COMMONWEALTH OF KENTUCKY
34th JUDICIAL CIRCUIT
WHITLEY CIRCUIT COURT
DIVISION 1
CIVIL ACTION NO. 09-CI-072

WALTER HOSKINS, as Executor of the Estate of BESSIE MORGAN, deceased, and on behalf of the Statutory Wrongful Death Beneficiaries of BESSIE MORGAN — PLAINTIFF

v.

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND NEW TRIAL

FIRST CORBIN LONG TERM CARE, INC.;
HILLCREST NURSING HOME OF CORBIN, INC.;
MANAGEMENT ADVISORS, INC.; and
UNKNOWN DEFENDANTS — DEFENDANTS

* * * * * * * * *

Come the Defendants, Hillcrest Nursing Home of Corbin, Inc., et al., and for their response and objection to Plaintiff's motion for judgment notwithstanding the verdict and new trial, hereby state as follows:

INTRODUCTION

On January 13, 2023, the jury rendered a verdict in favor of Hillcrest Nursing Home of Corbin and Defendants. The jury's deliberations lasted less than one hour. The Court entered a judgment consistent with the jury's findings. Parties presented evidence for five days, with Plaintiff using more than three of those days to present his case. The evidence of record supports the jury's finding and offers no legitimate reason for granting a new trial.

Plaintiff's motion for judgment notwithstanding the verdict and new trial claims there were irregularities, or other errors of law which necessitate retrying the same issues. However, all of the issues or alleged errors cited in Plaintiff's motion lack credibility in both fact and law. Moreover, Plaintiff failed to object contemporaneously to many of the "errors" of which he now complains,

and has waived those objections. The Court set evidentiary parameters before and at trial which cannot be disturbed unless there was a clear abuse of discretion. Plaintiff was not surprised with evidence, nor were there legal errors which could support the need for such a radical remedy as a new trial or judgment notwithstanding the verdict.

A motion for judgment notwithstanding the verdict "shall not be granted unless 'there is a completely absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ.'" Carter v. Coalfield Lumber Co., 331 S.W.3d 271, 275 (Ky. Ct. App. 2010), citing Bierman v. Klapheke, 967 S.W.2d 16, 18–19 (Ky.1998). The trial court must review the evidence presented to the jury, drawing all reasonable inferences most favorable to the verdict returned by the jury. Carter v. Coalfield Lumber Co., 331 S.W.3d 271, 275 (Ky. Ct. App. 2010).

"[N]ew trials are reluctantly granted. . . ." Louisville & N.R. Co. v. Ueltschi's Adm'r, 104 S.W.320, 321 (Ky. 1907). While it is within the trial court's discretion, "the trial court is without authority to grant a new trial where the record fails to disclose a sound reason therefor." Burton v. Spurlock's Adm'r, 171 S.W.2d 1012, 1016 (Ky. 1943); Sanders v. Drane, 432 S.W.2d 54, 56 (Ky. 1968).

The court must have very strong reasons for granting a new trial. Gray v. Sawyer, 247 S.W.3d 496, 498 (Ky. 1952). "Parties are not permitted thus to speculate with a new trial and accept the verdict, if satisfactory, or reopen it, if upon later investigation they think a different result may be obtained." Server v. McGahan, 76 S.W.2d 1, 3 (Ky. 1934) (quoting Quick v. Stanley, 289 S.W. 224, 225 (Ky. 1926)). There must be an injustice or wrong that will result unless the parties be allowed another opportunity to relitigate the *same issues*. Gray, 247 S.W.3d at 498 (emphasis added).

Plaintiff merely wants a second chance, which is not the purpose of CR 59. None of the issues raised in Plaintiff's motion resulted in an injustice or unfair trial.

ARGUMENT

I. Defendants presented sufficient evidence on all material issues to support the jury's verdict, and therefore Plaintiff's motion should be denied.

Plaintiff's motion for judgment notwithstanding the verdict should be denied because the jury verdict was supported by sufficient evidence. In ruling on a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. The trial court is precluded from entering a judgment notwithstanding the verdict unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ. Taylor v. Kennedy, 700 S.W.2d 415, 416 (Ky.App.1985). The standard for judgment notwithstanding the verdict is the same as that of summary judgment, there must be no genuine issue as to any material fact. Kentucky River Med. Ctr. v. McIntosh, 319 S.W.3d 385, 388 (Ky. 2010).

Defendants provided ample evidence to support the jury's verdict that Hillcrest Health & Rehabilitation Center met the standard of care while providing treatment to Bessie Morgan. Mossie Poynter and Rhonda Foister were likely two of the most important and influential witnesses at trial. Mossie and Rhonda were the *only* witnesses to testify at trial with first-hand knowledge of the care and treatment provided to Bessie Morgan. Both witnesses testified that the nursing home provided reasonable and appropriate care, and that Hillcrest Health & Rehabilitation Center had adequate staff to provide good care to Ms. Morgan. Additionally, Defendants' expert witnesses, Dr. David Carr, Dr. Neal Sharpe, and nurse Joy Schank each testified that Defendants

met the standard of care and did not cause Plaintiff's alleged injuries. Plaintiff's proof and expert testimony, on the other hand, was based on alleged discrepancies in nursing home records. However, this evidence was limited by Plaintiff's experts failing to review many key nursing home records documenting care provided by the Defendant and the fact that care could not be delivered in many instances because of the combative behaviors of Bessie Morgan. As the Court is aware, these behaviors likely resulted from Ms. Morgan's dementia and the abuse Ms. Morgan suffered at the hands of her daughter. Therefore, Plaintiff is unable to meet the standard required of a judgment notwithstanding the verdict, and Plaintiff's motion should be denied.

II. Juror and Foreperson, Stacey Abbott, was not dishonest about any relationship or connection she allegedly held with any party involved in this case.

Plaintiff's claims that juror and foreperson, Stacy Abbott, concealed her relationship and ties to multiple parties in this case, and provided false or misleading responses during *voir dire* are patently false. In an attempt to soil the verdict arrived at by this jury, Plaintiff has drawn nonsensical conclusions which are not based in fact. Plaintiff cites to the following as basis for his allegations: (1) Ms. Abbott's daughter has "liked" the professional Facebook page of Tipton & Tipton, (2) Lynn Tipton and Debra Tipton, the wives of Wes and Jeff Tipton, follow Ms. Abbott's Instagram account, (3) Ms. Abbott's daughter is "friends" with Wes Tipton's daughter on Facebook, (4) Ms. Abbott's daughter and ex-husband are "friends" with Lynn Tipton, the wife of Wes Tipton, on Facebook, and (5) Ms. Abbott is "friends" with an individual with the same last name, albeit with no known familial relation, as the Administrator of Hillcrest Nursing Home of Corbin. Each of these attempts at creating a relationship or connection between juror and foreperson, Stacy Abbott, are wildly broad and fantastical.

Juror and foreperson, Stacey Abbott, listened to all questions during *voir dire* and provided truthful, complete, and honest responses. (See, Affidavit of Stacey Abbott, attached hereto as

Exhibit 1). Ms Abbott is a special education teacher. She does not know attorneys Wes or Jeff Tipton either personally or professionally. She did not conceal any connection or relationship to either Wes or Jeff Tipton during *voir dire*. Furthermore, Ms. Abbott does not know Gail Gibbs, Administrator of Hillcrest Nursing Home. She has never communicated with Gail Gibbs either personally or professionally. Ms. Abbott likewise did not conceal any relationship or connection to Gail Gibbs during *voir dire*. In fact, Plaintiff's theorized connection between Ms. Abbott and Gail Gibbs put forward in his motion is baseless. Gail Gibbs is not related to Sherry Gibbs. (See, Affidavit of Gail Gibbs, attached hereto as **Exhibit 2**). They are simply two women with the same last name living in the same town. Plaintiff failed to verify the information contained in his motion and instead represented it as true to this Court in hopes of soiling the fair and just verdict arrived at by this jury. Such conduct should not be tolerated in a Court of the Commonwealth.

Even if we were to assume, for the sake of argument, that Ms. Abbott may have known of any of the parties involved in this case, or their family members, this information is not sufficient grounds to grant a new trial. In the case of Graham v. Com., 319 S.W.3d 331 (Ky. 2010), as modified (Sept. 10, 2010), the Supreme Court of Kentucky concluded that a juror's failure to disclose a casual acquaintanceship with the victim's family was not grounds for new trial. Specifically, the Court held that the juror's negative response to the question "Do you know the family" did not necessarily indicate dishonesty, given the different degrees to which one may "know" someone, and casual relationships between a juror and the victim's family would not suggest bias. Id. at 336. Similar to the town of Corbin, Kentucky, the town in which the Graham trial was held was of similar size. During a post-trial hearing regarding juror misconduct, the complaining witness acknowledged that "everyone in their hometown of Guthrie knew one another" and the relationship between the juror and the victim and her family was not necessarily

one of friendship, but "more of an acquaintanceship." Id. The trial court concluded that this casual relationship did not suggest bias and was insufficient basis for a new trial.

The Supreme Court of Kentucky has established a three-pronged test to determine whether a new trial should be granted in light of a juror's relationship to a party. "First, a material question must have been asked. Second, the juror must have answered the question dishonestly. And finally, the truthful answer to the material question would have subjected the juror to being stricken for cause." Taylor v. Commonwealth, 175 S.W.3d 68, 74–75 (Ky.2005). The material question asked during this trial was "Does anyone know Wes or Jeff Tipton?" VR 2023-01-09_11.45.02.310. Ms. Abbott *does not* know Wes or Jeff Tipton. Therefore, she did not answer this question dishonestly. Furthermore, had it been discovered during *voir dire* that Lynn and/or Debra Tipton follow Ms. Abbott's Instagram account, that would not have subjected her to being stricken for cause.

Absent a finding that any relationship, be it casual or otherwise, resulted in actual bias, a new trial should not be ordered. Graham, 319 S.W.3d at 338. This is especially the case in a community the size of Corbin, Kentucky. In Graham, the Supreme Court of Kentucky reasoned that "[t]o 'know' someone can have many different meanings and to 'know' someone in a small town such as Guthrie may mean something different than in a large city." 319 S.W.3d at 337. Therefore, simply because the juror answered during *voir dire* that he did not "know" any of the parties involved does not equate to that juror being dishonest. Without a dishonest answer, the truth of which would have subjected the juror to being stricken for cause a new trial is not warranted. Plaintiff has failed to provide any evidence of a relationship or connection between juror and foreperson, Stacey Abbott, that would suggest bias.

III. Alleged "juror misconduct" cannot be based exclusively on juror affidavits recounting statements from other jurors during jury deliberations.

Post-trial juror affidavits detailing fellow jurors' comments during deliberations may not be received as evidence of juror misconduct to impeach the verdict. Crawford v. Marshall Emergency Servs. Assocs., PSC, 431 S.W.3d 442, 445 (Ky. App. 2013). The post-trial juror affidavits offered in this case were offered solely to impeach the verdict and are inadmissible under Kentucky's rule, applied consistently for two centuries, that a verdict cannot be impeached by the affidavit or testimony of jurors. Taylor v. Giger, 3 Ky. 595, 597-98 (1808); Wickliffe v. Payne, 4 Ky. 413,418 (1809); see also, Robert G. Lawson, THE KENTUCKY EVIDENCE LAW HANDBOOK, § 3.15 p. 152 (3d ed.1993) (noting that "[t]here is a strong, deeply-rooted policy against subjecting jury verdicts to challenge on the basis of information provided by jurors who have rendered those verdicts… The policy is reflected most directly in a universally recognized principle that broadly prohibits jurors from impeaching the validity of their own verdicts, a prohibition that is firmly embedded in the case law of Kentucky.").

This rule protects the integrity and finality of the jury trial process, shields jurors from post-verdict scrutiny, and prevents jury tampering. Crawford, 43l S.W.3d at 448; Rietze v. Williams, 458 S.W.2d 613, 620 (Ky. 1970), overruled in part on other grounds by Centre College v. Trzop,127 S.W.3d 562, 566 (Ky. 2003); Maras v. Commonwealth, 470 S.W.3d 332, 335 (Ky. 2015). Jurors who observe inappropriate behavior are expected to report it to the judge **before** a verdict is entered. Crawford, 431 S.W.3d at 445 n.2. The long-standing rule in Kentucky that a jury verdict may not be impeached by testimony of a juror at times may work a hardship when juror misconduct can only be shown by the testimony of a fellow juror. However, the theory is that a juror will recognize and report any misconduct to the trial court immediately and that to allow

him to do it after the verdict "would invite the very kind of mischief the rule was designed to obviate." Rietze,458 S.W.2d at 620.

Plaintiff has asserted that juror Jordan Hall made a statement when he entered the deliberation room, *after the case had been turned over to the jury*, that he already made up his mind. This information comes from an affidavit submitted after the trial on behalf of juror Anna McGlamery, *not juror Jordan Hall*. Jordan Hall, himself, has denied these inflammatory allegations. (See, Affidavit of Jordan Hall, attached hereto as **Exhibit 3**). Jordan Hall has confirmed that he did not make any final decisions regarding whether Hillcrest Nursing Home provided appropriate care until the trial was complete. Plaintiff's claim is nothing more than unverified hearsay contained in a post-verdict affidavit from a juror, and thus inadmissible pursuant to Kentucky law.

The Plaintiff's reliance on Dalby v. Cook, 434 S.W.2d 35 (Ky. 1968) is misplaced and not applicable to the present case. In Dalby, one of the jurors had a conversation on the street, outside the courthouse while the trial was still ongoing, with another individual who had knowledge of the facts of the case. The juror then formed an opinion as to the merits of the case based upon this extrinsic information learned outside of trial. Id. at 37. Additionally, Plaintiff's citation to Doyle By and Through Doyle v. Marymount Hosp., Inc., 762 S.W.2d 813 (Ky. App. 1988) is likewise unavailing. The Court determined that a new trial was warranted because there was uncontroverted evidence that a juror discussed the case with another individual not serving on the jury on numerous occasions throughout trial. Id. at 817. There exists no evidence to suggest that any juror discussed this case or its merits with anyone prior to the case being submitted to the jury for deliberations. Jordan Hall did not make any final determination regarding whether Hillcrest Nursing Home provided appropriate care until after the trial was complete.

To the extent that Ms. McGlamery's affidavit is meant to support an allegation of misconduct on the part of Stacey Abbott, by implying that Ms. Abbott caused Ms. McGlamery to change her vote from Plaintiff to Defendants, it is insufficient under Kentucky law. The fact that a juror aggressively champions one position as opposed to the other in the jury room has no bearing on the issue of his misconduct outside the jury room. Doyle By & Through Doyle v. Marymount Hosp., Inc., 762 S.W.2d 813, 815 (Ky. Ct. App. 1988). Plaintiff relies exclusively on hearsay statements in affidavits alleged to have been made by fellow jurors during deliberations. Kentucky law does not permit such "evidence" to impeach the verdict. Furthermore, affidavits of the jurors in question rebut the hearsay statements contained in Plaintiff's motion. Not only are the juror misconduct allegations improper and unsubstantiated by any standard for admissible evidence, but the record refutes the allegations and reflects a fair trial.

IV. Tipton & Tipton did not previously represent a party to this lawsuit, and therefore Wes Tipton did not violate any duties owed to former clients of his firm.

Plaintiff's claim that Jeff Tipton, Wes Tipton's law partner, represented parties to the present lawsuit is yet another attempt to create a connection without merit or basis in fact. Plaintiff's claim fails as a matter of law for a number of reasons. First and foremost, Jeff Tipton did not previously represent Bessie Morgan as Plaintiff would have this Court believe. Kentucky Rule of Professional Conduct 1.9(a) states "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." Jeff Tipton represented Diana Hoskins in her bid to be appointed Bessie Morgan's guardian. (See, Petition for Relief from Order, attached hereto as **Exhibit 4**).

On March 2, 2007, the Whitley County District Court entered an Order appointing the Commonwealth of Kentucky as Bessie Morgan's guardian. Attorney, Sandra Reeves, represented Bessie Morgan and served as her guardian ad litem throughout this proceeding. Jeff Tipton, on behalf of Diana Hoskins, moved to intervene in the proceeding after the Order was entered. Id. By order of the Whitley County District Court Bessie Morgan was not the ward of Diana Hoskins at the time of Jeff Tipton's representation. Bessie Morgan was the ward of the Commonwealth of Kentucky.

The affidavit submitted with Plaintiff's motion in support of his claim that Wes Tipton violated his ethical obligations as it relates to his law firm's representation of former clients relies upon the case of Branham v. Stewart, 307 S.W.3d 94, 98 (Ky. 2010), for the proposition that the law firm of Tipton & Tipton owed an attorney-client relationship to Bessie Morgan through the representation of Diana Hoskins. However, the holding in Branham, is not applicable to the present issue. In Branham, the Supreme Court of Kentucky held that when a guardian brings an action on behalf of a ward the attorney that was retained by the guardian also serves as attorney for the ward. Id. at 98. In these types of actions the guardian serves as the agent of the ward under Kentucky law. Id. The Supreme Court of Kentucky reasoned that because the guardian brought the action solely for the purpose of prosecuting the legal interests of the ward, and not the legal interests of the guardian, the attorney-client relationship extended to the ward.

The holding in Branham does not apply to Jeff Tipton's representation of Diana Hoskins. Diana Hoskins retained Jeff Tipton to intervene in a proceeding in which the Commonwealth of Kentucky had been appointed as guardian of Bessie Morgan. Diana Hoskins was not the statutorily appointed guardian for Bessie Morgan when she retained Jeff Tipton. In fact, the Petition for Relief filed by Jeff Tipton, on behalf of Diana Hoskins, confirms that she was not Bessie Morgan's

guardian and simply was an "interested person." (Ex. 4, para. 1). Diana Hoskins did not retain Jeff Tipton to advance the legal interests of Bessie Morgan. Mrs. Hoskins retained him to pursue her own legal interests in overturning the order of the Whitley County District Court appointing the Commonwealth of Kentucky as Bessie Morgan's guardian. Accordingly, Jeff Tipton and the law firm of Tipton & Tipton did not have an attorney-client relationship with Bessie Morgan in that prior proceeding.

Next, Diana Hoskins is not a party to this lawsuit. Rather, the Plaintiff is Walter Hoskins, as Executor of the Estate of Bessie Morgan. Plaintiff spent a considerable amount of time in pre-trial proceedings and during trial making this position clear, Diana Hoskins is not a party to this lawsuit. In fact, Plaintiff went so far as to dispute whether Mrs. Hoskins was even an heir to Bessie Morgan's estate during closing arguments. VR 2023-01-13_15.40.01.380 at 0:00:15. Plaintiff took a strong and deliberate stance in the position that Diana Hoskins was not a party to this lawsuit when it did not serve Plaintiff's interests because of the documented abuse Bessie Morgan endured at the hands of Diana Hoskins. However, Plaintiff now seeks to change that position when it benefits him to assert that Diana Hoskins is in fact a party to this lawsuit and therefore the law firm of Tipton & Tipton violated ethical obligations owed to her as a former client. Plaintiff cannot have his proverbial cake and eat it too.

Plaintiff's tactical games are further evidenced by the letter Plaintiff's counsel sent to the law firm of Tipton & Tipton on *the same day* that Plaintiff filed the motion for new trial. (See, correspondence from Garcia & Artigliere, dated 1.31.23, attached hereto as **Exhibit 5**). Plaintiff's counsel ends this letter by stating:

> As we firmly believe the misconduct of each of you, and Tipton & Tipton, had a material impact upon the defense verdict in the matter of Bessie Morgan vs. Hillcrest Health & Rehabilitation Center, we advise *that should that verdict stand*,

> we will be commencing all appropriate civil actions as against you both and Tipton & Tipton.

(Ex. 5, p. 2.) This letter establishes that Plaintiff is now using the unsupported allegations of ethical violations as leverage because he did not obtain his desired verdict.

Plaintiff should be estopped from raising the alleged conflict of interest due to his failure to timely raise the issue until after a verdict was rendered against him. The Court has discretion to deny a party's request to disqualify, or in this case a motion for new trial, pursuant to an alleged conflict of interest on the basis that the party is estopped from making such a request when they fail to do so timely. Louisville/Jefferson Cnty. Metro Gov't v. Ackerson, 618 S.W.3d 485, 491 (Ky. Ct. App. 2020). Plaintiff filed a motion to disqualify Wes Tipton, on other grounds, prior to trial but later voluntarily withdrew that motion. Furthermore, Plaintiff addressed Jeff Tipton's representation of Diana Hoskins in the guardianship proceedings during a bench conference at trial, but failed to move to disqualify Wes Tipton at that time. VR 2023-01-12_16.37.00.051 at 0:01:00. "A party may be estopped from taking inconsistent positions in judicial proceedings when it has persuaded the trial court or another party to act in reliance on the earlier position to his detriment." Hisle v. Lexington-Fayette Urban Cty. Gov't, 258 S.W.3d 422, 434-35 (Ky. App. 2008). Plaintiff voluntarily withdrew the motion to disqualify Wes Tipton and failed to make a similar motion or raise the issue until after a verdict was rendered against him. Accordingly, Plaintiff has waived any conflict of interest and should be estopped from raising the alleged conflict at this late juncture.

Even if, assuming for the sake of argument, that Jeff Tipton owed an attorney-client relationship to Bessie Morgan or that Diana Hoskins was a party to this lawsuit, any such representation would not rise to the standard required by Kentucky law for disqualification. "Before a lawyer is disqualified based on a relationship with a former client or existing clients, the

complaining party should be required to show an actual conflict, not just a vague and possibly deceiving appearance of impropriety." Marcum v. Scorsone, 457 S.W.3d 710, 718 (Ky. 2015). "[T]hat conflict should be established with facts, not just vague assertions of discomfort with the representation." Id.

Moreover, the two matters must be substantially related. Kentucky Rules of Professional Conduct 1.9 defines matters as "substantially related" when they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. KY ST S CT RULE 3.130, RPC Rule 3.130(1.9), Note 3. Note 3 of Rule 1.9 goes on to state that "information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying." Jeff Tipton's representation of Diana Hoskins in a guardianship proceeding with the Commonwealth of Kentucky does not involve the same transaction or legal dispute as the Estate of Bessie Morgan's claims of nursing negligence as alleged in the present lawsuit. The information Defendants sought to introduce at trial pertaining to the guardianship proceeding consisted solely of information contained in public pleadings of record that had been to provided to all parties and adversaries involved in the Whitley County District Court matter. VR 2023-01-12_16.37.00.051 at 0:14:10 – 0:14:50. Accordingly, Jeff Tipton's representation of Diana Hoskins is not substantially similar to the nursing home negligence case litigated on behalf of Bessie Morgan, and as a result no conflict of interested was imputed upon Wes Tipton pursuant to Kentucky Rules of Professional Conduct 1.10. Wes Tipton did not violate any rules of professional conduct or other ethical obligations required of him as a licensed lawyer in the Commonwealth of Kentucky.

Finally, the Sixth Circuit Court of Appeals has reviewed cases in which actual conflicts did exist during trial and a motion was made following trial to overturn the verdict. The Sixth Circuit held that where an actual conflict exists, "prejudice would be presumed only if the defendant demonstrated that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." Gordon v. Norman, 788 F.2d 1194, 1198 (6th Cir. 1986). Where a party fails to show that they were adversely affected by the purported conflict of interest, the trial court need not reverse the verdict. Id. The only information Defendant sought to introduce based on the previous proceeding was introduced by avowal and outside the presence of the jury. Therefore, Plaintiff has failed to show how he was adversely affected by this alleged conflict of interest. Plaintiff's motion should be denied.

V. The jury did not apportion fault to Diana Hoskins or Bessie Morgan, and therefore Plaintiff's motion should be denied as moot.

On January 13, 2023, the jury deliberated for less than one hour and returned a verdict stating that Defendants complied with the standard of care and did not cause or contribute to Plaintiff's alleged damages. The jury made no determination regarding apportionment of fault. Furthermore, the jury instructions did not contain an apportionment line for Diana Hoskins. The jury was never asked to determine whether Diana Hoskins was negligent or the proximate cause of her mother's injuries. An apportionment line was properly included in the jury instructions based on Bessie Morgan's comparative negligence due to her refusals of care. However, the jury did not reach this instruction. Accordingly, this argument in Plaintiff's motion should be denied as moot.

The case law cited in Plaintiff's motion as it relates to any apportionment to Diana Hoskins is inapplicable because the jury instructions did not contain an apportionment instruction as to Diana Hoskins. An apportionment instruction against Bessie Morgan was appropriate and

warranted under Kentucky law. An apportionment instruction is appropriate when a patient's negligence was an active and efficient contributing cause of her injury. Morris v. Boerste, 641 S.W.3d 688, 694 (Ky. Ct. App. 2022). Evidence showing that a plaintiff's actions caused a worsening of her condition attributable to her failure to follow reasonable medical advice is also appropriate to establish mitigation of damages. Id.

Kentucky courts have ruled that comparative negligence may exist as a defense in a medical negligence case where some conduct of the plaintiff interferes with treatment by the medical provider. Blair v. Eblen, 461 S.W.2d 370 (Ky.1970); Mackey v. Greenview Hospital Inc., 587 S.W.2d 249 (Ky.App.1979). Defendants offered ample evidence and testimony that Bessie Morgan's conduct interfered with treatment by her medical providers at Hillcrest Health & Rehabilitation Center. Plaintiff's own expert, Dr. Aimee Garcia, testified that Bessie Morgan's condition declined more rapidly than would have been expected because of her underlying medical conditions, including agitation, yelling and aggressive behavior, wandering, refusal of medication, refusal to eat, depression, and hallucinations. VR 2023-01-11_16.25.13.524, at 0:1:22 – 0:4:48. She testified that this conduct on behalf of Bessie Morgan impacted her skin integrity, her nutritional status, and interfered with her medical care. Therefore, based on Plaintiff's expert's opinion the comparative negligence of Bessie Morgan was an appropriate defense. The testimony of Dr. Garcia was echoed by that of Defendants' experts.

Next, it was appropriate to discuss Diana Hoskins' conduct and the impact it had on Bessie Morgan's underlying medical conditions which interfered with her treatment by the staff at Hillcrest Health & Rehabilitation Center. Plaintiff's expert, Dr. Aimee Garcia, testified that the abuse Bessie Morgan suffered at the hands of her daughter, Diana Hoskins, can cause increased restlessness, agitation and combativeness, and can exacerbate Ms. Morgan's underlying medical

conditions. (Id. at 0:18:17 – 0:18:42.) These are the same underlying medical conditions that Dr. Garcia testified caused Ms. Morgan to conduct herself in a way which interfered with her medical care. The effect Diana Hoskins' abuse had on her mother, Bessie Morgan, and its exacerbation of her medical conditions is relevant to Plaintiff's claims and Defendants' defense. KRE 401 and 402. Again, Dr. Garcia's opinions were in line with those of Defendants' experts.

Evidence that has probative value to Plaintiff's allegations or cause of injury is admissible in trial. Ellis ex rel. Hodges v. Rightmyer, No. 2007-CA-000791-MR, 2010 WL 133050 (Ky. Ct. App. Jan. 15, 2010), attached hereto as **Exhibit 6**. In Ellis, the Court of Appeals of Kentucky affirmed a trial court's decision to admit evidence of drug paraphernalia found in a patient's home when the evidence had probative value to defendant's theory of defense. Defendant's theory of defense was that plaintiff's injury was caused by the patient developing a condition typically seen in drug users, and not caused by medical negligence. Plaintiff objected to defendant admitting evidence of drug paraphernalia found in the patient's home, and the trial court concluded that the evidence was relevant pursuant to KRE 401 and 402 and probative to the defendant's theory of defense. Id. at *3.

Likewise, when a patient puts their medical condition at issue and claims that their injuries are the result of defendant's conduct, defendant is permitted to rebut those claims with evidence of prior symptoms and or medical treatment. Glasson v. Afzal, No. 2008-CA-000255-MR, 2009 WL 2901210, at *4 (Ky. Ct. App. Sept. 11, 2009), attached hereto as **Exhibit 7**. In Glasson, the plaintiff claimed that defendant's conduct caused her to suffer from symptoms such as anxiety, depression, etc. The trial court permitted defendant to admit evidence of plaintiff's prior symptoms and treatment for mental health as an alternative explanation for plaintiff's current condition. The Court of Appeals of Kentucky held that this was appropriate because whether

plaintiff's mental condition was caused by the events at issue was a fact of consequence for the jury. Evidence of the plaintiff's prior symptoms and/or treatment was relevant to a determination of the issue of causation. Id.

In the present case, Plaintiff alleged that Bessie Morgan's overall health deteriorated, she developed pressure ulcers, and lost significant amounts of weight because of the negligent care provided to her by the nursing staff at Hillcrest Health & Rehabilitation Center. Pursuant to well-settled Kentucky law it was appropriate for Defendants to rebut those claims by admitting evidence of Ms. Morgan's behaviors due to abuse. Those behaviors included agitation, combativeness, and refusal to accept or comply with care recommendations. The impact of the abuse she suffered at the hands of her daughter contributed to the very medical conditions for which Plaintiff sought damages. This evidence was not only probative to the claims before the jury, but was relevant to a determination of the issue of causation.

VI. Counsel is granted leeway in commenting upon the evidence and counsel for Defendants did not exceed the permissible scope of Closing Arguments.

It has long been the rule in courts of this Commonwealth that counsel has great leeway in their closing statements, because a closing argument "is just that – *an argument*." Slaughter v. Commonwealth, 744 S.W.2d 407, 412 (Ky.1987) (emphasis in original). Additionally, "[c]ounsel may draw reasonable inferences from the evidence and propound their explanations of the evidence and why the evidence supports their particular theory of the case." Wheeler v. Commonwealth, 121 S.W.3d 173, 180–181 (Ky.2003). Defendants did not stray outside the record during closing arguments.

The vast majority of the alleged "improper arguments" addressed in Plaintiff's motion were not objected to contemporaneously during trial. When counsel fails to object to perceived improper statements made during closing arguments, such failure operates as a waiver of the

objection. Pauly v. Chang, 498 S.W.3d 394, 413 (Ky. Ct. App. 2015), as modified (Dec. 23, 2015). Waived objections may only be reviewed under the palpable error rule for manifest injustice. Murphy v. Commonwealth, 509 S.W.3d 34, 42 (Ky. 2017). To determine whether manifest injustice has occurred the focus is on what happened and whether the defect is so manifest, fundamental, and unambiguous that it threatens the integrity of the judicial process. Id. Palpable error is a high standard and Plaintiff has failed to put forward sufficient evidence to meet this burden.

Plaintiff first takes issue with Defendants' counsel's reference to "tricks of the trade." Counsel is expressly permitted to comment upon tactics used by the opposing party during closing arguments. Slaughter v. Commonwealth, 744 S.W.2d 407, 412 (Ky.1987). Counsel is further permitted to comment upon the evidence and the falsity of the opposing party's position. Id. Defendants' statements during closing arguments were not offered to intentionally impugn Plaintiff's counsel. The statements were made to address the tactics used by Plaintiff during trial and highlight the falsity of Plaintiff's position on the evidence. Furthermore, to the extent there is any error found in these statements it would be harmless error. Plaintiff's counsel spent the first six and a half minutes of closing arguments bolstering his credentials and background in dispute of the "tricks of the trade" statements made in Defendants' closing argument. When the final result likely would have been the same absent the alleged error then the error is not considered prejudicial and is not basis for a new trial. CSX Transp., Inc. v. Begley, 313 S.W.3d 52, 69 (Ky. 2010).

Next, Plaintiff takes issue with the statement that the nursing staff at Hillcrest Health & Rehabilitation Center care more about patient care than record keeping. This theme is certainly within the trial record, evidenced most heavily by the hours of testimony from nurse Rhonda Foister. Ms. Foister consistently testified that regardless of whether specific words and phrases

were contained in Bessie Morgan's medical chart, the record is clear that the nursing staff was providing good and appropriate care. VR 2023-01-10_13.30.47.445 at 0:14:36 – 1:21:57. Comments by counsel summarizing the testimony of a witness or the general theme of the witness's testimony are permissible during closing arguments.

Plaintiff takes issue with Defendants' statements about the amount of money Plaintiff was seeking in damages. Plaintiff bears the burden of itemizing damages. Fratzke v. Murphy, 12 S.W.3d 269, 271 (Ky. 1999). It is Plaintiff, and Plaintiff alone, who puts forth the amount to be sought in itemized damages on the interrogatory instruction which goes back to the jury for deliberations. In the present case, Plaintiff requested up to $10,000,000 in pain and suffering damages and $50,000,000 in punitive damages, in addition to the other categories of damages he sought. Defendant gives a closing argument first and plaintiff gives a closing argument last. Therefore, Defendants can only rely on the amount of damages put forth by Plaintiff in the jury instructions when addressing damages during closing arguments. These comments were not improper. They were based directly on the instructions to be given to the jury for deliberations.

Plaintiff voluntarily withdrew his claim for wrongful death before the case was submitted to the jury. The matter was discussed prior to closing arguments and the Court stated that it would not advise the jury, from the bench, that the claims for wrongful death had been dismissed. The Court made no order regarding whether counsel could reference the wrongful death claim in closing arguments. VR 2023-01-13_09.07.16.484 at 0:2:45 – 0:4:27. Defendants' statements that the claims had been dismissed were not in violation or contradiction of any order or directive from the Court. In fact, Plaintiff made an impassioned speech at the end of closing arguments specifically related to the life that had been "taken" from Bessie Morgan by Hillcrest Health & Rehabilitation Center. Specifically, Plaintiff's statements were as follows:

> Every day on this earth we are granted by God. We deserve the right to live it, enjoy it. It should not be taken away from us by others. It certainly shouldn't be taken away from us by those we pay to help make it better. VR 2023-01-13_16.22.46.366 at 0:31:15 – 0:31:30

Despite the voluntary withdrawal of the claim for wrongful death, Plaintiff proceeded to argue to the jury in closing statements that Hillcrest Health & Rehabilitation Center wrongfully caused the death of Bessie Morgan. Thus, Defendants' statement that the wrongful death claim had been dismissed was necessary in anticipation of Plaintiff's closing argument. Plaintiff was not prejudiced in any way by this statement.

Next, Plaintiff takes issue with Defendants pointing the jury's attention to the fact that Diana and Walter Hoskins did not testify. In any medical or nursing negligence case, the plaintiff bears the burden of proof. Andrew v. Begley, 203 S.W.3d 165, 170 (Ky. App. 2006). Defendant is not obligated to call any witnesses or put on any proof. Furthermore, counsel is permitted to comment upon the tactics used by the opposing party, and comment upon the evidence. Slaughter v. Commonwealth, 744 S.W.2d 407, 412 (Ky.1987). Therefore, it was not an "improper argument" to address the fact that neither Walter Hoskins nor Diana Hoskins testified. Defendants were simply drawing the jury's attention to the tactics used by Plaintiff and commenting upon what Plaintiff chose to provide to them in evidence. Plaintiff failed to call a single individual who witnessed negligent care or abuse, as claimed. Defendant called multiple eye witnesses who supported the appropriate care provided. These statements were permissible pursuant to Kentucky law.

Despite the numerous allegations of "improper arguments" outlined in Plaintiff's motion filed after the jury rendered a verdict against him, Plaintiff only objected contemporaneously to one statement made by Defendants during closing arguments. The Estate of Bessie Morgan is the Plaintiff in this case. The Executor of that Estate is Walter Hoskins. Walter Hoskins is married

to Diana Hoskins. These facts were evidence of record. During closing argument defense counsel made the inference from the above-stated evidence that Diana Hoskins would receive portions of any verdict rendered in favor of Plaintiff. Plaintiff objected and the Court admonished the jury in accordance with Plaintiff's request. In Kentucky, the rule has long been that an admonition to the jury to disregard an improper argument "cures the error unless it appears the argument was so prejudicial, under the circumstances of the case, that an admonition could not cure it." Price v. Commonwealth, 59 S.W.3d 878, 881 (Ky.2001) (citing Knuckles v. Commonwealth, 261 S.W.2d 667 (Ky.1953), and Thomas v. Commonwealth, 245 S.W. 164 (Ky. 1922)). Here, the jury received an appropriate admonition from the Court and Plaintiff was not prejudiced.

Plaintiff takes issue with defense counsel's statement following the admonition that Walter Hoskins and Diana Hoskins are married and the jury could draw their own conclusions about this evidence. This was a permissible statement under Kentucky law. The Kentucky Supreme Court has repeatedly outlined the generally applied, fundamental principle that "a jury is entitled to draw all reasonable inferences from the evidence." Moore v. Commonwealth, 462 S.W.3d 378, 388 (Ky. 2015), citing Toler v. Sud–Chemie, Inc., 458 S.W.3d 276, 287 (Ky. 2014), as modified on denial of reh'g (April 7, 2015.); and Beatrice Foods Co. v. Chatham, 371 S.W.2d 17, 19 (Ky.1963) (Findings of the jury will be sustained on appeal "if there was competent and relevant evidence affording a reasonable and logical inference or conclusion of a definite fact."). Accordingly, Defendants statements were not improper and fell within the long standing rule of this Commonwealth.

Finally, Plaintiff takes issue with Defendants statement that Dr. Aimee Garcia did not offer any staffing criticisms against Hillcrest Health & Rehabilitation Center. Under KRE 702, the trial judge acts as the gatekeeper, screening the evidence that the jury will hear. In determining

admissibility of expert opinions, the trial judge must determine at the outset whether the expert's opinions are both relevant and reliable. Miller v. Eldridge, 146 S.W.3d 909, 913-914 (Ky. 2004). Simply because an expert witness holds criticisms on certain topics does not make those criticisms relevant or reliable. In the present case, the Court ruled that any criticisms Dr. Aimee Garcia may have related to staffing at Hillcrest Health & Rehabilitation Center were not admissible. This ruling was based upon Dr. Garcia stating in her discovery deposition that she had no such criticisms. When certain evidence is not admissible that evidence does not exist for purposes of the trial. Dr. Garcia did not have admissible staffing criticisms against Hillcrest Health & Rehabilitation Center. Defendants' statements were appropriate.

In sum, Plaintiff has listed a litany of statements made by Defendants in closing argument which Plaintiff now takes issue with *after the jury rendered a verdict against him.* Plaintiff failed to object contemporaneously to the vast majority of these statements and therefore has waived the objections. Furthermore, counsel is granted wide latitude during closing arguments to comment on the evidence and draw reasonable inferences from it. Defendants did not go outside the record and the arguments made during closing statements were permissible under Kentucky law. To the extent Plaintiff objected to any implication that Diana Hoskins was the Plaintiff in this case, an appropriate jury admonition was given by the Court and Plaintiff suffered no prejudice. Any further alleged error should be considered harmless.

CONCLUSION

Setting aside the jury's verdict and granting a new trial is an extreme remedy. The record must disclose a sound reason, showing injustice significant enough to relitigate the same issues. See, e.g., Burton, 171 S.W.2d at 1016. None of the "errors" addressed in Plaintiff's motion approach the level

of injustice required to grant a motion for a new trial. The jury's findings are well-supported by the evidence of record. Plaintiff's motion for a new trial should be overruled.

Respectfully submitted,

/s/ Mark E. Hammond

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CERTIFICATE OF SERVICE

I hereby certify that on **May 15, 2023**, the foregoing was filed with the clerk of the court using the KCOJ e-filing system, which will automatically send a notice of electronic filing to the following:

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