintiff has put into issue hardships and financial distress or implies financial distress

³⁶ *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 42 01 Ky. L. Summary 27 (Ky. 1995).

³⁷ *Burke Enterprises, Inc. v. Mitchell*, 700 S.W.2d 789, 796 (Ky. 1985).

³⁸ *Peters v. Wooten*, 297 S.W.3d 55.

caused by defendant's action, the defendant may rebut this by showing that other financial means were available to plaintiff. In other words, when a plaintiff attempts to mislead the jury by claiming they are under financial hardship due to the defendant, and at the same time use the collateral source rule as protective cover, the rule becomes subservient to the truth. Errors predicated on restricting the defendant from rebutting such evidence can be the basis of finding that the defendant did not receive a fair trial.

The Court noted:

Justice cannot allow a general precept of the law to be manipulated to mislead the jury. * * *Kentucky has a long history of holding accountable parties who **open the door to evidence where the jury may be misled**. As aptly stated in *Harris v. Thompson*, 497 S.W.2d 422, 430 (Ky. 1973), Peters, "opened the book on the subject, [and was] not in a position to complain when [his] adversaries sought to read other verses from the same chapter and page."³⁹

Similarly in the instant case, during opening statement and trial evidence⁴⁰, Plaintiff's counsel made statements and asked questions which opened the door to Medicaid payment for Ms. Robbins healthcare. In particular, Plaintiff's counsel suggested that the fund for her care would have no money left if she lived to her life expectancy and that the costs, "were the cost of her care." Based on the *Peters v. Wooten* case, the defense should have been permitted to present evidence of Ms. Robbins' medical bills being paid by government assistance and that the amount of the life care plan was not a realistic amount of the cost of her care would be in this case. We also wished to

³⁹ *Id.* at 19. Emphasis added.

⁴⁰ Life Care Planner and Dr. Goddard.

present an alternative amount for future damages based on coverage under the Affordable Care Act which was not permitted. See Offer of Proof.

CONCLUSION:

As stated by the Kentucky Supreme Court, “While finality of judgment is a laudable goal, it cannot take precedence over the fair and equitable resolution of disputes.”⁴¹ Based on the foregoing, Defendants are entitled to all the relief requested herein.

Respectfully submitted,

CALDERHEAD, LOCKEMEYER & PESCHKE
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NOTICE OF HEARING:

This Motion requests that you appear in the Courtroom of Judge Patricia Summe at the Kenton County Courthouse on Monday September 22, 2017 at 9 a.m.

/s/ Joshua F. DeBra
Joshua F. DeBra, Esq.

⁴¹ *Terwilliger v. Terwilliger*, 64 S.W.3d 816, 819

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon the following by e- mail this 24th day of April, 2017.

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