COMMONWEALTH OF KENTUCKY
WHITLEY CIRCUIT COURT
DIVISION 1
CIVIL ACTION NO. 09-CI-00072

ELECTRONICALLY FILED

WALTER HOSKINS, as Executor of the Estate of BESSIE MORGAN, deceased — PLAINTIFF

v.

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

HILLCREST NURSING HOME OF CORBIN, INC., et al. — DEFENDANTS

*** *** *** ***

NOTICE

Please take notice that the undersigned will, on March 6, 2023, at 9:00 a.m. (EST), or as soon thereafter as counsel may be heard, Plaintiff, Walter Hoskins, as Executor of the Estate of Bessie Morgan, deceased, by and through counsel, will move this Court pursuant to Civil Rules 50.02 and 59 to grant a judgment notwithstanding the verdict ("JNOV") and grant a new trial.

I. INTRODUCTION

A. Summary of Grounds[1]

Plaintiff is entitled to a new trial because **the Foreperson of the seated jury that returned a verdict with the bare minimum of nine (9) jurors, Stacey Abbott, concealed her significant ties to the attorneys representing the Defendants** and the President of the Nursing Home Defendant - Hillcrest Nursing Home of Corbin, Inc. as well as her ties to the Defendants' corporate

[1] Plaintiff is entitled to the requested relief because the verdict is not sustained by sufficient evidence and is contrary to law.

representative present in Court, Gail Gibbs, during *voir dire* and throughout trial. As a result, the **jury trial was unknowingly rigged from start to finish**. It is legally impermissible for jurors and defense counsel to conceal their relationships that extend to the Defendants themselves and defense counsel, who is also the President of the Nursing Home Defendant – Hillcrest Nursing Home of Corbin, Inc. As a result, Plaintiff suffered severe prejudice and is entitled to the requested relief. To deny this requested relief in light of the evidence that has been uncovered since this rigged trial would be to sanction the impermissible activities and truly make a mockery of the entire justice system.

Next, Plaintiff is entitled to a new trial because another juror violated KRS § 29A.310 when he admitted that he *formed his opinion* to vote in favor of the Defendants *before* the case was submitted to the jury, which mandates the grant of a new trial under well settled Kentucky law.

Next, Plaintiff is entitled to a new trial because defense counsel, Wesley Tipton, violated the Kentucky Rules of Conduct in "changing sides" from his law firm's representation of his former clients, Bessie Morgan and Diana Hoskins, to representing the instant Defendants at trial where he also serves as the President of Defendant Hillcrest Nursing Home of Corbin, Inc.

Next, Plaintiff is entitled to a new trial because the Defendants were allowed to impermissibly apportion fault to a non-party, Diana Hoskins, over Plaintiff's objection, just as they had unsuccessfully sought to do through their proposed jury instructions. In addition, Defendants impermissibly blamed Bessie Morgan for her own injury, which is not an available defense to a medical negligence claim.

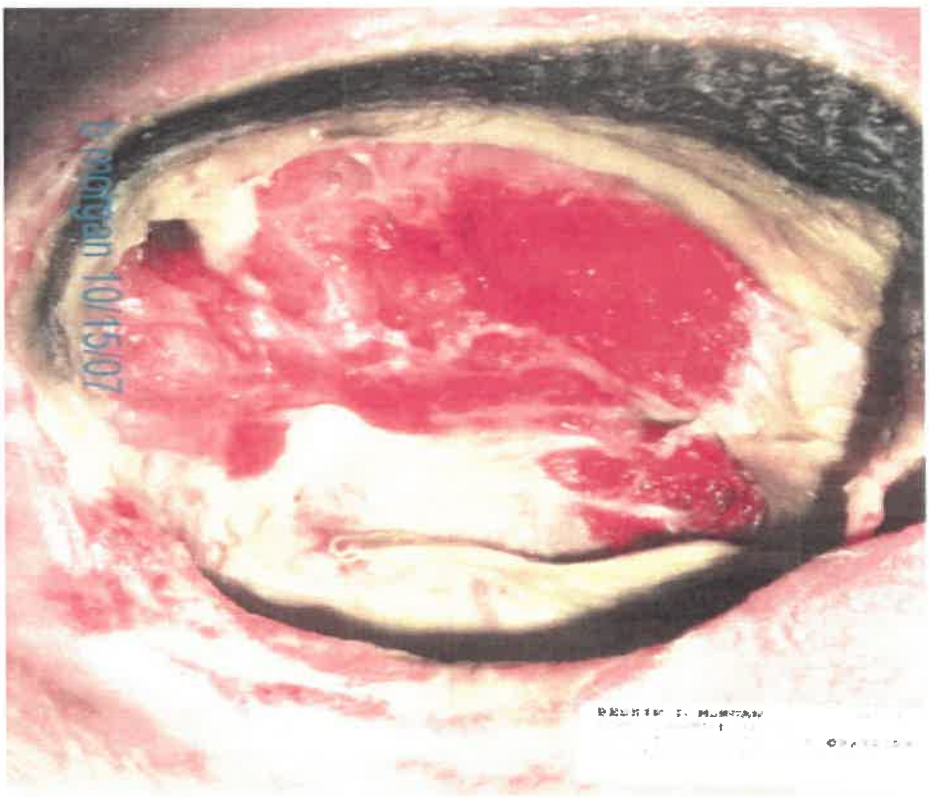
Finally, Plaintiff is entitled to a new trial because Defendants impermissibly argued to the jury that Plaintiff's wrongful death claim had been dismissed by the Court when, in reality, the Plaintiff voluntarily dismissed the claim. Notably, this Court prohibited defense counsel from

making such a statement to the jury after Plaintiff objected; however, defense counsel disregarded this Court's order and made the false argument anyway. Finally, Plaintiff is entitled to the requested relief because the Defendants impermissibly attacked Plaintiff's counsel in closing argument as an out-of-town "scamster" who had a "playbook" on how to take money from nursing homes through Kentucky and was equivalent to trying to "sell you swamp land in Florida" (where Plaintiff's counsel resides). Plaintiff moved pre-trial to exclude such statements and argument to which Defendant agreed to refrain from doing yet proceeded to repeatedly lodge personal attacks on Plaintiff's counsel in his closing argument.

B. Liability Factual Background

Overall, Defendants Hillcrest Nursing Home of Corbin, Inc. and Management Advisors, Inc. ("Defendants") failed to provide appropriate care and treatment to Bessie Morgan while she resided at Hillcrest in 2006 and 2007. Defendants failed to act in compliance with the applicable standard of care in providing care and treatment to Bessie Morgan, and Defendants' failures and substandard care resulted in numerous injuries which included several falls, multiple pressure injuries and osteomyelitis, and eye infections; all of which required multiple hospitalizations and pain and suffering and, ultimately, her death. Defendants not only violated the applicable standard of care but those same failures and resulting violations also violated their own policies and procedures as well as applicable state and federal regulations that impact the standard of care. Defendants' failures include the failure to complete appropriate nursing assessments, identify risk, and develop appropriate care plans for Bessie Morgan's risk of falls, risk of skin integrity issues including the development of pressure injuries, risk for infection, risk for malnutrition and weight loss, and risk for eye infections as well as the failure to provide appropriate and necessary care and treatment to Bessie Morgan throughout her residency at Hillcrest. These failures resulted in

preventable and reported falls that occurred after Defendants identified Ms. Morgan as a "high risk" for falls upon admission to the facility but without an appropriate care plan to address that risk, at a minimum, on or about July 22, 2006; August 29, 2006; November 28, 2006; November 29, 2006; January 24, 2007; January 27, 2007; February 11, 2007; February 15, 2007; February 20, 2007; February 22, 2007; February 28, 2007; March 18, 2007; and April 22, 2007. In addition to suffering from the numerous and preventable falls reported above, Defendants failed to provide sufficient care and treatment to Ms. Morgan to prevent and treat multiple Stage IV pressure injuries. Defendants' failures as to these pressure injuries required multiple surgical procedures at Baptist Regional Medical Center, where surgeons discovered that one of the pressure injuries required "extensive debridement" of "sacral decubitus with bone exposed" and placement of a colostomy as shown here:



Exhibits 17-987; 17-892.

Notably, Defendants understaffed the nursing staff at the facility as detailed by multiple witnesses who were employed at Hillcrest and who attempted to provide care and treatment to Mrs. Morgan during her residency. As to Defendant Management Advisors, Inc., David Dietz, the Administrator of Defendant Hillcrest during Bessie Morgan's residency in 2006 and 2007, testified that:

> * **Defendant Management Advisors operated Defendant Hillcrest**;
> * As the Administrator at Defendant Hillcrest, **Dietz reported to Defendant Management Advisors**;
> * **Defendant Management Advisors "directed the operations of" Defendant Hillcrest**;
> * **Defendant Management Advisors was "responsible for the fiscal operations of Hillcrest"**;
> * Defendant Management Advisors assisted Defendant Hillcrest in "determining its staffing and workload requirements";
> * **Defendant Management Advisors assisted in preparation of Defendant Hillcrest's budget**; and
> * Defendant Management Advisors "recruited and trained senior personnel at Hillcrest."

See Dietz Trial Deposition Testimony at 8:14-17; 9:1-2; 25:2-6; 25:23-25; 26:3-9; 26:13-16; 26:17-20; 27:9-11.

Multiple witnesses at trial testified that the facility was understaffed and that Administrator Dietz and Christy Jarboe, the Director of Nursing knew of the understaffing but did not alleviate this facility-wide failure. For example, at trial, Hillcrest's MDS Coordinator and Supervisor, Rhonda Foister, admitted that Hillcrest fell below the applicable standard of care in their care and treatment of Bessie Morgan, which included Hillcrest leaving Bessie Morgan in her own urine and feces that resulted in an infected coccyx pressure injury depicted above, the failure to provide care and treatment as reflected on Hillcrest's own records for Bessie Morgan, and the failure to comply with physician-ordered treatments for Bessie Morgan that Nurse Foister repeatedly admitted was "not good care." *See* V/R 2023-01-10_15.44.40.696 at 3:45 to 3:52. Nurse Supervisor Foister even admitted, as reflected in numerous records, that Hillcrest staff did not have enough time to respond to the needs of Bessie Morgan in order to prevent injury to her. *See* V/R 2023-01-10_15.44.40.696 at 3:55-3:56; *Id.* at 4:07:25 – 4:11:15. Further, a former nurse at Hillcrest, Janie Cima, admitted that Hillcrest overloaded nursing staff, that the facility was understaffed, that Hillcrest's understaffing was widely known by facility nursing staff, that Hillcrest's understaffing adversely affected the care of all residents at Hillcrest, including Bessie Morgan, and that she notified both the Administrator and Director of Nursing at Hillcrest, who both "agreed" Hillcrest was understaffed but were either unable or unwilling to rectify Hillcrest's understaffing. *See* V/R 2023-01-11_09.04.51.848 at 9:33:48 – 9:39:24. Further, Defendants' own expert witness, Dr. David Carr, admitted that Hillcrest's failures included the failure to adequately monitor Bessie Morgan, the failure to adequately care plan for Bessie Morgan, the failure to actually comply with the care plan Hillcrest created for Bessie Morgan, the failure to implement the selected care plan interventions, which included malfunctioning equipment, and the failure to update and provide

additional interventions to Bessie Morgan were "not good." *See* V/R 2023-01-12_15.09.50.631 at 3:28:40 – 3:55:55.

II. LAW AND ANALYSIS

A. Standard for JNOV and New Trial

First, Civil Rule 50.02 (Motion for judgment notwithstanding the verdict; alternative motion for new trial) provides:

> 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**; or if a verdict was not returned, such party within 10 days after the jury has been discharged may move for judgment 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**. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

CR 50.02 (emphases added)

The standard for sustaining a motion for JNOV is that there is "[a] complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ." *Moore v. Stills*, 307 S.W.3d 71, 86 (Ky. 2010) (quoting *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998)). In accordance with CR 50.02, Plaintiff moved for a directed verdict at the close of all evidence pursuant to CR 50.01, which this Court denied. *See* V/R 2023-01-13_12.44.43.324. As the evidence demonstrably showed Defendants' liability for negligence and "no reasonable mind could differ" in concluding same, the Court should grant Plaintiff a JNOV as requested herein.

Next, Civil Rule 59.01 (Grounds) provides:

> **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.
> (b) **Misconduct of the jury, of the prevailing party, or of his attorney**.
> (c) Accident or surprise which ordinary prudence could not have guarded against.
> (d) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court.
> (e) Error in the assessment of the amount of recovery whether too large or too small.
> (f) **That the verdict is not sustained by sufficient evidence, or is contrary to law**.
> (g) Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.
> (h) **Errors of law occurring at the trial and objected to by the party under the provisions of these rules**.

CR 59.01 (emphases added).

Whether to grant a new trial "must be determined on a case-by-case basis." *Savage v. Three Rivers Med. Ctr.*, 390 S.W. 104, 112 (Ky. 2012). A trial court's decision to grant a new trial "[i]s presumptively correct." *City of Louisville v. Allen*, 385 S.W.2d 179, 184 (Ky. 1964). Notably, an "[a]ppellate court is more reluctant to reverse an order granting a new trial than one denying it." *Louisville Mem'l Gardens, Inc. v. Com. Dept. of Highways*, 586 S.W.2d 716, 717 (Ky. 1979).

B. Juror Misconduct of Juror/Foreperson Stacey Abbott (Juror #361) Mandates New Trial

A litigant is entitled to a new trial based on juror misconduct when a juror provides "[a] false answer, *or no answer*, to a pertinent question addressed to him on the voir dire examination." *Sluss v. Commonwealth*, 381 S.W.3d 215, 225 (Ky. 2012) (quoting *Drury v. Franke*, 57 S.W.2d 969, 984 (Ky. 1933) (emphases added)); *see also Gibson v. Fuel Transport, Inc.*, 410 S.W.3d 56, 62 (Ky. 2013) ("A trial court may grant a new trial based on juror misconduct

upon demonstration that 'a juror failed to answer honestly a material question on *voir dire*, and that a correct response would have provided a valid basis for a challenge for cause.") (quoting *Adkins v. Commonwealth*, 96 S.W.3d 779, 796 (Ky. 2003) (italics in original)). Notably, in *Sluss*, the Supreme Court held that "[t]he fact that the false information was unintentional, and that there was no bad faith, does not affect the question, as **the harm lies in the falsity of the information**, regardless of the knowledge of its falsity on the part of the informant; [and] while willful falsehood may intensify the wrong done, it is not essential to constitute the wrong." *Sluss*, 381 S.W.3d at 226 (quoting *Drury*, 57 S.W.2d at 985) (emphases added)). Further in *Sluss*, the Supreme Court held that a new trial is warranted if a juror provides a false answer during *voir dire* regarding connections to individuals related to a party shown by being "friends" on Facebook. *Id.* at 229-30.

During *voir dire*, jurors were asked a number of questions regarding any knowledge or connections with the parties, witnesses, and attorneys. For example, after taking a sworn oath to provide "true answers," jurors were asked: "Do any of you have any other type of professional or personal relationship with any of these folks that have been introduced such that it would be difficult for you?" *See* V/R 2023-01-09_10.21.29.955 at 00:54. In turn, several prospective jurors answered honestly and were excused for cause. *See* V/R 2023-01-09_10.22.43.315; V/R 2023-01-09_10.23.52.988; V/R 2023-01-09_10.25.16.723; V/R 2023-01-09_10.26.22.754. In addition, prospective jurors were specifically asked: **"Wes Tipton obviously practices law here in Corbin with his brother Jeff, does anybody know Wes or Jeff? Does anyone know Wes or Jeff Tipton?"** *See* V/R 2023-01-09_11.45.02.310. In response, **Juror and Foreperson Stacey Abbott failed to acknowledge her significant knowledge of and ties to Wesley Tipton**, who is

both defense counsel and President of the Defendant Nursing Home, Hillcrest. *See* Corporate Report filed with the Kentucky Secretary of State attached hereto as **Exhibit 1**.

Company:	HILLCREST NURSING HOME OF CORBIN, INC.
Company ID:	0003129
State of origin:	Kentucky
Formation date:	1/10/1972 12:00:00 AM
Date filed:	5/31/2022 3:26:57 PM
Fee:	$15.00

Principal Office
P O BOX 1450
CORBIN, KY 40702

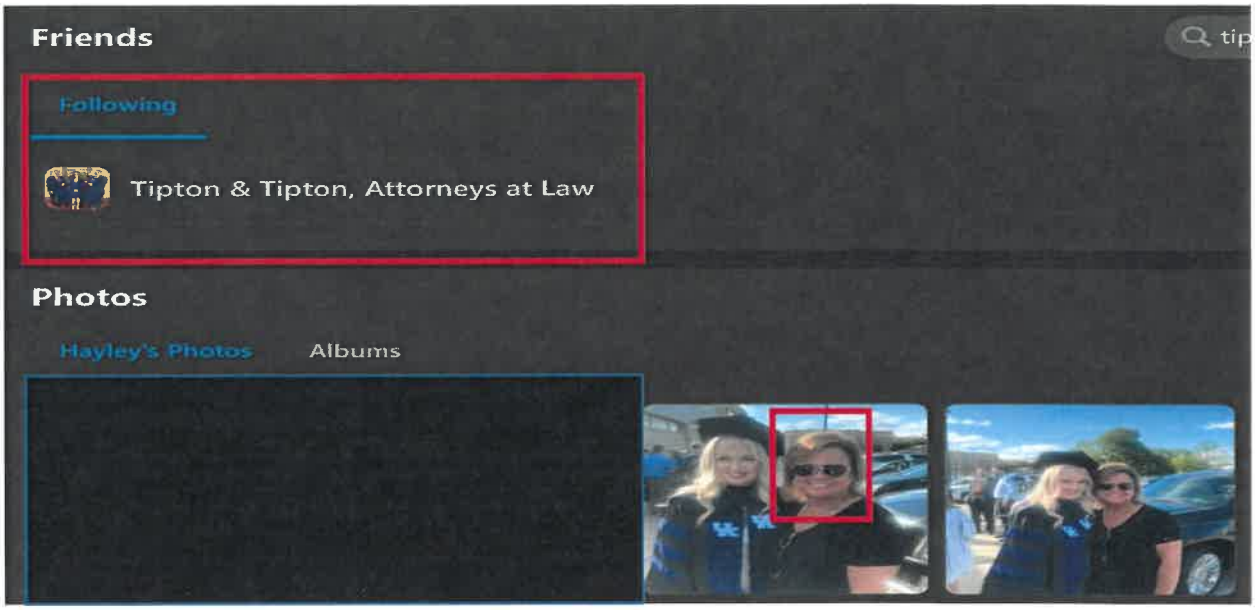
Registered Agent Name/Address
CT CORPORATION SYSTEM
306 W. MAIN STREET
SUITE 512
FRANKFORT, KY 40601

Current Officers
President Wes Tipton PO Box 1450, Corbin, KY 40702

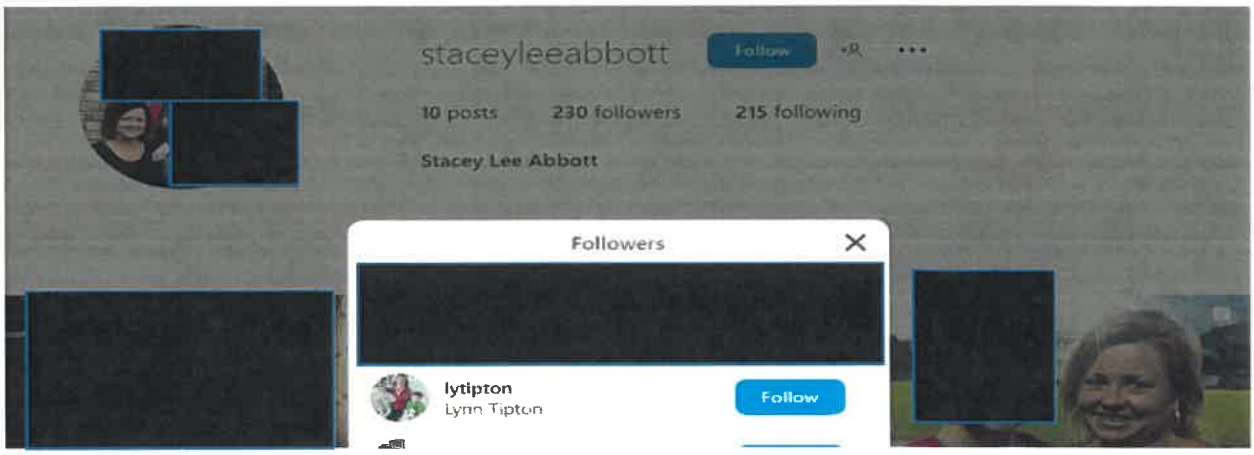
As shown below and as explained on his law firm's website, Wesley Tipton practices at his law firm, Tipton & Tipton, with his twin brother, Jeffery Tipton, along with Wesley Tipton's daughter, Sarah Tipton Reeves. *See* Firm Website Page attached hereto as **Exhibit 2**.

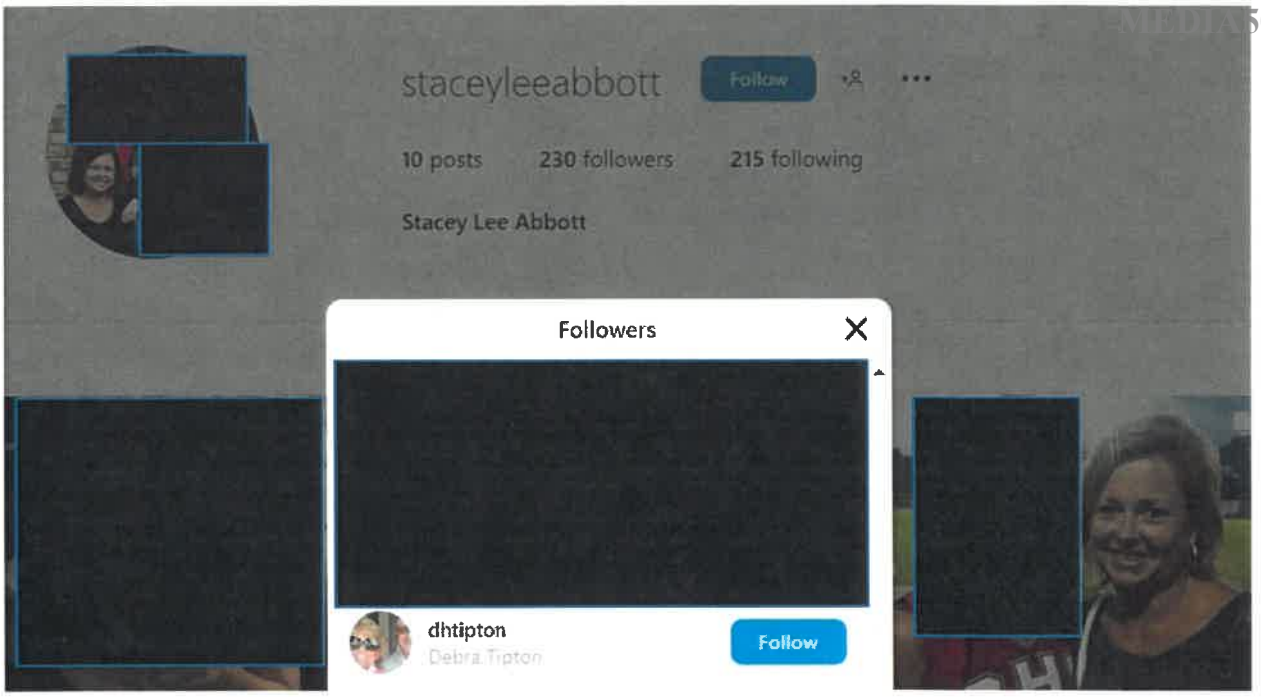
Throughout *voir dire* and trial, Juror and Foreperson Stacey Abbott concealed her significant knowledge and ties to the Defendants and their counsel; all resulting in severe prejudice

to Plaintiff. First, Juror and Foreperson Stacey Abbott, as shown below in her daughter's FaceBook page, are "friends/following" Defendants' President and law firm Tipton & Tipton. *See* Facebook screenshot attached hereto as **Exhibit 3**.



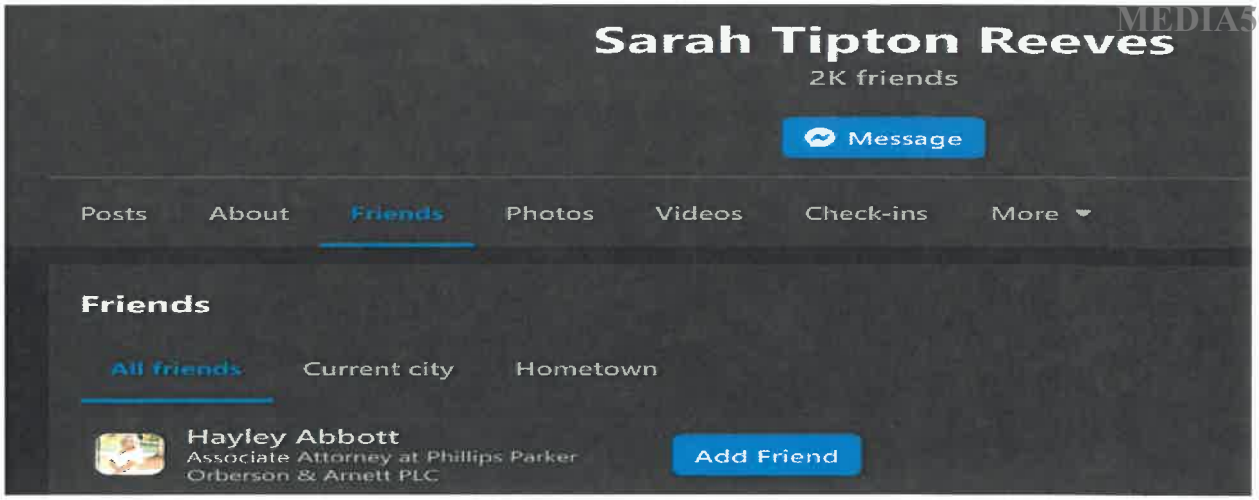
Next, these significant ties also include Juror and Foreperson **Stacey Abbott connected to Wesley Tipton's wife, Lynn Tipton, and Jeffery Tipton's wife, Debra Tipton, on Instagram**. *See* Instagram screenshots attached hereto as **Exhibits 4 and 5**, respectively.



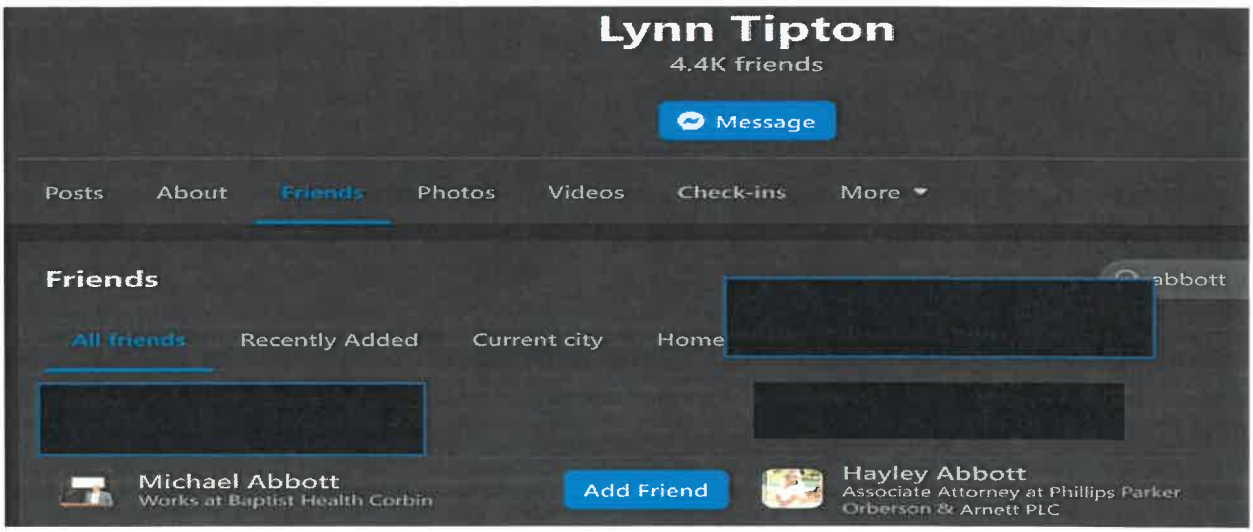


Notably, Lynn Tipton is also listed as "Our Staff" on the law firm's website as shown here:

Next, these significant ties also include Juror and Foreperson Stacey Abbott's daughter, a medical malpractice defense attorney in Louisville, connected to Sarah Tipton Reeves, Wesley Tipton's daughter and law partner at the law firm of Tipton & Tipton, as shown above and in the following screenshot.

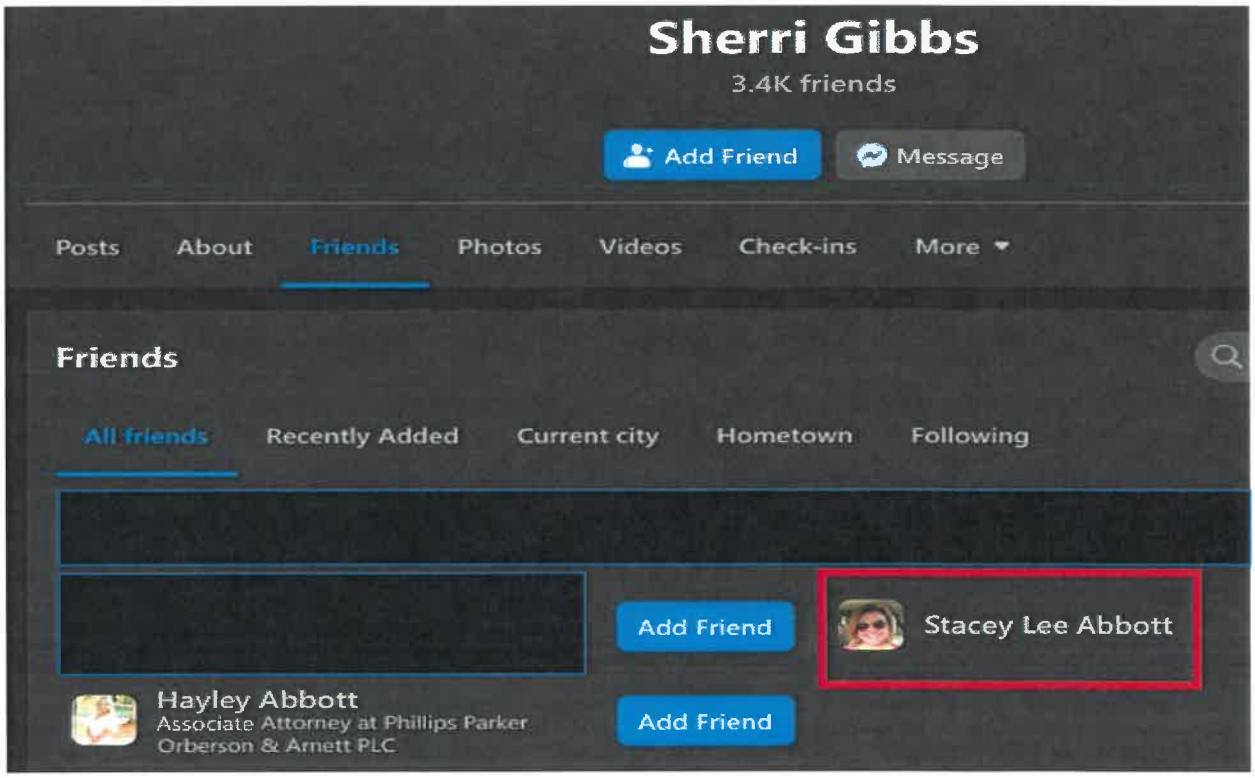


Next, these significant ties also include Wesley Tipton's wife and law firm staff member "for 20 years," Lynn Tipton, and Jeffery Tipton's wife, Debra Tipton, connected to Juror and Foreperson Stacey Abbott's daughter and ex-husband as shown in the following screenshot.



Next, these significant ties also include connections **between Juror and Foreperson Stacey Abbott and Gail Gibbs**, the Corporate Representative for Defendant Hillcrest Nursing Home who was not only present in court during the entirety of trial but also the individual that defense counsel repeatedly referenced and argued to the jury deserved vindication by way of a defense verdict. *See* V/R 2023-01-09_10.17.10.380; V/R 2023-01-09_10.1.40.07.384. Notably, during *voir dire*, prospective jurors were specifically asked: **"You guys have been introduced to**

Gail Gibbs, have had the opportunity to look at her for a little bit, had a chance to kind of process who Gail is, does anyone now recognize Gail who maybe did not recognize her before?" *See* V/R 2023-01-09_11.45.02.310. Defense Counsel even identified Gail Gibbs's husband, Jeff Gibbs, and her two (2) children, Cameron and Megan. Just as with Wesley Tipton, Juror and Foreperson Stacey Abbott is connected to Gail Gibbs through Sherri Gibbs, as shown in the following screenshots.



Yet again, Juror and Foreperson Stacey Abbott concealed her knowledge of and connections to Gail Gibbs just as she had done regarding Wesley Tipton. *See id.* Just as the Supreme Court explained *Sluss*, here, a new trial is warranted because Juror and Foreperson Stacey Abbott provided multiple false answers during *voir dire* regarding connections to individuals related to a party when a juror provides "**[a] false answer, *or no answer*, to a pertinent question addressed to him on the voir dire examination.**" *Sluss* at 225 (emphases and italics added). Notably, it is well settled that juror misconduct warrants a new trial because "**no vestige of suspicion of improper conduct by jurors be tolerated.**" *Hansford v. Stephens*, 2017 WL 129071, at *5 (Ky. App. Jan. 13, 2017) (quoting *Leslie v. Egerton*, 445 S.W.2d 116, 118 (Ky. 1969)) (emphases added).

As shown in the attached Affidavits from Jurors Dennis Crump, Kendra Shupe, and Anna McGlamery, Juror and Foreperson Stacey Abbott elected herself as Foreperson, dominated what brief deliberations did occur, and then immediately urged others to sign the verdict form with her for the Defendants. *See* Affidavits attached hereto as **Exhibits 6, 7, and 8**, respectively. The

testimony in these Affidavits is corroborated in the executed verdict form, which shows that Juror and Foreperson Stacey Abbott signed first just as she then directed the others to sign:

INTERROGATORY NO. 1

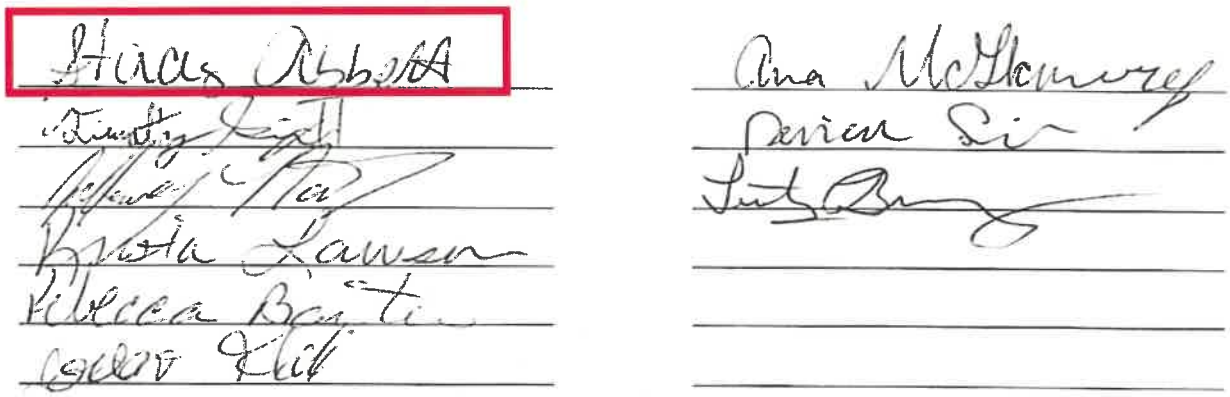
Do you believe from the evidence that the Defendants failed to comply with their duties set forth in Instruction No. 3, and that such failure was a substantial factor in causing any injury Bessie Morgan?

Hillcrest Nursing Home of Corbin, Inc. d/b/a "Hillcrest Health and Rehabilitation Cente ("Hillcrest Nursing Home")

Yes___ No X

Management Advisors, Inc.

Yes___ No X



See **Exhibit 9**.

C. Juror Jordan Hall's (#3) Violation of KRS § 29A.310 Also Mandates New Trial

As expressly shown in **Exhibit 8**, Juror Jordan Hall (#3), who sat directly in front of Juror and Foreperson Stacey Abbott in the jury box, violated KRS § 29A.310 when he admitted that he *formed his opinion* to vote in favor of the Defendants *before* the case was submitted to the jury. *See* **Exhibit 8** at p. 2. KRS § 29A.310 strictly mandates that jurors have the "***[d]uty not to form, or express an opinion thereon, until the case is finally submitted to them.***" KRS § 29A.310 (emphases and italics added) Notably, "**[v]iolations of the admonition by jurors may not be tolerated nor may verdicts be permitted to stand when rendered by juries which have**

violated the admonition." *Doyle By and Through Doyle v. Marymount Hosp., Inc.*, 762 S.W.2d 813, 816 (Ky. App. 1988) (quoting *Dalby v. Cook*, 434 S.W.2d 35, 38 (Ky. 1968)) (emphases added). In *Dalby*, the Court of Appeals reversed the trial court's refusal to grant a new trial finding that **adherence to the admonition is mandatory and, if violated, requires a new trial**. *Dalby*, 4343 S.W.3d at 38. Accordingly, here, the juror's violation of his "duty not to form . . . an opinion . . . until the case is finally submitted" to the jury mandates the grant of a new trial.

D. Wesley Tipton's Violations of Duties Owed to His Firm's Former Clients, Bessie Morgan and Diana Hoskins Mandates New Trial

Defendants' Counsel Wesley Tipton violated his duty to his firm's former clients, Bessie Morgan and Diana Hoskins, by acting as co-defense counsel for Defendants in this action. Specifically, Mr. Tipton's participation as defense counsel violated Kentucky Supreme Court Rule 3.130 (Kentucky Rules of Professional Conduct 1.9 and 1.8). These violations alone warrant a new trial. "Under 59.01(b), **a new trial may be granted by the trial court based upon the misconduct of an attorney**." *Slone v. EQT Production Company*, 2021 WL 298412, at *6 (Ky. App. Jan. 29, 2021) (emphases added).[2] As shown in the attached Affidavit of Peter L. Ostermiller (**Exhibit 10**), an expert in the field of legal ethics, Wesley Tipton violated Kentucky Supreme Court Rule 3.130, Kentucky Rules of Professional Conduct 1.9 and 1.10, when his firm represented Bessie Morgan and Diana Hoskins in the Guardianship/Disability actions before this same Court as shown in **Exhibit 11**.[3]

[2] Pursuant to CR 76.28(4), Plaintiff attaches a copy of the opinion.

[3] In addition, Defendants' Counsel Wesley Tipton, violated the Witness/Advocate Rule by acting as an attorney for the Defendants at trial and being the President of Defendant Hillcrest Nursing Home and as the corporate representative for Defendant First Corbin Long Term Care, Inc. for which he testified on behalf of at Defendant Hillcrest Nursing Home's deposition pursuant to CR 32.06. *See* **Exhibit 12**. It is well settled and accepted that the roles of lawyer and witness are incompatible within a single action. Kentucky Supreme Court Rule 3.130 and Rule 3.7(a) of the Rules of Professional Conduct provide that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness." In *Zurich Ins. Co. v. Knotts*, the Kentucky Supreme Court concluded that an opposing party has a proper objection to an attorney continuing his or her representation of a party in an action

As shown in **Exhibit 10**, Mr. Ostermiller determined that:

> [t]he **conduct of Wesley Tipton fell below that required of an attorney pursuant to SCR 3.130-1.9 and SCR 3.130-1.10 regarding Mr. Tipton's representation of the Defendants in the above-mentioned civil suit as a result of the law firm's previous representation, through another law firm lawyer, of Bessie Morgan and Diana Hoskins as Guardian for Ms. Morgan in an earlier Civil Disability proceeding**. The representation by Jeffery Tipton, a law partner with Wesley Tipton, concerned the representation of Diana Hoskins, as Guardian of Ms. Morgan. There was also an attorney client relationship between Jeffrey Tipton and Ms. Morgan, the ward in that Civil Disability proceeding. The subsequent representation by Wesley Tipton of the Defendants in the recent civil suit concerned the same or substantially related matter and included the assertion of positions adverse to the interests of the former clients Diana Hoskins and Bessie Morgan. That conflict of interest constituted an imputed conflict of interest concerning Wesley Tipton, which was neither addressed nor resolved as provided for in SCR 3.130-1.9 and SCR 3.130-1.10. **In my professional opinion, this deviation of the standard of care was materially prejudicial to the rights of the Plaintiff to a fair trial**.

Exhibit 10 at ¶ 2 (emphases added). *See also Branham v. Stewart*, 307 SW3d 94 (Ky. 2010) (attorney in a Guardian/Ward representation has "direct attorney-client relationship" between attorney and ward). Notably, Wesley Tipton's action here equate to his "**changing sides**" as strictly prohibited under Comment 2 to Rule 1.9 (absent informed consent confirmed in writing from former clients – which did not occur). *See* **Exhibit 10** at ¶ 18. In closing, Mr. Ostermiller concluded: "In my professional opinion, this deviation of the standard of care was **materially prejudicial to the rights of the Plaintiff to a fair trial**." *See* **Exhibit 10** at ¶ 22 (emphases added). As plainly provided in Civil Rule 59.01(b), a

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"where the combination of roles would prejudice that party's rights in the litigation." *Zurich Ins. Co. v. Knotts*, 52 S.W.3d 555, 559 (Ky. 2001). There, the Court noted, "[i]t may not be clear to a jury whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof." *Id.* at 559-60.

Under CR 59.01, a new trial is warranted when there are "irregularity in the proceedings of the court" or "misconduct of the "attorney for the prevailing party." CR 59.01(a)(b). Here, Plaintiff objected to Wesley Tipton's multiple roles but Defendants nonetheless continued in his dual roles warranting a new trial.

new trial is warranted for: "**[m]isconduct of the jury, of the prevailing party, *or of his attorney***." CR 59.01(b) (emphases and italics added). Accordingly, a new trial is warranted for this irrefutable conflict where Mr. Tipton "changed sides" from his firm representing Bessie Morgan and Diana Hoskins to representing the Defendants.

E. Defendants' Apportionment of Fault by Diana Hoskins (Non-Party) and Bessie Morgan (Patient of Medical Negligence Claim)

Next, a new trial is warranted because Defendants, over Plaintiff's specific objection, repeatedly sought to apportion fault to a non-party, Diana Hoskins, just as they proposed in their specific jury instruction that sought to impose a duty on Diana Hoskins, a non-party, and that Diana Hoskins breached that duty, and, therefore, Defendants were then not liable. *See* Def. Inst. No. 4 filed on October 28, 2022, at p. 7.

Defendants cannot relieve themselves of some or all of their liability for Bessie Morgan's injuries during or stemming from her residency at Hillcrest by contending that any **non-party** was negligent. Defendants failed to name or pursue any individuals, including Diana Hoskins, as third-party defendants in this case. As **fault cannot be apportioned to non-parties**, such alleged evidence and argument was irrelevant and inadmissible. Notably, applicable law rejects the inclusion of non-parties with regard to apportionment of fault and related jury instructions. Instead, apportionment of fault is ***only*** permitted with respect to a "[c]laimant, defendant, third-party defendant, and person who has been released from liability." KRS § 411.182(1). Clearly, section 411.182(1) **does not permit apportionment of fault to a non-party** and, here, there is no active assertion of any claim against any other individuals or entities not named as Defendants herein. In *Baker v. Webb*, the Kentucky Court of Appeals confirmed that apportionment **does not encompass non-parties**. *Baker v. Webb*, 883 S.W.2d 898-99 (Ky. Ct. App. 1994); *see also Copass v. Monroe County Med. Found., Inc.*, 900 S.W.2d 617, 619 (Ky. App. 1995) (party may not

advance comparative negligence theory unless parties are "before the court" or were "settling tortfeasors"); *Jones v. Stern*, 168 S.W.3d 419, 423 (Ky. App. 2005) (apportionment improper against doctors who were non-settling non-parties in medical malpractice action against other doctors); *Jefferson County Commonwealth Attorney's Office v. Kaplan*, 65 S.W.3d 916, 922 (Ky. 2001) (apportionment improper where persons were not third-party defendants nor settling tortfeasors); *McDonald's Corp. v. Ogborn*, 309 S.W.3d 274, 295 (Ky. App. 2009) (same). Since non-party apportionment is a **prohibited theory or defense**, any evidence or testimony relating to the alleged negligence of a non-party, Diana Hoskins, was irrelevant and inadmissible. In other words, Defendants were prohibited from blaming a non-party, Diana Hoskins, for the injuries Bessie Morgan suffered because these Defendants specifically and intentionally chose not to name Diana Hoskins as a third party. Nonetheless, Defendants spent considerable time and effort to inject this inadmissible material to the jury over Plaintiff's specific objections. *See* V/R 2023-01-13_15.21.44.858.

Next, a new trial is warranted because Defendants, over Plaintiff's specific objection, apportioned fault to Bessie Morgan herself, just as they did when they proposed a specific jury instruction that sought to impose a duty on Bessie Morgan, the patient of the medical negligence claim. *See* Def. Inst. No. 5 filed on October 28, 2022, at p. 8. It is well-settled law that Defendants were precluded from blaming Bessie Morgan for any injuries that led Bessie Morgan to submit to Defendants' care and treatment. *Pauly v. Chang*, 498 S.W.3d 394, 417-18 (Ky. App. 2015), *as modified*, (Dec. 23, 2015) *and review denied*, (Sept. 15, 2016); *Williams v. Baptist Healthcare System, Inc.*, 2019 WL 7546592, at *12 (W.D. Ky. Sept. 30, 2019) (defendant not entitled to contributory negligence instruction under Kentucky law). In *Pauly*, the Court of Appeals affirmed the Circuit Court's preclusion of defendants from "[i]ntroducing evidence as to Dr. Pauly's fault .

. . ." *Pauly*, 498 S.W.3d at 416. There, the Court of Appeals explained that "[t]he defense of comparative or contributory negligence does not apply when 'a patient's conduct provides the occasion for medical attention, care or treatment which later is the subject of a medical malpractice claim or when the patient's conduct contributes to an illness or condition for which the patient seeks the medical attention, care or treatment on which a subsequent medical malpractice claim is based.'" *Pauly* at 416 (quoting *Jensen v. Archbishop Bergan Mercy Hospital*, 459 N.W.2d 178, 186 (Neb. 1990)). Nonetheless, Defendants spent considerable time and effort to inject this inadmissible material to the jury over Plaintiff's specific objections.

F. Defense Counsel's Improper Closing Argument

Finally, a new trial is warranted because of the impermissible closing argument made by defense counsel. A new trial may be granted based solely on an improper argument by counsel. *Horton v. Hendon*, 70 S.W.2d 975, 977 (Ky. App. 1934); *Smith v. McMillian*, 841 S.W. 172, 174-75 (Ky. 1992) (improper argument by counsel grounds for new trial and mandated when counsel "go[es] outside the record in the jury argument . . . .").

Throughout his closing argument, defense counsel made several improper arguments that were either "outside the record" or only offered to intentionally impugn Plaintiff's counsel. For example, defense counsel argued that Plaintiff's case was nothing more than an example of the "tricks of the trade" and that defense counsel has learned all of these "tricks" over his 22-year career defending health care providers. *See* V/R 2023-01-13_15.21.44.858 at 2:01. Defense counsel also improperly argued that nursing home staffers care more about patient care than record keeping – none of which was ever contained in the trial record. *Id.* at 8:27. Defense counsel also improperly argued that Plaintiff was asking for "millions and millions of dollars" and a "ton of money," when Plaintiff's counsel made no such request. *Id.* at 9:55. Defense counsel also

improperly argued that Plaintiff's wrongful death claim had been "dismissed by the Court", which the Court specifically prohibited Defendants from referencing the voluntarily-dismissed cause of action because the jury had never been apprised of the claim at all during the trial, thereby leaving the misimpression that the Court was critical of Plaintiff's evidence and case and had to take action adverse to Plaintiff. *Id.* at 11:58. Defense counsel also improperly argued that Diana and Walter Hoskins "refused to take the witness stand," when Defendants never even called them to testify. *Id.* at 13:04. Defense counsel even argued that "we know why she's not testifying." *Id.* at 13:20. Defense Counsel impermissibly added that he "has not seen Diana Hoskins in trial since Monday," (concealing that defense counsel caused her absence from trial because Mrs. Hoskins was prohibited from being in the courtroom by Court Order after the Defendants insisted that she be sequestered, and that "the most powerful evidence is the evidence we don't hear." *See* V/R 2023-01-13_15.41.10.693 at 16:35. Defense counsel also improperly argued that **"I don't want you to get scammed. That's what this is a scam. It's the courthouse version of selling you swamp land in Florida [Plaintiff's counsel state of residence]. Don't be fooled."** *Id.* at 13:45. Defense counsel also improperly argued that Plaintiff's counsel asked for money to go to Diana Hoskins, "the heir of the Estate" when Plaintiff is Walter Hoskins and no such evidence existed or was even placed before the jury. *Id.* at 18:05. This Court agreed that this argument was improper and admonished the jury that Diana Hoskins is not a party. *See* V/R 2023-01-13_15.40.01.380. Defense counsel then continued with this improper argument by claiming that Walter Hoskins and Diana Hoskins are married and that the jury should "draw your own conclusions" about who would receive any money as a result of any award of damages in the case. *See* V/R 2023-01-13_15.41.10.693 at 00:14. Defense counsel also improperly argued that Dr. Aimee Garcia "did not have any staffing criticisms against Hillcrest" when, in reality, she did have such criticisms but

Defendants were successful in convincing the Court to exclude those criticisms outside of the jury's presence. *Id.* at 17:50. Finally, Defense counsel also improperly argued in his final argument to the jury: **"[d]on't be scammed by this lawyer."** *Id.* at 23:55.

Notably, the law in Kentucky is that prejudice is *presumed* when an attorney makes an improper argument, especially when that argument involves argument from "outside of the record." *Smith*, 841 S.W. at 175 (quoting *Louisville & N.R. Co. v. Gregory*, 144 S.W.2d 519, 522 (Ky. App. 1940)). In *Gregory*, the Court of Appeals plainly held that **courts "will reverse the judgment" when "counsel go outside the record in the jury argument"** just as defense counsel repeatedly did here even after the Court directed otherwise. *Gregory*, 144 S.W.2d at 522. For this reason alone, a new trial is warranted.

III. CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff the requested JNOV or, at a minimum, grant him a new trial based on the above-listed and blatant juror and attorney misconduct and irregularity in addition to other errors that severely prejudiced Plaintiff, which included a rigged jury with a foreperson who repeatedly concealed her knowledge of and connections to Defendants, their Corporate Representatives, and defense counsel themselves as well as another Juror's blatant violation of KRS § 29A.310, which strictly mandates that jurors have the **"*[d]uty not to form*, or express an opinion thereon, until the case is finally submitted to them."** For all of those reasons, at a minimum, a new trial must be granted.

Respectfully submitted,

GARCIA & ARTIGLIERE

/s/ Stephen M. Garcia
Stephen M. Garcia
Matthew M. Coman (PHV)

312 S. 4th Street, Suite 700
Louisville, KY 40202
Telephone: 502.584.3805
Counsel for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was electronically filed and served via electronic service and/or U.S. Mail, postage prepaid, on this 31st day of January 2023, upon the following:

Mark E. Hammond
O'BRYAN, BROWN & TONER, PLLC
401 South Fourth Street, Suite 2200
Louisville, KY 40202
Counsel for Defendants

Wesley Tipton
TIPTON & TIPTON
P.O. Box 1284
Corbin, KY 40702
Counsel for Defendants

/s/ Stephen M. Garcia
Counsel for Plaintiff

Filed 09-CI-00072 03/01/2023 Gary W. Barton, Whitley Circuit Clerk

EXHIBIT 1

MOS : 000026 of 000144

Filed 09-CI-00072 03/01/2023 Gary W. Barton, Whitley Circuit Clerk

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Commonwealth of Kentucky
Michael G. Adams, Secretary of St

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KY Secretary of State
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Secretary of State
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Frankfort, KY 40602-1150
(502) 564-3490
http://www.sos.ky.gov

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Company: HILLCREST NURSING HOME OF CORBIN, INC.
Company ID: 0003129
State of origin: Kentucky
Formation date: 1/10/1972 12:00:00 AM
Date filed: 5/31/2022 3:26:57 PM
Fee: $15.00

Principal Office

P O BOX 1450
CORBIN, KY 40702

Registered Agent Name/Address

CT CORPORATION SYSTEM
306 W. MAIN STREET
SUITE 512
FRANKFORT, KY 40601

Current Officers

President	Wes Tipton	PO Box 1450, Corbin, KY 40702
Assistant Secretary	Jackie L Willis	PO Box 1450, Corbin, KY 40702
Secretary	David Witt	PO Box 1450, Corbin, KY 40702
Treasurer	Roger W Alsip	PO Box 1450, Corbin, KY 40702

Directors

Director	Wes Tipton	PO Box 1450, Corbin, KY 40702
Director	Roger Alsip	PO Box 1450, Corbin, KY 40702
Director	David Witt	PO Box 1450, Corbin, KY 40702

Signatures

Signature Jackie Willis
Title Assistant Secretary

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EXHIBIT 2

MOS : 000028 of 000144

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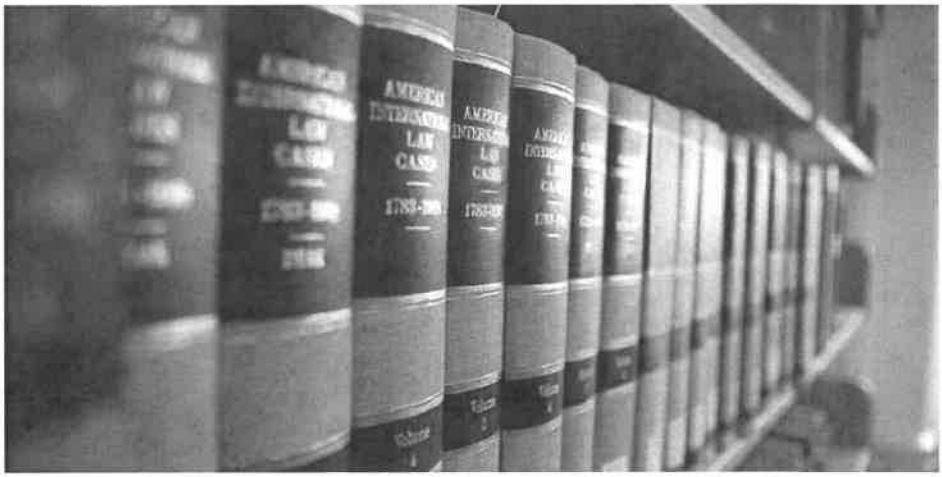

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OUR ATTORNEYS

Wesley Ray Tipton, BS, JD

Wes Tipton is from Corbin, Kentucky. He was admitted to practice law in 1986. Other admissions: U.S. Court of Appeals, Sixth Circuit; U.S. District Court, Eastern District of Kentucky; U.S. Bankruptcy Court, Eastern District of Kentucky.
Preparatory education: University of Kentucky (B.S. in Accounting with Distinction 1983).
Legal education: University of Kentucky College of Law (J.D. 1986).
Moot Court Board, 1984-1985; AM JUR Book Award-Criminal Law.
Member: Whitley County and Kentucky Bar Associations; **Treasurer** for Whitley County BAR Association since 1987. Approved Attorney for Old Republic National Title Insurance Company.

Jeffery Ray Tipton, BS, JD

Jeff Tipton is a Corbin native, also. He was admitted to practice law in 1986; Other admissions: U.S. Court of Appeals, Sixth Circuit; U.S. District Court, Eastern District of Kentucky; U.S. Bankruptcy Court, Eastern District of Kentucky.

Preparatory education: University of Kentucky (B.S. in Accounting with Distinction 1983).

Legal education: University of Kentucky College of Law (J.D. 1986).
Moot Court Board, 1984-1985.

Sarah Tipton Reeves, BA, JD

Member: Whitley County and Kentucky Bar Associations. Approved Attorney for Old Republic National Title Insurance Company.

Sarah Reeves also hails from Corbin. She was admitted to practice law in 2016 in Kentucky; Other admissions: U.S. District Court, Eastern District of Kentucky.

Preparatory education: Transylvania University, (B.A., English, Magna Cum Laude, 2013).

Legal education: University of Kentucky College of Law, (J.D. 2016). Staff, 2014-2016: *Kentucky Law Journal*.

Member: Whitley County and Kentucky Bar Associations.

CONTACT US

Get in Touch!

Name

Email*

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P.O. Box 1284, Corbin, KY 40702-1284 • 404 Roy Kidd Ave., Corbin, KY 40701-1170

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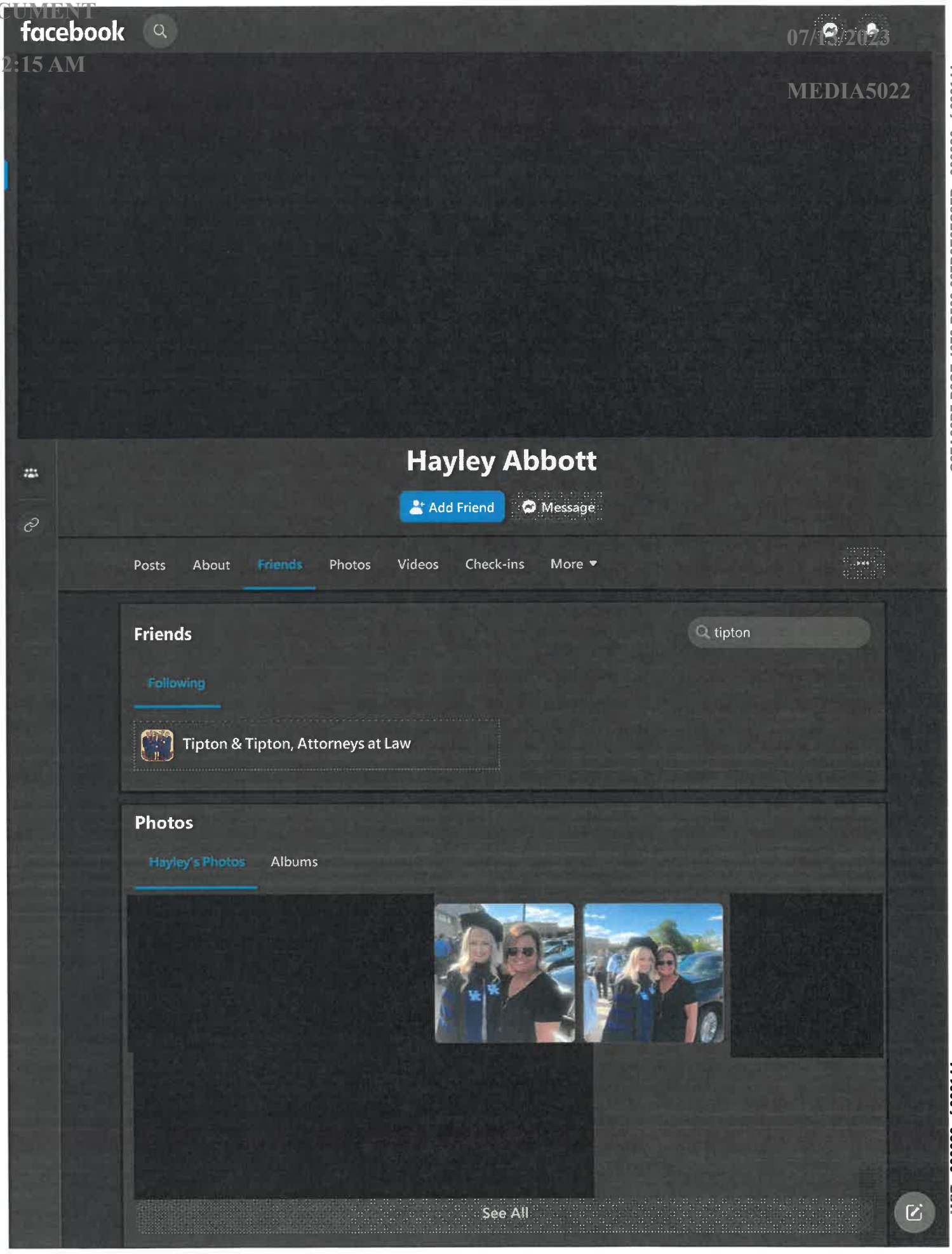

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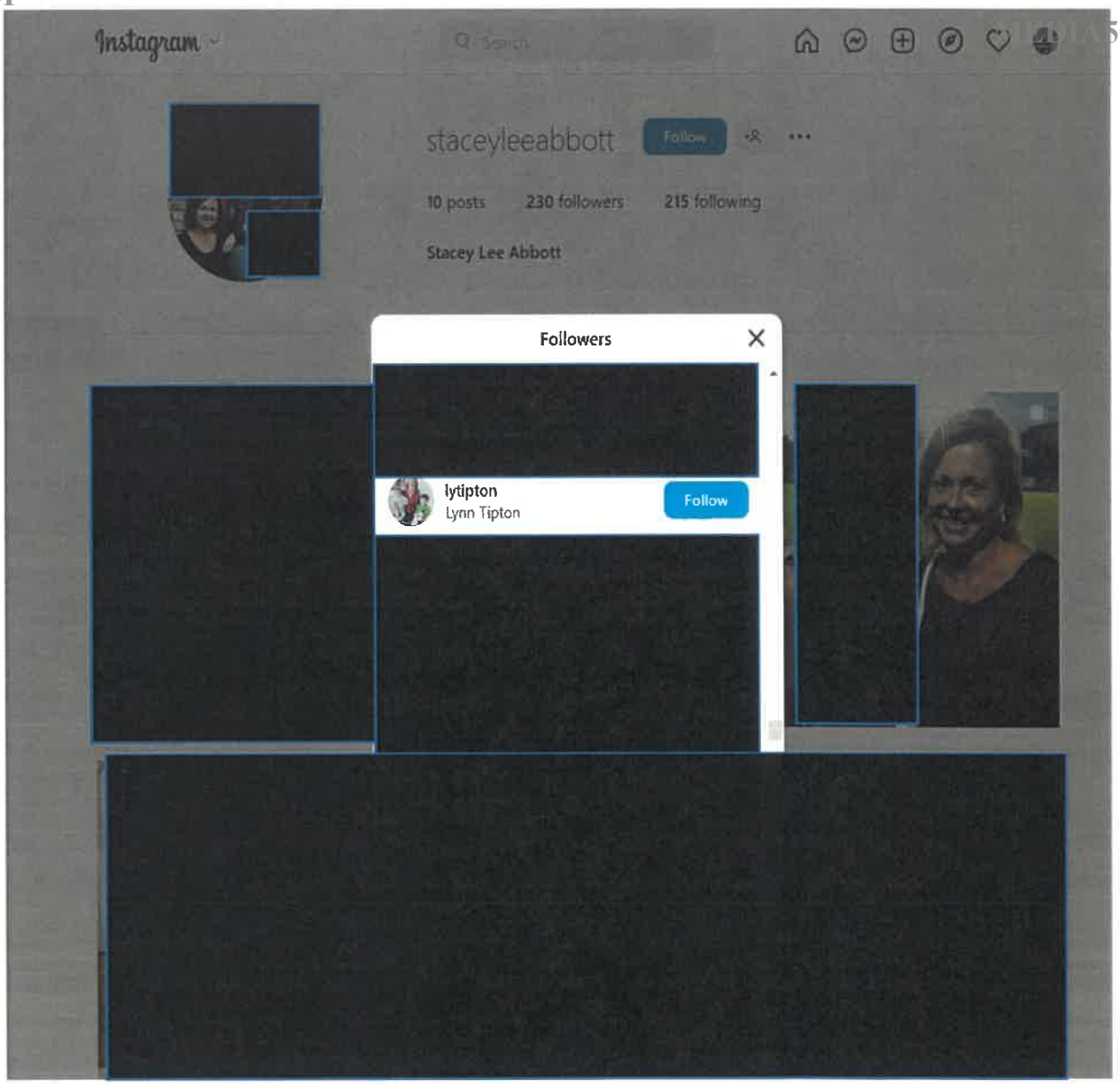

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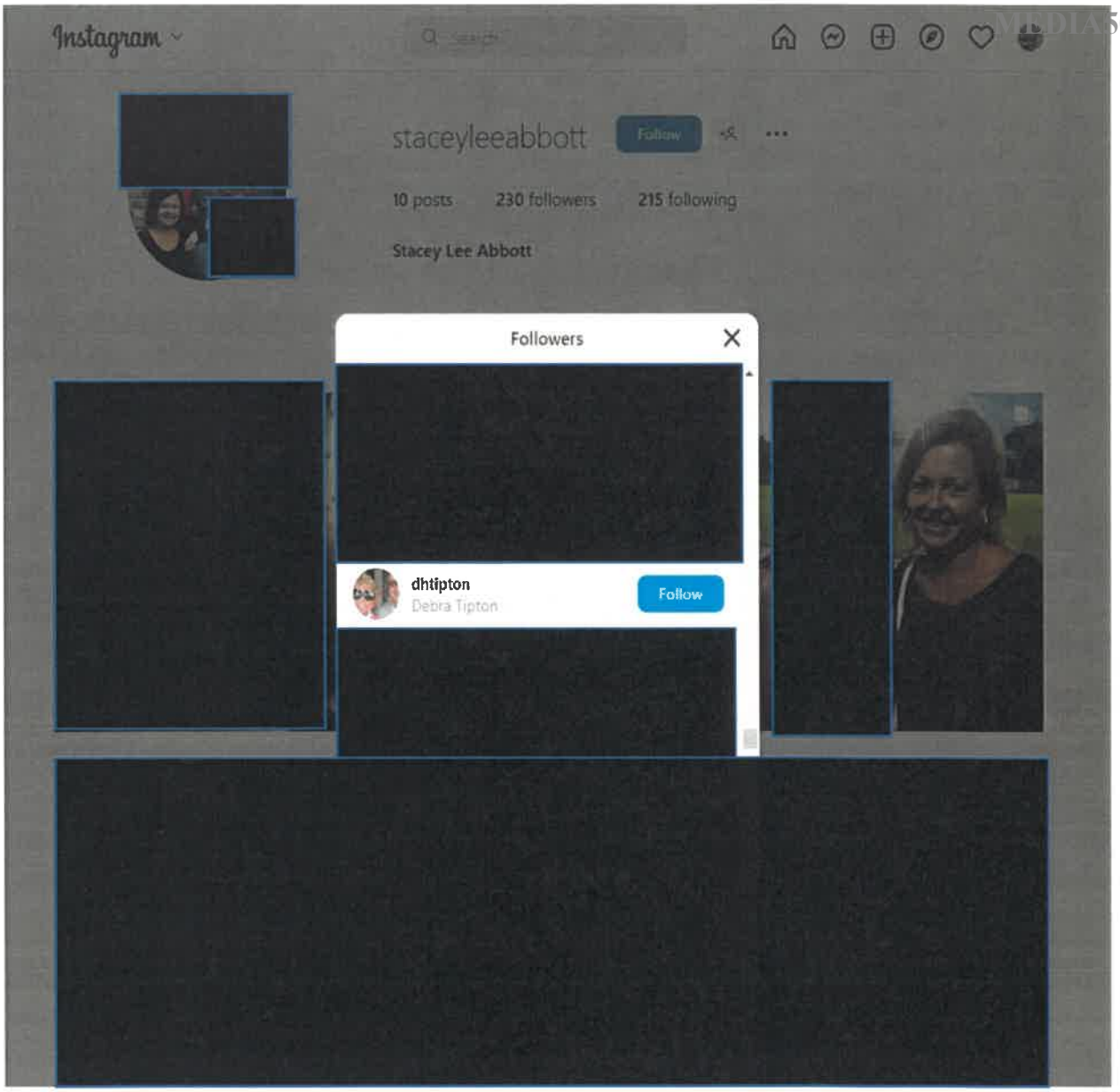

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EXHIBIT 6

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COMMONWEALTH OF KENTUCKY
WHITLEY CIRCUIT COURT
DIVISION 1
CIVIL ACTION NO. 09-CI-00072

ELECTRONICALLY FILED

WALTER HOSKINS, as Executor of the Estate of BESSIE MORGAN, deceased — PLAINTIFF

v.

AFFIDAVIT OF DENNIS CRUMP

HILLCREST NURSING HOME OF CORBIN, INC., et al. — DEFENDANTS

*** *** *** ***

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, a Notary Public duly commissioned and qualified in accordance with the law of the State of Louisiana, personally came and appeared:

DENNIS CRUMP

who, having first being duly sworn, did depose and say:

1. I served as a Juror in the above-captioned matter beginning on January 9, 2023 and ending on January 13, 2023.

2. None of the jurors ever reviewed any of the evidence brought to the jury room during deliberations.

3. Following the Court excusing the Jury to deliberate in this matter, I stepped out of the jury room to go to the restroom and to get a cup of coffee. When I returned Juror Stacey Abbott acted as the foreperson (although I do not know how she assumed that role) and was reviewing the jury instructions and called for a vote.

4. During deliberations, multiple conversations occurred all at the same time.

5. Juror and Foreperson Stacey Abbott maintained possession of the written jury instructions provided by the Court to the Jury during the entirety of the deliberations, the instructions were not shared with me or with other jurors from what I observed, and then she called for a verdict in favor of the Defendants.

6. Juror and Foreperson Stacey Abbott then turned the jury instructions to the verdict form.

7. The first vote was 8 to 4 in favor of the Defendants.

8. Juror and Foreperson Stacey Abbott then had the signature page and one Juror changed her vote from Plaintiff to Defendants.

9. The foregoing matters are made on personal knowledge for which I am competent to testify.

10. I have read the foregoing statements and aver they are true and accurate.

DocuSigned by:
Dennis Crump
FD269EEE627140F...
Dennis Crump — Date: 1/23/2023

DocuSigned by:
Timothy Crump
Witness (Printed): Timothy Crump — Date: 1/23/2023

On this 23rd day of January 2023, before me personally appeared, DENNIS CRUMP, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed. This is a remote online notarial act under La. R.S. 35:627.

DocuSigned by:
Jordan M. Jeansonne
B1B363D6BD8740E...
Jordan M. Jeansonne
Notary Public
State of Louisiana
LSBA # 33203
Notary ID # 90939
My Commission Expires at Death

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EXHIBIT 7

MOS : 000044 of 000144

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COMMONWEALTH OF KENTUCKY
WHITLEY CIRCUIT COURT
DIVISION 1
CIVIL ACTION NO. 09-CI-00072

ELECTRONICALLY FILED

WALTER HOSKINS, as Executor of the Estate of BESSIE MORGAN, deceased — PLAINTIFF

v.

AFFIDAVIT OF KENDRA SHUPE

HILLCREST NURSING HOME OF CORBIN, INC., et al. — DEFENDANTS

*** *** *** ***

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, a Notary Public duly commissioned and qualified in accordance with the law of the State of Louisiana, personally came and appeared:

KENDRA SHUPE

who, having first being duly sworn, did depose and say:

1. I served as a Juror in the above-captioned matter beginning on January 9, 2023 and ending on January 13, 2023.

2. Following the Court excusing the Jury to deliberate in this matter, Juror Stacey Abbott assumed the position of Foreperson and then immediately turned the jury instructions to the verdict form asking who would be signing their names to the form in favor of the Defendants.

3. Juror and Foreperson Stacey Abbott maintained possession of the written jury instructions provided by the Court during the entirety of the deliberations, the instructions were not shared with me or with other jurors from what I observed, and then Juror and Foreperson Stacey Abbott called for a verdict in favor of the Defendants.

4. The first vote was 8 to 4 in favor of the Defendants.

5. Juror and Foreperson Stacey Abbott then recirculated the signature page and one Juror changed her vote from Plaintiff to Defendants because she had two (2) children at home and was anxious to get home.

6. During deliberations, none of the jurors reviewed the evidence brought to the jury room.

7. The foregoing matters are made on personal knowledge for which I am competent to testify.

8. I have read the foregoing statements and aver they are true and accurate.

DocuSigned by:
Kendra Shupe
Kendra Shupe 1/23/2023
Date

DocuSigned by:
Michael R Shupe
Witness (Printed) 1/23/2023
Date

On this 23rd day of January 2023, before me personally appeared, KENDRA SHUPE, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that she executed the same as her free act and deed. This is a remote online notarial act under La. R.S. 35:627.

DocuSigned by:
Jordan M. Jeansonne
1/23/2023
Jordan M. Jeansonne
Notary Public
State of Louisiana
LSBA # 33203
Notary ID # 90939
My Commission Expires at Death

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EXHIBIT 8

MOS : 000047 of 000144

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COMMONWEALTH OF KENTUCKY
WHITLEY CIRCUIT COURT
DIVISION 1
CIVIL ACTION NO. 09-CI-00072

ELECTRONICALLY FILED

WALTER HOSKINS, as Executor of the Estate of BESSIE MORGAN, deceased — PLAINTIFF

v. **AFFIDAVIT OF ANNA MCGLAMERY**

HILLCREST NURSING HOME OF CORBIN, INC., et al. — DEFENDANTS

*** *** *** ***

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, a Notary Public duly commissioned and qualified in accordance with the law of the State of Louisiana, personally came and appeared:

ANNA MCGLAMERY

who, having first being duly sworn, did depose and say:

1. I served as a Juror in the above-captioned matter beginning on January 9, 2023 and ending on January 13, 2023.

2. Following the Court excusing the Jury to deliberate in this matter, Juror Stacey Abbott assumed the role of foreperson without any vote or selection process.

3. Juror and Foreperson Stacey Abbott maintained possession of the written jury instructions provided by the Court to the Jury during the entirety of the deliberations and then immediately asked which nine (9) jurors were going to sign the verdict form in favor of the Defendants.

4. In the first vote, I voted for the Plaintiff.

5. The night before the end of trial, Thursday, January 12, 2023, I had to rush my young son to the hospital where he was diagnosed with RSV. I did not return to my home until around 2:00 a.m. on January 13, 2023 and then had to go to work for around 5:00 a.m. before going to Court for jury duty shortly before 9:00 a.m. I was then anxious to go home to care for my son the evening of Friday, January 13, 2023 because my husband had to report to work at 5:00 p.m., and my son, who is autistic, needed me to care for him given his condition and illness.

6. Juror and Foreperson Stacey Abbott pressed for a vote for the Defendants from the beginning of deliberations, dominated what deliberations occurred, and then pressed others to vote for the Defendants to the point that I believe a fight was going to occur if there was anything other than a verdict for Defendants.

7. Juror and Foreperson Stacey Abbott was very intimidating, and I changed my vote in favor of the Defendants.

8. None of the jurors ever reviewed any of the evidence brought to the jury room during deliberations.

9. One Juror, a tall and slender male sitting directly in front of Juror and Foreperson Stacey Abbott in the jury box, stated that he had made up his mind well before any jury deliberations began.

10. The foregoing matters are made on personal knowledge for which I am competent to testify.

11. I have read the foregoing statements and aver they are true and accurate.

DocuSigned by:
Anna McGlamery 1/24/2023
3D97813998611415...
Anna McGlamery Date

Witness (Printed): Date

On this ~~23rd~~ 24th day of January 2023, before me personally appeared, ANNA MCGLAMERY, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that she executed the same as her free act and deed. This is a remote online notarial act under La. R.S. 35:627.

DocuSigned by:
Jordan M. Jeansonne 1/24/2023
B1B363D6BD874QE...
Jordan M. Jeansonne
Notary Public
State of Louisiana
LSBA # 33203
Notary ID # 90939
My Commission Expires at Death

Filed 09-CI-00072 03/01/2023 Gary W. Barton, Whitley Circuit Clerk

EXHIBIT 9

MOS : 000050 of 000144

Filed 09-CI-00072 03/01/2023 Gary W. Barton, Whitley Circuit Clerk

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INTERROGATORY NO. 1

Do you believe from the evidence that the Defendants failed to comply with their duties as set forth in Instruction No. 3, and that such failure was a substantial factor in causing any injury to Bessie Morgan?

Hillcrest Nursing Home of Corbin, Inc. d/b/a "Hillcrest Health and Rehabilitation Center" ("Hillcrest Nursing Home")

Yes___ No X

Management Advisors, Inc.

Yes___ No X

FOREPERSON (IF ALL 12 AGREE

If you have answered YES to either Defendant in Interrogatory No. 1, please proceed to Verdict No. 1.

If you have answered NO to both Defendants in Interrogatory No. 1, please notify the Deputy Sheriff.

Filed 09-CI-00072 03/01/2023 Gary W. Barton, Whitley Circuit Clerk

EXHIBIT 10

C2FA26B7-B2CE-4679-B509-097B9E6FC8FB : 000052 of 000144

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AFFIDAVIT OF PETER L. OSTERMILLER

1. I was requested by the law firm of Garcia & Artigliere to provide my professional opinion on certain legal ethics and professional responsibility matters regarding the standard of care of Wesley Tipton and his law firm, Tipton and Tipton, regarding the representation of the Defendants in a Whitley Circuit Court case, Hoskins v. Hillcrest Nursing Home of Corbin, Inc., et al., 09-CI-00072, concerning certain conflict of interest issues.

2. In summary, in my professional opinion, the conduct of Wesley Tipton fell below that required of an attorney pursuant to SCR 3.130-1.9 and SCR 3.130-1.10 regarding Mr. Tipton's representation of the Defendants in the above-mentioned civil suit as a result of the law firm's previous representation, through another law firm lawyer, of Bessie Morgan and Diana Hoskins as Guardian for Ms. Morgan in an earlier Civil Disability proceeding. The representation by Jeffery Tipton, a law partner with Wesley Tipton, concerned the representation of Diana Hoskins, as Guardian of Ms. Morgan. There was also an attorney client relationship between Jeffrey Tipton and Ms. Morgan, the ward in that Civil Disability proceeding. The subsequent representation by Wesley Tipton of the Defendants in the recent civil suit concerned the same or substantially related matter and included the assertion of positions adverse to the interests of the former clients Diana Hoskins and Bessie Morgan. That conflict of interest constituted an imputed conflict of interest concerning Wesley Tipton, which was neither addressed nor resolved as provided

for in SCR 3.130-1.9 and SCR 3.130-1.10. In my professional opinion, this deviation of the standard of care was materially prejudicial to the rights of the Plaintiff to a fair trial.

3. I am an attorney at law licensed to practice to law in the Commonwealth of Kentucky and have been licensed in Kentucky since 1980. Since that time up to the present time, I have been engaged in the private practice of law. My law practice is concentrated in matters relating to legal ethics and professional responsibility, including representing attorneys in attorney disciplinary proceedings before the Kentucky Bar Association, conferring and counseling with lawyers and law firms concerning their legal ethics and professional responsibility duties, representing parties in attorney fee disputes in civil proceedings and Kentucky Bar Association Fee Arbitration, conferring and counseling with lawyers and law firms concerning risk management and professional liability issues, representing applicants seeking admission to the practice of law in Kentucky, representing suspended lawyers seeking reinstatement of their law license in Kentucky, representing and counseling Judges regarding judicial ethics, and representing Judges before the Judicial Conduct Commission. On occasion, I retained as an expert witness concerning legal ethics and professional responsibility issues. Attached to my Affidavit is a current copy of my curriculum vitae.

4. In forming my opinions as set forth in this affidavit, I was provided certain documents by Garcia & Artigliere as follows:

1. May 31, 2022 Annual Report of Hillcrest Nursing Home of Corbin, Inc.

2. January 26, 2009 Complaint, 09-CI-0072

3. September 9, 2022 Plaintiff's Motion to Disqualify Wesley Tipton based on the "Advocate Witness Rule"

4. April 1, 2022 Deposition of Wesley Tipton, 09-CI-0072

5. May 9, 2007 Petition for Relief from Order of Appointment of Guardian by Diana Hoskins, Jeffery Tipton, attorney, 06-H-00029

6. June 20, 2007 Order, 06-H-00029

7. October 28, 2022 Defendants' Response to Plaintiff's Motion to Disqualify Wesley Tipton, 09-CI-0072

8. November 1, 2006 Motion to Dismiss Petitioner and Appoint Commonwealth as Guardian for the Respondent by Sandra Reeves, Guardian Ad Litem for Bessie Morgan, 06-H-00029

9. November 1, 2006 Notice of Filing and Supplemental Report of Guardian Ad Litem, Sandra Reeves, 06-H-00029

10. December 13, 2006 letter from Sandra Reeves for Guardian Ad Litem for Bessie Morgan to Dr. Samuel Kreis

11. December 8, 2006 letter from Sandra Reeves, Guardian Ad Litem for Bessie Morgan, to Mossie Poynter and Diana Hoskins

12. July 12, 2006 Order for Emergency Appointment of Fiduciary 06-H-00029

13. Video tape of Bench Conference, January 12, 2023, commencing at 4:33:10

I was also provided by Garcia & Artigliere information concerning procedural events in the recent jury trial.

5. The opinions stated herein are based on the documents I have reviewed to

date. I reserve the right to modify or supplement this Affidavit if additional documents and information are provided to me.

6. The Rules of Professional Conduct found in SCR 3.130 et seq., establish minimum standards of care for attorneys practicing law in Kentucky. An attorney's violation of a particular provision of the Rules does not, by itself, give rise to a private cause of action against the lawyer nor create a presumption that a legal duty has been breached. However, "...since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of care." SCR 3.130 Scope XXI.

7. Based on my consideration of the documentation and information provided, my consideration of applicable Rules of Professional Conduct and other applicable law, and given my training and experience in legal ethics and professional responsibility matters of over thirty five years, the following is my review of the documents provided and my professional opinions regarding the matters set out in this affidavit.

8. In the civil suit, 09-CI-0072, the Defendants were represented by attorneys from O'Bryan, Brown and Toner and by Wesley Tipton, Tipton and Tipton. The lawyers in Tipton and Tipton include Wesley Tipton, his brother, Jeffery Tipton, and Sarah Reeves, the daughter of Wesley Tipton.

9. The three named Defendants in that civil suit are First Corbin Long Term Care, Inc., Hillcrest Nursing Home of Corbin, Inc., and Management Advisors, Inc.

Wesley Tipton, in addition to being counsel of record for those Defendants in that civil suit, is also the President of First Corbin Long Term Care, Inc., and Hillcrest Nursing Home of Corbin, Inc. Wesley Tipton testified as a corporate representative at a deposition concerning First Corbin Long Term Care, Inc. Mr. Tipton testified that First Corbin Long Term Care, Inc., was the sole owner of Hillcrest Nursing Home of Corbin, Inc. According to a May 31, 2022 Annual Report of Hillcrest Nursing Home of Corbin, Inc., filed with the Kentucky Secretary of State, Wesley Tipton is also a Director of that company.

10. In 2006, a Civil Disability proceeding was filed in the Whitley District Court, 06-H-00029. The Respondent/Ward in that proceeding was Bessie Morgan. Ms. Morgan, now deceased, through her Executor, Walter Hoskins, the Plaintiff in 09-CI-0072, was the subject of that Circuit Court suit.

11. In that Civil Disability proceeding, Sandra Reeves was the Guardian Ad Litem on behalf of Bessie Morgan. Based on the documentation I have reviewed, it appears the procedural status of that Civil Disability proceeding in December of 2006 was that Diana Hoskins was serving as a Trustee over the finances of Bessie Morgan and Mossie Poynter was serving as the Emergency Guardian previously appointed in that Civil Disability proceeding. On March 22, 2007, the District Court appointed the Commonwealth as the Guardian of Ms. Morgan. The documents reflect that Ms. Poynter elected to not be appointed as the Guardian of Ms. Morgan.

12. On May 3, 2007, Diana Hoskins filed a Petition seeking relief from the

March 22, 2007 Order. Ms. Hoskins was represented by Jeffery Tipton of Tipton and Tipton as counsel of record in that proceeding. Ms. Hoskins was seeking to serve as the Guardian of Ms. Morgan, thereby replacing the Commonwealth. The Petition identified Ms. Hoskins as a daughter of Bessie Morgan and therefore an "interested person." The Petition noted Ms. Morgan was living at Hillcrest Nursing Home, (one of the Defendants in the subsequent nursing home case). The Petition also alleged Ms. Hoskins had been taking care of the needs of Bessie Morgan for some time including "almost daily" visits by Ms. Hoskins to Ms. Morgan at the Hillcrest Nursing Home. The Petition further alleged that Ms. Hoskins had been taking care of Ms. Morgan's personal and financial needs for several months before the filing of her Petition. On June 20, 2007, the District Court entered an Order appointing Ms. Hoskins as the Guardian of Ms. Morgan.

13. On January 26, 2009, a Complaint was filed in the Whitley Circuit Court, 09-CI-0072. The Plaintiff was Walter Hoskins, in a representative capacity as the Executor of the Estate of Bessie Morgan, deceased, and on behalf of the statutory wrongful death beneficiaries of Ms. Morgan. Defendants named in that Complaint were First Corbin Long Term Care, Inc., Hillcrest Nursing Home of Corbin, Inc. and Management Advisors, Inc. A jury trial was held in that case in January of this year. The Defendants were represented by Wesley Tipton, of the Tipton and Tipton law firm, and by attorneys from the law firm of O'Bryan, Brown & Toner. The Plaintiff was represented by Stephen Garcia and Matthew Coman, of the Garcia & Artigliere law firm.

14. During that jury trial, the Defendants sought to introduce evidence, by witnesses and exhibits, taking positions adverse to the interests of Diana Hoskins and Bessie Morgan. In particular, the Defendants attempted, unsuccessfully, to call Sandra Reeves as a witness on behalf of the Defendants. Ms. Reeves had served as the Guardian Ad Litem for Bessie Morgan in the Civil Disability proceeding, 06-H-00029. The Defendants also sought to introduce as exhibits correspondence and court documents from that Civil Disability proceeding as evidence on behalf of the Defendants adverse to the interests of Diana Hoskins and Bessie Morgan. A reasonable inference is that counsel for the Defendants, including Wesley Tipton, used confidential and privileged information concerning Ms. Hoskins and Ms. Morgan from the earlier Civil Disability proceeding as part of the defense of the Defendants in the recent trial. Mossie Poynter was called as a witness on behalf of the Defendants and testified adverse to the interests of Diana Hoskins and Ms. Morgan. At the time of that testimony, the Defendants' legal representation included Wesley Tipton, whose law firm, through his partner and brother, Jeffery Tipton, represented Ms. Hoskins and Ms. Morgan in the earlier Civil Disability proceeding.

15. In reviewing the documentation provided to me concerning the earlier Civil Disability proceeding, it appears issues concerning the care and condition of Ms. Morgan, during a time when she was at the Hillcrest Nursing Home, was a subject raised in and during the Civil Disability proceeding. The care and condition of Ms. Morgan was also a material issue in the recent nursing home case, 09-CI-00072.

16. The standard of care attorneys owe former clients is set out in SCR 3.130-1.9, ("Rule 1.9"). Under certain circumstances, attorneys are permitted to represent a client even if the attorney has previously represented a former client in a matter which somehow relates to the representation of the current client. However, there are circumstances when an attorney may not represent a current client as a result of earlier representation of a now-former client.

17. A threshold issue, as in all determinations of whether an attorney's conduct fell above or below the applicable standard of care, is the identification of the client or clients. The activity of record by Jeffery Tipton as attorney of record for Diana Hoskins in the Civil Disability proceedings establishes Ms. Hoskins, during the time of the nursing home civil suit, was a former client of Tipton and Tipton. Furthermore, there was also an attorney client relationship between the Tipton and Tipton law firm and Bessie Morgan as a result of the Civil Disability proceeding. An attorney who represents the personal representative of an Estate or who represents the Trustee of Trust has no attorney client relationship with beneficiaries of the Estate or the Trust. However, in a Guardian/Ward representation where the attorney is representing the Guardian, the Supreme Court has stated that in a Guardian/Ward matter the Guardian is performing work for only one person, i.e., the Ward. In Branham v. Stewart, 307 SW3d 94 (Ky 2010), the Supreme Court held that in a Guardian/Ward representation, there is a "direct attorney-client relationship" between the attorney and the ward. In Branham, the Guardian/Ward representation

concerned a minor child as the Ward. The legal analysis would also apply to a person under a disability for whom a Guardian has been appointed in a Civil Disability proceeding, as in the case concerning Bessie Morgan in 06-H-0029. Both a minor and a disabled person are non sui juris. Therefore, Ms. Morgan was also a former client of the Tipton and Tipton law firm under a standard of care conflict of interest analysis pursuant to Rule 1.9.

18. Under Rule 1.9, unless the former client gives informed consent confirmed in writing, a lawyer may not represent a client if the lawyer earlier represented another person in the "same or substantially related matter" in which the interests of the current client are "material adverse" to the interests of the former client. Comment 2 to Rule 1.9 indicates generally that the scope of the "matter" is fact-dependent and may be a matter of degree. That Comment concludes by stating that the "underlying question" is "whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a change in sides in the matter in question." In my professional opinion, the conduct of Wesley Tipton in the representation of the Defendants represented just such a changing of sides given the earlier representation of Diane Hoskins and Bessie Morgan in the Civil Disability proceeding. Comment 3 notes that "substantially related" is present if the representation involve the "same transaction or legal dispute" or if there is a "substantial risk that confidential factual information as would have normally been obtained in the prior representation would materially advance the client's position in the subsequent matter." In my professional opinion, that "substantial risk" is present in the

current case concerning Wesley Tipton.

19. Given the matters at issue in the earlier civil disability proceeding as set out in the documents I was provided, and the positions asserted by the Defendants concerning Ms. Hoskins and Ms. Morgan in the nursing home case, the two representations are substantially related and concern the same or substantially same matter for which representation of the subsequent client is prohibited unless the former client gives informed consent, confirm in writing. Furthermore, the conduct of the Defendants, through counsel, including Wesley Tipton, to introduce evidence and testimony concerning the earlier Civil Disability proceeding confirms that the two legal matters were the same or substantially related matters for a conflict of interest analysis concerning the standard of care of Mr. Tipton. Based on the matters which occurred during the Bench Conference during trial as noted above as one of the items I was provided and reviewed, it does not appear that informed consent of the former clients, either Ms. Hoskins or Ms. Morgan, was ever sought or obtained.

20. Rule 1.9(c) also sets out limitations on an attorney using and revealing information from a previous representation subject to certain exceptions, which, in my professional opinion, do not exist in this case. The "use" limitation would apply if the Rules of Professional Conduce would permit or require the disclosure or if the information has become "generally known." Generally known information is not necessarily matters of public record but are matters which are generally known within the relevant community.

ABA Formal Opinion 479. I have seen no evidence the information sought to be introduced by the Defendants at the recent trial adverse to Ms. Morgan and Ms. Hoskins was generally known. Furthermore, the "reveal" provision of Rule 1.9(c)(1) would only permit an attorney to reveal information from a former representation unless the Rules of Professional Conduct would permit or require. I have not seen any evidence which would provide any waiver of any confidentiality nor require the disclosure of the information sought to be introduced by the Defendants adverse to the interests of Ms. Morgan and Ms. Hoskins.

21. The legal representation provided to Ms. Hoskins and Ms. Morgan by the Tipton and Tipton law firm in 2007 was by Jeffery Tipton, a partner with Wesley Tipton in Tipton and Tipton law firm. Pursuant to Rule 1.10(a), no attorney may knowingly represent a client if any other attorney within the law firm, if practicing alone, would be prohibited from doing so pursuant to Rule 1.7 or Rule 1.9. In the present case, Jeffery Tipton, who represented Diana Hoskins and Bessie Morgan, would not have been able to switch sides and represent the Defendants in the nursing home civil case adverse to the interests of Ms. Hoskins or Ms. Morgan. Since Jeffery Tipton and Wesley Tipton are partners of the same law firm, the conflict of interest of Jeffery Tipton is imputed to Wesley Tipton.

22. Based on the foregoing analysis and information set out in this Affidavit, in my professional opinion, within reasonable probability, Wesley Tipton's representation of

the Defendants in the civil suit was a conflict of interest which precluded him from representing the Defendants and that conflict of interest was not waived nor consented to by either Ms. Morgan, through the personal representative of her Estate, nor by Diana Hoskins. In my professional opinion, this deviation of the standard of care was materially prejudicial to the rights of the Plaintiff to a fair trial. Furthermore, based on the Bench Conference I reviewed which occurred during the jury trial in the civil suit, had such consent been requested by the Defendants, the current clients of Wesley Tipton, such consent from the former clients would have been expressly denied.

Peter L. Ostermiller

COMMONWEALTH OF KENTUCKY)
COUNTY OFJEFFERSON)

Subscribed and sworn to before me by Peter L Ostermiller, this 30th day of January, 2023.

My commission expires: 4-28-2023

Notary Public, State at Large, KY
Print Name: Jennifer M. Nieman
Notary ID: 620068

PETER L. OSTERMILLER
Attorney at Law
1303 Clear Springs Trace, Suite 110
Louisville, Kentucky 40223

502-426-1798(office)
502-426-1755 (fax)
502-648-4160 (cell)
peterlo@ploesq.com

Admitted Commonwealth of Kentucky 1980

Admitted United States District Courts for the Western and Eastern Districts of Kentucky, and Sixth Circuit Court of Appeals

Education

University of Louisville, College of Arts and Sciences, B.A., Political Science, 1977

University of Louisville School of Law, J.D., 1980
Managing Editor, Journal of Family Law 1979-1980

Employment

1995 to present: Peter L. Ostermiller, attorney at law

1989 to 1995: Of Counsel, Frank Haddad

1980 to 1995: Associate attorney, Stallings and Stallings

Professional Associations

Kentucky Bar Association

Louisville Bar Association

Association of Professional Responsibility Lawyers

Law Practice

The first 15 years or so of Mr. Ostermiller's practice covered many civil practice areas including, domestic relations proceedings, tort litigation, contract litigation, transactional matters such as corporate formation and Wills and Trusts, real estate litigation, administrative proceedings at the local and state level, appeals and original actions, and similar legal matters both litigation-based and transactional. Additionally, in working with Frank Haddad, Mr. Ostermiller participated in a number of white-collar criminal defense cases at the Trial Court level and at the appellate level. During this time, Mr. Ostermiller's practice increased concerning legal ethics and professional responsibility

matters. As a result of Mr. Ostermiller's representation of attorneys over the last 30 years or so regarding their ethical duties and responsibilities in representing their clients, he has acquired broad knowledge regarding the underlying and varied practice areas of the attorneys he has represented. Given the nature of Mr. Ostermiller's practice, he has had legal matters in Courts throughout the Commonwealth.

Mr. Ostermiller's law practice is concentrated in the following areas:

- Counseling and conferring with lawyers and law firms regarding professional responsibility and legal ethics matters concerning the operation of their practice and law firm.
- Representation of lawyers in attorney disciplinary proceedings.
- Representation of parties in attorney's fee disputes.
- Representation of applicants seeking admission and attorneys seeking readmission before the Kentucky Office of Bar Admissions, Character and Fitness Committee.
- Counseling and representation regarding Unauthorized Practice of Law matters and Attorney Advertising Commission matters.
- Counseling and conferring with Judges regarding their judicial ethics and representing Judges before the Judicial Conduct Commission.
- Serving as a consulting expert and expert witness regarding legal ethics and professional responsibility.
- Appellate practice and Original Actions before Kentucky appellate courts.
- Administrative Disciplinary proceedings for licensed professions in Kentucky regulated by the General assembly.
- General litigation practice.

Other Professional Activities

Since the late 1980's, Mr. Ostermiller has taught numerous seminars on legal ethics and professional responsibility. He has also given judicial ethics seminars on behalf of the Kentucky Administrative Office of the Courts to Judges, Master Commissioners, Trial Commissioners and judicial staff attorneys.

Mr. Ostermiller has taught a professional responsibility course at the University of Louisville, Brandeis School of Law.

Mr. Ostermiller's legal ethics and professional responsibility law practice has been the subject of the following newspapers articles:

"When Lawyers Need a Lawyer: Attorneys, Judges Call Louisville Man When Trouble Arises," Courier-Journal, January 11, 2004

"Kentucky Solo Builds Practice Representing Lawyers," Lawyers Weekly USA, May 24, 2004

Kentucky Bar Association Ethics 2000 Committee regarding Rules of Professional Conduct, member (2003-2006)

Kentucky Supreme Court Task Force on Kentucky Attorney Disciplinary Procedure Rules, member (1999-2000)

AV rating through Martindale-Hubbell

Personal Information

Mr. Ostermiller has been married to Kathy Ostermiller for 46 years, and their one child, Beth Whitsel, 34 years old, is married, has one child, and lives and works in Baltimore, Maryland.

Filed 09-CI-00072 03/01/2023 Gary W. Barton, Whitley Circuit Clerk

EXHIBIT 11

MOS : 000068 of 000144

Filed 09-CI-00072 03/01/2023 Gary W. Barton, Whitley Circuit Clerk

Filed 09-CI-00072 01/31/2023 Gary W. Barton, Whitley Circuit Clerk

COMMONWEALTH OF KENTUCKY
34TH JUDICIAL DISTRICT
WHITLEY DISTRICT COURT
06-H-00029
CORBIN DIVISION

COMMONWEALTH OF KENTUCKY, EX REL,
MOSSIE POYNTER

VS:

PETITION FOR RELIEF FROM
ORDER OF APPOINTMENT OF GUARDIAN

BESSIE L. MORGAN RESPONDENT

* * * * * * * * * *

Comes the movant, Diana Hoskins, pursuant to KRS 387.620, and after being first duly sworn, states as her petition for relief from the Order of Appointment of Guardian, states and alleges as follows:

1. The movant, Diana Hoskins, is an interested person in regards to the ward, Bessie L. Morgan, in that the movant is Bessie L. Morgan's daughter. The movant's address is 142 Osborne Road, London, Kentucky 40741.

2. The name and address of the ward is Bessie L. Morgan, 100 Chestnut Road, Corbin, Kentucky 40701.

3. The name of the guardian appointed by the Court pursuant to the Order entered March 22, 2007 is Commonwealth of Kentucky. No address is given for the guardian.

4. The names and addresses of the ward, Bessie L. Morgan's, next of kin are as follows:

(1) Janet Morgan, 4214 Romaine Drive, Apartment #13, Cincinnati, OH 45209;

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(2) Clayton Morgan, 21230 Palataka Drive, Dunnellon, FL 34431;

(3) Donna Witt, 2516 Tri-County Highway, Mt. Orab, Ohio;

(4) Dallas Morgan, ADC 76492-1-B-12, Lewis Morey Unit, P.O. Box 3300, Buckeye, AZ 85326; and

(5) Diana Hoskins, 142 Osborne Road, London, KY 40741.

5. The name and address of the facility having custody of the ward is Hillcrest Nursing Home, American Greetings Road, Corbin, Kentucky 40701.

6. The movant requests that she be substituted as guardian for Bessie L. Morgan in the place of the Commonwealth of Kentucky. In support of her request for relief, the movant submits that she has taken care of her mother's personal as well as financial needs for several months prior to the filing of the Petition initiating this action. The Petition was filed by the ward's sister, Mossie Poynter, who withdrew her request to become guardian on the date of the hearing. After her request was withdrawn, no opportunity was given to the movant, nor any of her siblings as to whether they would like to be the guardian.

The movant is a responsible individual who loves her mother and has always taken care of her mother's needs. Further, since this matter was initiated, it has been the movant who has mainly taken care of her mother's personal needs as well as seeing after her finances. Even since the entry of the Order on March 22, 2007, the movant has borne all responsibilities, both personal and

financial, for her mother, the ward.

The ward is currently residing at Hillcrest Nursing Home on American Greetings Road in Corbin, Kentucky. The movant visits with and takes care of her mother on almost a daily basis. The movant has applied for her mother to be admitted to Laurel Heights Nursing Home in London in the Alzheimer Care Unit. The ward is currently on the waiting list and the movant would like to be able to move her mother to the Alzheimer Unit at this facility. In order to do so, she will have to be named guardian for her mother.

7. The Commonwealth of Kentucky was appointed guardian for the ward on March 22, 2007. No representative of the Commonwealth has made any effort or attempt whatsoever to visit with, tend to the personal affairs or oversee the financial affairs of the ward. The movant has been required to continue to take care of these matters for the ward.

WHEREFORE, the movant respectfully requests an Order be entered by the Court modifying the Order of Appointment of Guardian entered March 22, 2007, to designate the movant, Diana Hoskins, as guardian of the ward, Bessie L. Morgan.

Respectfully Submitted,

JEFFERY R. TIPTON
TIPTON & TIPTON
P.O. BOX 1284
CORBIN, KENTUCKY 40702
TELEPHONE: (606) 528-1166

VERIFICATION

I, DIANA HOSKINS do hereby verify that I have read the foregoing and that it is true and correct to the best of my knowledge and belief.

DIANA HOSKINS

STATE OF KENTUCKY

COUNTY OF WHITLEY

Subscribed and sworn to before me this 3 day of May, 2007 by the above named DIANA HOSKINS to be her own free act and deed.

My commission will expire: 7/10/09.

NOTARY PUBLIC

BMorgan001844

NOTICE

Please take notice that the foregoing will be brought on for hearing before the Whitley District Court on Monday, 21st day of May, 2007 at the hour of 10:00 a.m. or as soon thereafter as soon as counsel may be heard.

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing was this 3 day of May, 2007, deposited in the United States mail, postage pre-paid, addressed for delivery to the following:

1. Hon. Paul Winchester, County Attorney, P.O. Box 1278, Corbin, Kentucky 40702;

2. Hon. Sandra Reeves, P.O. Box 1341, Corbin, Kentucky 40702; and

3. Commonwealth of Kentucky, Cabinet for Families and Children, P.O. Box 560, Corbin, Kentucky 40702.

JEFFERY R. TIPTON

BMorgan001845

COMMONWEALTH OF KENTUCKY
34TH JUDICIAL CIRCUIT
WHITLEY DISTRICT COURT
CASE NO. 06-H-00029

COMMONWEALTH OF KENTUCKY, EX REL, MOSSIE POYNTER — **PETITIONERS**

v.

BESSIE L. MORGAN — **RESPONDENT**

ORDER

IT IS HEREBY ORDERED that Diana Hoskins, is appointed Successor Guardian for the Respondent, Bessie L. Morgan, and the State is relieved from their duties as Guardian herein, effective May 21, 2007.

Dated this 19th day of June, 2007.

CATHY E. PREWITT
Judge, Whitley District Court

DISTRIBUTION:

Hon. Jeffery R. Tipton
Tipton & Tipton
P.O. Box 1284
Corbin, KY 40702

Cabinet for Families & Children
P.O. Box 560
Corbin, KY 40702

Hon. Sandra Reeves
P.O. Box 1341
Corbin, KY 40702

ENTERED
GARY W. BARTON, CLERK
JUN 20 2007
WHITLEY CIRCUIT/DISTRICT COURT
BY: D.C.

Clerk's Initials 6.20.07 Date

BMorgan001805

COMMONWEALTH OF KENTUCKY
34TH JUDICIAL CIRCUIT
WHITLEY DISTRICT COURT
CORBIN DIVISION
CASE NO: 06-H-00029-001

FILED
NOV 01 2006
GARY W. BARTON

COMMONWEALTH OF KENTUCKY, ex rel
MOSSIE POYNTER, PETITIONER

VS.

BESSIE LEE MORGAN, RESPONDENT

MOTION TO DISMISS PETITIONER AND APPPOINT COMMONWEALTH AS GUARDIAN FOR THE RESPONDENT

Comes now the Respondent, Bessie Morgan, by and through her guardian ad litem and counsel, and move this Court for an order dismissing the petitioner herein, and substituting the Commonwealth as guardian for the Respondent. In support of said motion the Respondent states as follows:

1. The Respondent's sister, who is the petitioner herein, had filed for guardianship over the Respondent. The Respondent's daughter, has argued with the Respondent over filing the petition, and requested that the petitioner dismiss the petition for guardianship.

2. The Respondent's daughter, has a fully executed power of attorney, signed by the Respondent, in which she was granted the authority to make the decisions for the Respondent that the emergency guardian currently makes through her emergency appointment.

3. It appears that the Petitioner and Respondent's daughter have argued considerably over who should be the Respondent's guardian; however, the daughter never filed a petition for guardianship.

4. There have been several occasions when the Petitioner has initiated contact with the guardian ad litem, related to the disagreement between her and the Respondent's daughter. In addition, the Respondent's daughter and several other family members have complained to the deputy clerk of the Whitley District Court, and have expressed their anger with the Court for continuing the hearing; and for failing to give these family members advanced notice of same, although these individuals have not previously requested notice, they were not previously disclosed to the Court by the Petitioner, and notice to these nonparties is not required.

5. In addition, the petitioner and the Respondent's daughter have argued considerably over the Respondent's current placement in the nursing home, with the Respondent's daughter complaining that the nursing home was consuming the Respondent's funds for her care, and that she had no say over how the Respondent's funds were used. It appears that in an attempt to divert the Respondent's income, the Respondent's daughter attempted to remove the Respondent from her current placement, without the consent of the guardian ad litem, the social worker assigned to the case, the Respondent's physician, the petitioner, or the Court.

6. When the guardian ad litem and the social worker were contacted they discovered that the prior allegations of elder abuse have been raised against the daughter, after witnesses at the hospital observed said abuse. It appears that the charges were dismissed only after the Petitioner herein admitted that, upon the request of the daughter, she denied that the daughter had abused the Respondent.

7. Upon the recommendation of the social worker and the guardian ad litem herein, the nursing home denied the Respondent's daughter permission to remove her from the home.

8. The Respondent's daughter then, through independent counsel, established a trust, and made herself the trustee over the Respondent's income, with a provision to pay herself an income for administering the trust, and thereby diverting the funds away from the Respondent's care.

9. As a result of the discord with the Respondent's daughter and other family members, the Petitioner, Mossie Poynter, has informed the guardian ad litem that it is her desire to withdraw the petition that she filed for guardianship over the Respondent, Bessie Morgan, as she can no longer deal with the stress of same. The Petitioner has likewise informed the guardian ad litem that in exchange for agreeing to withdraw her petition for guardianship that the Respondent's daughter has consented to leave the Respondent in the nursing home, while administering the trust that she set up, which permits her to pay herself income for same.

10. The guardian ad litem is not convinced that dismissing the petition altogether is in the best interest of the Respondent, although would agree that it is in the Respondent's best interest to dismiss the Petitioner, Mossie Poynter, and to release her from her obligation to the Respondent, as the Petitioner no longer desires to carry out said responsibility.

11. The guardian ad litem is convinced that the Respondent's monthly income should be used exclusively for the Respondent' support, and that the trust set up by the respondent's daughter should be set aside to the extent that it permits any of her income to be used for any purpose other than the support of the Respondent, and that the Respondent's daughter should not be permitted to pay herself an income for administering the trust.

WHEREFORE, the guardian ad litem, moves this court for an order as follows:

1. Continuing with the disability hearing to determine the Respondent's disability;
2. Dismissing the Petitioner, Mossie Poynter, as emergency guardian over the Respondent, Bessie Morgan;
3. In the event that the Court finds the Respondent disabled, appointing the Commonwealth as her guardian;
4. Setting aside the trust to the extent that the Respondent's daughter may use the trust for any purpose other than the Respondent's care, and denying the trustee permission to pay herself an income for administering the trust; and
5. Compelling the administrator of the trust to make a full accounting on a monthly basis.

Respectfully submitted,

Sandra J. Reeves

SANDRA J. REEVES
The Reeves Law Office, PLLC
1015 Master Street
P.O. Box 1341
Corbin, Kentucky 40702-1341

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing was this 30th day of October, 2006, served on the following via regular U.S. Mail, postage prepaid, addressed to the following:

ORIGINAL

Whitley District Clerk
805 South Main Street, Suite 10
Corbin, Kentucky 40701

COPY

Whitley County Attorney
P.O. Box 238
Williamsburg, Kentucky 40769

Jean Collins
Community Based Services
P.O. Box 560
Corbin, Kentucky 40702

Mossie Poynter
267 S. Hwy 1223
Corbin, Kentucky 40701
Emergency Guardian and Petitioner

Sandra Reeves
SANDRA J. REEVES

BMorgan001889

COMMONWEALTH OF KENTUCKY
34TH JUDICIAL CIRCUIT
WHITLEY DISTRICT COURT
CORBIN DIVISION
CASE NO: 06-H-00029-001

COMMONWEALTH OF KENTUCKY, ex rel
MOSSIE POYNTER, PETITIONER

VS.

BESSIE LEE MORGAN, RESPONDENT

NOTICE OF FILING
AND
SUPPELEMENTAL REPORT OF GUARDIAN AD LITEM

Notice is hereby given to the parties by the Hon. Sandra Reeves, guardian ad litem for the Respondent, Bessie Morgan, of the filing of a Qualifying Income Trust, that appears to have been drafted by attorney, John Milton, for the Respondent, Bessie Morgan, by Diana Hoskins, who holds power of attorney for the Respondent, and by Mossie Poynter, who was appointed by this Court as the emergency guardian for the Respondent. See **EXHIBIT A** attached hereto and incorporated herein by reference as if set forth fully.

The Qualifying Income Trust transfers the Respondent's monthly check to an account over which Diana Hoskins retains control, and from which she is authorized to make disbursements, including paying herself a trustee and administration fee, at her sole discretion.

Prior to the Qualified Income Trust being drafted, the Trustee, Diana Hoskins, attempted to remove the Respondent from the nursing home, over the objection of the emergency guardian, Mossie Pointer, and argued that she should be permitted to remove

the Respondent as the nursing home was consuming the Respondent's income. There were allegations by the emergency guardian that the trustee, Diana Hoskins, was attempting to gain control over the Respondent's check for her own personal use by removing the Respondent from the nursing home. In addition, the Cabinet for Health and Family Services had opened an investigation of elder abuse against the Respondent, perpetrated by the Trustee, Diana Hoskins, based upon a report by witnesses at the hospital whom had witnessed the abuse. The emergency guardian confirmed the abuse had taken place and also informed the undersigned that the investigation was closed after the trustee had coerced her into stating that no such abuse had taken place.

Based upon this information, the nursing home staff, the social worker assigned to the Respondent's interdisciplinary evaluation team, and the undersigned agreed that they would not authorize the removal of the Respondent from the nursing home. Consequently, to the trustee. The trustee then without informing the undersigned or this Court then contacted the Hon. John Milton, who without previously discussing the matter with the undersigned, drafted, executed and filed the Qualified Income Trust.

Respectfully submitted,

SANDRA J. REEVES
The Reeves Law Office, PLLC
1015 Master Street
P.O. Box 1341
Corbin, Kentucky 40702-1341

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing was this 29th day of October, 2006, served on the following via regular U.S. Mail, postage prepaid, addressed to the following:

BMorgan001891

Reeves Law Office, PLLC
1015 Masters Street
P.O. Box 1341
Corbin, Kentucky 40702-1341

Sandra J. Reeves
Attorney at Law

Phone: 606 528-4376
Fax: 606 528-4438
reeveslawoffice@aol.com

December 13, 2006

Dr. Samuel D. Kreis, M.D.
Mountain View Family Practice
148 London Mountain View Drive, Suite 3
London, Kentucky 40741

Re: Commonwealth v. Bessie Lee Morgan
Whitley District Court, Corbin Division
Case No: 06-H-00029-001
Your Patient: Bessie Lee Morgan
DOB: 09-12-1929

Dear Dr. Kreis:

I am writing to you on behalf of my client, Bessie Lee Morgan. Ms. Morgan's sister, Mossie Poynter, has petitioned for guardianship over Ms. Morgan. Her mental health hearing has been continued until January 24, 2007. The Court cannot convene the hearing to determine Ms. Morgan's mental disability until such time as the attached form has been completed by both a physician and psychologist/psychiatrist who have treated Ms. Morgan, that is no more than 30 days old.

Her sister may be contacting you to have your report completed, as her last hearing was set for next Wednesday. Please do not complete your evaluation until after the 24th, so that your report will be no more than 30 days old.

I would be grateful, if you would be so kind as to assist me in getting these forms completed, and then forward to the Court at 805 S. Main Street, Corbin, Kentucky 40701.

Thank you for your assistance in this matter.

Sincerely,

Sandra J. Reeves

Enclosure

SJR/ml

BMorgan001876

Reeves Law Office, P.L.L.C.

Sandra J. Reeves
Attorney at Law

1015 Masters Street
P.O. Box 1341
Corbin, Kentucky 40702-1341

Phone: 606 528-4376
Fax: 606 528-4438
reeveslawoffice@aol.co

December 8, 2006

Ms. Mossie Poynter
267 S. Hwy 1223
Corbin, Kentucky 40701

Ms. Diana L. Hoskins
142 Osborne Road
London, Kentucky 40741

RE: Commonwealth of Kentucky v. Bessie Morgan
Whitley District Court
Action No: 06-H-00029

Dear Ladies:

The Court has continued the hearing in the above referenced matter until December 20, 2006, as neither of you have seen to it that Mrs. Morgan has seen Dr. Glenn Uber, or that his fees have been paid for a consult with Mrs. Morgan since June 1, 2006. Mrs. Poynter has requested leave of the court to be dismissed as petitioner in this action. My guess is that the court will grant her request to be dismissed as petitioner, but may not dismiss the action as Ms. Morgan appears to be in need of assistance.

However, at present Ms. Poynter is still Ms. Morgan's emergency guardian, and Ms. Hoskins is the trustee over Ms. Morgan's finances.

In those capacities both of you are responsible for seeing to it that Mrs. Morgan receives the medical examination that the court has ordered, and are responsible for seeing to it that the cost of the medical evaluation is prepaid from the trust account. Therefore, I would ask that Ms. Hoskins contact Dr. Glenn Uber's office today and find out what his fees will be for performing Ms. Morgan's medical examination, and get that money to Dr. Uber tomorrow.

I would ask that Ms. Poynter, as emergency guardian, make sure that Ms. Morgan gets in to see Dr. Uber as soon as possible so that he can prepare his report prior to the December 20, 2006 hearing date.

BMorgan001871

Failure to carry out your duties toward Ms. Morgan in your capacities as trustee and as emergency guardian could result in a motion for sanctions and removal against both of you.

Please notify my office to let me know when you have complied with this request.

Sincerely,

Sandra J. Reeves

AOC-748
Rev. 11-96

Doc. Code: OAEF

Commonwealth of Kentucky
Court of Justice

KRS 387.740, 387.590

Case No. 06-H-00029-001
Court DISTRICT
County WHITLEY

COMMONWEALTH OF KENTUCKY ex rel

MOSSIE POYNTER
Petitioner

VS.

BESSIE LEE MORGAN
Respondent

ENTERED
JUL 12 2006
WHITLEY CIR./DISTRICT COURTS
BY: [illegible] D.C.

ORDER FOR EMERGENCY APPOINTMENT OF FIDUCIARY

*** *** *** ***

Upon motion of the Petitioner, the Court being sufficiently advised finds as follows:

1. A proceeding for a determination of partial disability or disability, or an appeal therefrom, is pending.

2. If immediate action is not taken, there is an imminent danger of (a) serious impairment to the health or safety of the above-named Respondent or (b) damage or dissipation to the Respondent's property. Specifically, said danger consists of: RESPONDENT HAS A RIGHT HIP FRACTURE AND IS AT RISK FOR FUTURE FALLS AND FRACTURES. SHE REQUIRES CONSTANT SUPERVISION FROM A NURSING HOME.

3. The above finding of danger is based on the following source(s): CORBIN FAMILY HEALTH CENTER DR. GLENN M. UBER, D.O.

4. The above finding of danger requires the provision to Respondent of the following assistance:

Based on the above findings, IT IS HEREBY ORDERED:

1. That the following [X] individual [ ] agency is appointed Emergency Limited [X] Guardian [ ] Conservator:

Name: MOSSIE POYNTER

Address: 100 CHESTNUT RD., CORBIN, KY 40701

BMorgan001910

Phone: (606) 528-[illegible]

2. That bond is fixed at the sum of $ _____.

3. That the emergency fiduciary shall perform all orders and decrees of this Court, including:

a. The filing of reports and / or inventories as required by KRS Chapter 387.

b. [ ] The filing of a report of the personal status and condition of the Respondent and the initial inventory of the Respondent's assets within _____ days of this appointment.

c. [ ] Other: _____

4. That the emergency fiduciary's powers and duties are Limited to: [ ] disposing of property, [ ] executing instruments, [ ] entering into contractual relationships, [X] determining living arrangements, [X] consenting to medical procedures, [ ] handling financial responsibilities, and [ ] other: _____

5. That unless otherwise ordered by this Court, this order remains in effect until such time as the pending action or appeal therefrom has been resolved.

6. That a final hearing is scheduled for _____ a.m. / p.m., _____, 19____.

There being no just cause for delay, this is a final and appealable order.

07-12-06
Date

Judge

Please print or type the Judge's name in the space below:

DAN BRAUN

* * * * * * * * * * * *

To Be Completed On Copies Only:

I, _____, Clerk of the _____ District Court, do hereby certify that this is a true and correct copy of the Order for Emergency Appointment of Fiduciary as recorded in my office.

This Order and Qualification is in full force and effect.

Date

Signature

Copy Distribution:
Petitioner / Attorney / County Attorney
Respondent / Attorney
All persons named in petition
Facility where or person with whom respondent resides

BMorgan001911

Filed 09-CI-00072 03/01/2023 Gary W. Barton, Whitley Circuit Clerk

EXHIBIT 12

MOS : 000087 of 000144

Filed 09-CI-00072 03/01/2023 Gary W. Barton, Whitley Circuit Clerk

Filed 09-CI-00072 01/31/2023 Gary W. Barton, Whitley Circuit Clerk

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CIVIL ACTION NO. 09-CI-0072

WALTER HOSKINS, AS EXECUTOR OF THE ESTATE OF BESSIE MORGAN, DECEASED

V.

HILLCREST NURSING HOME OF CORBIN, INC., ET AL.

DEPONENT:

WES TIPTON 30(B)(6)

DATE:

April 01, 2022

COMMONWEALTH OF KENTUCKY

WHITLEY COUNTY CIRCUIT COURT

DIVISION 1

CIVIL ACTION NO.: 09-CI-0072

WALTER HOSKINS, AS EXECUTOR OF
THE ESTATE OF BESSIE MORGAN,
DECEASED,
Plaintiff

V.

HILLCREST NURSING HOME OF CORBIN,
INC., ET AL.,
Defendants

DEPONENT: WES TIPTON, 30(b)(6)

DATE: APRIL 1, 2022

REPORTER: MAGGIE PATTERSON

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Louisville, KY 40201

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APPEARANCES

ON BEHALF OF THE PLAINTIFF, WALTER HOSKINS, AS EXECUTOR OF THE ESTATE OF BESSIE MORGAN, DECEASED:

Matthew M. Coman, Esquire
Garcia & Artigliere
444 East Main Street
Suite 108
Lexington, Kentucky 40507
Telephone No.: (502) 584-3805
E-mail: mcoman@lawgarcia.com
(Appeared via videoconference)

ON BEHALF OF THE DEFENDANTS, HILLCREST NURSING HOME OF CORBIN, INC., FIRST CORBIN LONG TERM CARE, INC., ET AL.:

Mark E. Hammond, Esquire
O'Bryan, Brown & Toner, PLLC
401 South Fourth Street
Suite 2200
Louisville, Kentucky 40202
Telephone No.: (502) 585-4700
E-mail: hammondm@obtlaw.com
(Appeared via videoconference)

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STIPULATION

The VIDEO 30(b)(6) deposition of WES TIPTON was taken at KENTUCKIANA REPORTERS, LLC, 730 WEST MAIN STREET, SUITE 101, LOUISVILLE, KENTUCKY 40202, via videoconference in which all participants attended remotely, on FRIDAY the 1st day of APRIL 2022 at 10:08 a.m.; said VIDEO deposition was taken pursuant to the KENTUCKY Rules of Civil Procedure. The above-referenced notarial act involved the use of communication technology. Specifically, the court reporter appeared by videoconference pursuant to KRS 423.455 and complied with all statutory requirements.

It is agreed that MAGGIE PATTERSON, being a Notary Public and Court Reporter for the State of KENTUCKY, may swear the witness.

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PROCEEDINGS

COURT REPORTER: We are now on the record. My name is Maggie Patterson. I'm the video technician and court reporter today representing Kentuckiana Reporters located at 730 West Main Street, Suite 101, Louisville, Kentucky 40202. Today is the first day of April 2022. The time is 10:08 a.m. We are convened by videoconference to take the 30(b)(6) deposition of First Corbin Long Term Care, Inc., Wes Tipton, in the matter of Walter Hoskins as executor of the estate of Bessie Morgan, deceased, versus Hillcrest Nursing Home of Corbin, Inc., et al. pending in the circuit court of Whitley County, Kentucky, civil action number 09-CI- 0072. Will counsel please state your appearance, how you are attending, and the location you're attending from, starting with the plaintiff's counsel?

MR. COMAN: Yes. Good morning. My name is Matthew Coman. I'm plaintiff's counsel. I am appearing via Zoom from my home office in New Orleans, Louisiana.

MR. HAMMOND: I'm Mark Hammond. I'm here for the defendants in the case and the witness, Wes Tipton.

COURT REPORTER: Thank you. And sir, will you please hold your ID up to the camera and state your name? That was perfect.

THE WITNESS: My name -- my name is Wesley R. Tipton.

COURT REPORTER: Perfect. Thank you. And do all parties agree that the witness is, in fact, Mr. Tipton?

MR. COMAN: Yes.

MR. HAMMOND: Yes.

COURT REPORTER: Thank you. And sir, will you please raise your right hand?

THE WITNESS: Yes. Just one second.

COURT REPORTER: Yeah. You're fine. Do you solemnly swear or affirm that the testimony you're about to give is the truth, the whole truth, and nothing but the truth?

THE WITNESS: Yes, ma'am.

COURT REPORTER: Thank you. You may proceed.

DIRECT EXAMINATION

BY MR. COMAN:

Q Thank you. Sir, please state your full name for the record.

A Wesley R. Tipton.

Q And sir, do you live in Corbin, Kentucky?

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A Yes, I do.

Q Please take a look at the notice of deposition. I will share my screen. And I believe you also have a copy in front of you; is that correct?

A Yes.

Q All right. Let me know, can you see my screen with the document attached?

A Yeah.

Q Okay. This is the same notice that we provided to counsel in this case for today's deposition. Have you had a chance to review this document?

A Yes.

Q Sir, by whom are you employed?

A I'm self-employed. I'm an attorney with the law firm of Tipton & Tipton. It's myself and my brother, Jeff Tipton, are the partners. And my daughter's a partner, Sarah Tipton Reeves, and my son is also employed here as an attorney.

Q Okay. What position do you hold with First Corbin Long Term Care, Inc., if any?

A I'm the president.

Q Since when?

A For several years. I -- I don't have that in front of me. I can check with the secretary of state, but probably for about five years. Five or six, maybe a

little bit longer.

Q Okay. In 2006 and 2007, SEKY Holding Company utilized the name First Corbin Long Term Care, Inc.; is that correct?

A Yes, it is.

Q And is it correct that First Corbin Long Term Care, Inc. changed its name to SEKY Holding Company in 2017?

A That's correct.

Q And for today's deposition, I will use those names interchangeably as to refer to the same entity that was first known as First Corbin Long Term Care, Inc. up until 2017 and then as SEKY Holding Company after 2017. Is that okay and acceptable to you?

A Yes, it is. I -- I understand.

Q Okay. It's two different names, same company, correct?

A Correct.

Q Looking at the deposition notice, please share with us which topics of inquiry relating to which you are being produced as the corporate representative.

A I've reviewed the notice and each -- each topic. I'm the corporate representative for First Corbin Long Term Care or the other entity. What is that, South -- SEKY, I'll be the corporate rep.

Q Okay. And for the record, that's SEKY Holding Company; is that correct?

A Yes. And I'm writing it down just so I remember it. Just a second. Yes.

Q Okay. And take a look at page 4 of the notice, which is the request for production of documents.

A Yes.

Q Okay. And those are six in number, and I'm going to go through those one at a time. Looking first at the request for production of documents number 1, "Seeking any and all documents in the deponent's care, custody or control which pertain reference and/or referred to Bessie Morgan or plaintiff." What, if anything, has First Corbin produced?

A No documents which refer to Bessie Morgan or the plaintiff. There are none.

Q What efforts did you undertake to search for any responsive records to that particular request for production?

A I talked to the custodian of the records, Jackie Willis, and asked her to review those documents, anything that might be in the possession of First Corbin that had referred to Bessie Morgan. Met with her and there was nothing.

Q Okay. What computer and e-mails were searched by whom and using what search terms?

A Well, First Corbin Long Term Care or SEKY Holding does not have a e-mail address, so no search terms were used. I did not check any e-mail. There is no e-mail to check.

Q Does First Corbin Long Term Care and/or SEKY Holding Company, whichever it is, does the company maintain or has ever maintained any computer files?

A No. It has no e-mail address, no computer files.

Q And my question is more expansive and larger in scope than just confined to e-mail. So my question is, does the company have, or has it ever had, any computer files in any type of digital format?

A No.

Q Looking at request for production of documents number 2, did First Corbin Long Term Care, Inc., exchange any documents with the facility Hillcrest or Management Advisors?

A No.

Q First Corbin doesn't communicate with the facility?

A Well, it -- it asked for Bessie Morgan. There was nothing referring to Bessie Morgan or her residency

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between First Corbin or any other listed defendant.

Q Right. And if you look at -- let's look at -- I'm going to read this into the record so we can be very specific on

A Yes.

Q -- and you understand.

A Yes.

Q Request for production of documents number 2 states specifically, "All documents which were exchanged between the deponent and the facility or any named co-defendants during the time period Bessie Morgan was a resident of the facility."

A Okay.

Q And the time period in which Bessie Morgan was a resident, the records show that occurred from July 14, 2016, through October 1 of -- I'm sorry -- July 14 of 2006 through October 1 of 2007. So that's the term of the residency.

A Yes, it is.

Q "Of the facility concerning any relationship, obligation, services, or payments between First Corbin and the facility or any named co-defendants."

A Yes.

Q So did First Corbin exchange any documents with the facility, Hillcrest, or Management Advisors,

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from July 14, 2006 through October 1, 2007?

A It did not.

Q First Corbin did not communicate with the facility for that time fame?

A They may have communicated, but as far as exchanging documents, there were no documents exchanged.

Q Do those communications occur between -- or did they occur between First Corbin and the facility through Management Advisors, Inc.?

A I do not know. I know of no communications.

Q In another matter, the corporate representative for Management Advisors -- strike that -- the corporate representative for one of the named defendants testified that, "Our communications, generally, between the corporation, the holding company and the facility flow through Management Advisors." Do you have any cause to disbelieve that particular testimony?

MR. HAMMOND: Object to form. Matt, can you tell me whose deposition you're talking about?

MR. COMAN: It's Mr. Alsip's, about three weeks ago.

MR. HAMMOND: Okay. He testified on behalf of Forcht Group of Kentucky, not on behalf of First Corbin Long Term Care, correct?

MR. COMAN: Correct.

MR. HAMMOND: And he was speaking for the Forcht Group of Kentucky. I don't recall him speaking on behalf of First Corbin Long Term Care, Inc., so...

MR. COMAN: Correct.

MR. HAMMOND: Yeah. So I don't think his testimony has anything to do with the First Corbin Long Term Care, Inc. But given my objection, you can answer the question, Wes.

A I -- you -- if -- if -- you'll just have to take that up with Mr. Alsip. I don't have any documents that were -- that shows there were any communications between the two.

BY MR. COMAN:

Q Okay. So on our -- so on number 2, same question as for number 1. But as for number 2, what efforts did you undertake to search for those responsive records to that particular request?

A I talked to and met with Jackie Willis, the custodian of the records.

Q And what efforts did she undertake in turn?

A Looked through the -- the files, what files there are for First Corbin, to determine if there were anything that existed.

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Q Are those paper files or computer files or both?

A It would just be a file. I'm not aware of any computer files.

Q Did Ms. Willis specifically inform you of whether or not those files were in paper format or computer format or what format those files are in?

A Did not. I'm assuming they were paper files. That's the way we've always dealt with them.

Q And what instructions did you provide to her?

A I need to -- I -- I -- I read her a copy of this and probably -- and gave her a copy of this, and it, on number 2, told her to provide any documents between First Corbin and Hillcrest Nursing Home, Inc. and Management Advisors.

Q Okay. And what was her response?

A There were none.

Q Looking at request for production number 3, "Did First Corbin receive any documents from the facility, Hillcrest, or from Management Advisors from July 14, 2006 through October 1, 2007"?

MR. HAMMOND: In regard to number 3, Matt, he's not going to answer questions related to budget. The budget's specifically referenced there, but you can answer the question as it applies to those other

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issues or topics, Wes.

MR. COMAN: Well, before he gets to his answer, which -- are you instructing him not to answer that particular part of the question?

MR. HAMMOND: I am.

MR. COMAN: What's your basis?

MR. HAMMOND: I was getting to it.

MR. COMAN: Okay.

MR. HAMMOND: I don't think it's anticipated the lead to admissible evidence. In fact, this court has ruled in another case that it's not discoverable, so that's the basis.

MR. COMAN: That's not what the court ruled in another case, but we'll take that up with Your Honor on a future date to resolve that issue.

MR. HAMMOND: Sure.

BY MR. COMAN:

Q Sir, your answer?

A Okay. Repeat the question. I'm sorry.

Q All right. Request for production of documents number 3 states specifically, and requests that "All documents which provided to you," meaning First Corbin, "by the facility," meaning Hillcrest, "or any co-defendants, including Management Advisors and/or by you to the facility or any co-defendants referencing

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facility, staffing, census, budget, and/or regulatory compliance issues during the time period that Bessie Morgan was a resident of the facility."

A But there were none.

Q What efforts did you want take to search for responsive records to that particular request for production?

A I talked with the custodian of records, Jackie Willis, provided her with this, or read it to her, one, and asked her, "Do we have any documentation?" There's no documents that flowed either way.

Q Looking at request for production number 4, did First Corbin exchange any documents with the facility, Hillcrest, or with Management Advisors from July 14, 2006 through October 1, 2007, evidencing ownership, supervision, oversight, or management?

A No.

Q What efforts did you undertake to search for responsive records to that particular request for production?

A I spoke with the custodian of records, Jackie Willis, provided her with a copy of this, or read it, had her check, and there were no documentation.

Q Is it First Corbin's testimony that First Corbin has never exchanged any documents with any of the

name co-defendants in this case?

A Yes.

Q And it has no documents related to any of the services or payments from or to Hillcrest from July 14, 2006 through October 1, 2007; is that correct?

A Yes, it is.

Q And the same would be true as to issues concerning staffing?

A Correct.

Q Census?

A Correct.

Q Budget?

MR. HAMMOND: Objection. He's not going to answer questions related to budget, reasons stated earlier.

BY MR. COMAN:

Q And regulatory compliance?

A Correct.

Q Looking at requests for production of documents numbers 5 and 6 on page 5 of the notice, does First Corbin possession any documents responsive to those two particular requests?

MR. HAMMOND: Matt, let me jump in here just a second. You referenced earlier any time -- I assume Mr. Tipton is -- he's understanding that you're

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talking about July of 2006 through October of 2007.

MR. COMAN: Correct.

MR. HAMMOND: So that's what he's here to talk about. I just want to make sure that's clear on the record.

MR. COMAN: Well, what it says in the request for production, during the time period to the residency.

MR. HAMMOND: Right. I just want to make sure we're on the same page.

BY MR. COMAN:

Q Okay. Sir, you can answer.

A As far as number 5, no documents regarding job duties of the administrator or director of nursing. There were no documentation. No flow between First Corbin and the facility or Management Advisor.

Q Number 5 specifically requests "All documents reflecting efforts by the deponent," being First Corbin, "with the facility to ensure that the administrator and director of nursing of the facility were fit to perform his or her job duties with the facility during the residency of Bessie Morgan."

A No such documents. No documents were found.

Q Okay. And as to number6, that specifically requests all documents which were by you, First Corbin,

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to the facility, Hillcrest, or any co-defendants referencing facility staffing, census, budget, and/or regulatory compliance. Do any records exist?

MR. HAMMOND: Same objection in regard to budget. And I think this is actually the exact same request as number 3, but you can go ahead and answer.

A Yes, no documents were provided by First Corbin to the facility or Management Advisor.

BY MR. COMAN:

Q And the efforts that you described earlier regarding your search for those was confined to a conversation with Jackie Willis; is that correct?

A That's correct.

Q Did Terry Forcht incorporate First Corbin back in 2003?

A I don't know. I could look it up on the secretary of state's page.

Q And is Hillcrest Nursing Home, is that the facility part of a chain organization of First Corbin; is that correct?

A I --

MR. HAMMOND: Object to form. You can answer.

A I -- I don't know. It -- it -- it -- First Corbin holds the stock for Hillcrest.

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Q if you can -- can you still see my screen, Mr. Tipton?

A Yes, I can.

Q Okay. I'd like to show you Exhibit 55, which is tab two on the screen, and I'm going to blow it up. Let me know if you can see that.

A Yes.

Q Okay. This is Hillcrest Nursing Home's Medicare cost report filed in 2014, which specifically lists, you can see the block portion, that it's -- that the facility is part of a chain organization, being First Corbin Long Term Care in Corbin, Kentucky. Correct?

A That's what it says. Yes.

Q Do you have any information that says otherwise?

A No, I don't.

Q Okay. Let me also show you on my screen, which is tab 3, Exhibit 73. Is this the articles of a corporation of First Corbin Long Term Care, Inc.; is that correct?

A That's what it says. Yes.

Q And on page 3 of that particular exhibit, which is Exhibit 73, page 3, did Mr. Terry Forcht himself sign as the incorporator on March 12, 2003?

A I recognize that to be his signature.

Q And he's listed as incorporator, correct?

A Yeah. I don't have the secretary of state stuff in front of me, but I have -- that's what it says. Yes.

Q Okay. Well, this is the articles of incorporation that were produced in discovery.

A If -- if -- I did not incorporate it. I have no doubt that he did, if that's what it says.

Q Okay. Who is Mr. Forcht?

A Well, Terry Forcht is a businessman that lives here in Kentucky. He's also an attorney.

Q Okay. What relationship, if any, does Mr. Forcht have with First Corbin?

A I don't know. Let's see. I -- I've got an annual report here. He's the -- I'm looking at an annual report from the Kentucky secretary of state, but it's 2006. I guess that's the time period we're talking about. He was the registered agent at the time. He was also the chairman. Well, he was an officer, a chairman, president, and he was also a director.

Q So that's in 2006 and 2007; is that correct?

A Yes. Let me look at seven here. Yes.

Q And what relationship, if any, does Mr. Forcht have with First Corbin currently?

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A I don't think he is -- I'm not aware of any.

Q Well, you're the president of First Corbin, correct?

A Yes.

Q Has Mr. Forcht had any relationship with First Corbin during the timeframe in which you have acted as a president of that particular corporation?

MR. HAMMOND: Just object to the form. What do you mean by relationship, Matt?

MR. COMAN: I don't know. Any contact relationship. I'll let him explain.

A I've not discussed anything with First Corbin with Mr. Forcht personally. I can look him up here real quick.

MR. HAMMOND: Where are we on the notice, Matt?

MR. COMAN: This is topic number 1. All of this is covered.

MR. HAMMOND: Okay. Where -- number 1 is the existence in nature of the relationship between First Corbin Long Term Care and any of the name co-defendants. So Terry Forcht's not a party to this case.

MR. COMAN: Okay. We're not going to play question and answer today, Mark. Okay? So if you want to instruct him not to answer it, that's fine.

We'll take it up with the judge.

MR. HAMMOND: Okay. I'm going to instruct my --

MR. COMAN: But I'm not going to have this over and over again, where you say, "Where is it? Where is it that" -- it's all covered in this. We have -- I'm talking now. We have --

MR. HAMMOND: You go ahead and do it.

MR. COMAN: 11 topics that covers the waterfront on all these things. Mr. Tipton has been the president of the corporation for five years. He's an attorney. He's a sophisticated individual. I'm not looking to elongate the deposition at all, but I'm ready to move forward if you are.

MR. HAMMOND: Yeah, I'm ready to move forward, but we're going to move forward on the topics that you provided. He's here to testify regarding those topics. He's prepared himself for those topics. And if you're going to ask him questions that aren't covered by the topics, he's not going to answer those --

MR. COMAN: Fair enough.

MR. HAMMOND: -- because he's not prepared.

MR. COMAN: Okay.

MR. HAMMOND: So Terry Forcht is nowhere on

this topic sheet. And just like we did the other day, we're not going to answer questions about issues that aren't covered. So Terry Forcht's not on here, and he's not going to answer the question. So move along, please.

BY MR. COMAN:

Q What relationship -- as far as Hillcrest, what is the relationship between Hillcrest and First Corbin?

A First Corbin is a stock holding company holding Hillcrest stock.

Q Who owns First Corbin stock?

MR. HAMMOND: Yeah, I'm going to object. He's not going to answer questions about the stockholders of the corporation. I don't think that's anticipated to lead to admissible evidence.

MR. COMAN: They're a named defendant in a lawsuit. I'm asking you who owns the company that he's a corporate representative for it, and you think that's inadmissible?

MR. HAMMOND: I -- I do. I don't think it's discoverable, the shareholders --

MR. COMAN: Do you have a case or -- do you have a case that you could cite to, Mr. Hammond?

MR. HAMMOND: If you could stop yelling at me, it'd be great. I can find the cases for you. You

can file a motion if you want, Matt. We can fight it out. But there are cases out there that say shareholders are not responsible in Kentucky for actions of corporations. They don't run corporations, they're shareholders. It's no different than if you sued Coca-Cola. You couldn't come in and ask who all the shareholders of Coca-Cola are. So he's not going to answer that question.

MR. COMAN: So let me get this straight for the record. That Mr. Tipton is the president of a corporation that's a named defendant in a case in the Commonwealth of Kentucky, and it's the defendant's position that discovery is prohibited to discover who owns that defendant corporation. Is that your position?

MR. HAMMOND: Who the shareholders are, yes, that is my position. You can ask him about the operations of the company and if they're associated with the actual care being provided here. That's all on the table, obviously. So far you haven't done that. But he's not going to talk about who owns shares of stock in a company that's a holding company that has nothing to do with providing actual care to nursing on that.

MR. COMAN: Well, guess what? You're not the judge. We'll let him make that decision.

MR. HAMMOND: Sounds good.

BY MR. COMAN:

Q Mr. Tipton, do you own any shares?

A No.

MR. HAMMOND: Same objection.

THE WITNESS: Oh, my bad.

MR. HAMMOND: Don't answer the questions about shareholders.

THE WITNESS: My bad.

BY MR. COMAN:

Q What relationship, if any, does Mr. Forcht have with management advisors?

MR. HAMMOND: The same objection. That's not on the table. He's here -- it's not on the notice. He's not here to talk about management advisors. He's here to talk about First Corbin Long Term Care.

MR. COMAN: Are you also instructing him not to answer the question?

MR. HAMMOND: I'm -- I am.

BY MR. COMAN:

Q Please take a look at the screen, which is tab 4, Exhibit 36. This record is the bylaws for First Corbin; is that correct?

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A Yes.

Q Please look at tab 5, which is, for the record Exhibit 34. Do you see that on the screen, Mr. Tipton?

A Yes.

Q Okay. And this was provided by the defense in this case, in discovery, by First Corbin, your corporation. This is entitled, Shareholder's Agreement. Do you see that?

A Yes.

Q And do you see the second paragraph of this particular document, the second sentence, does it in fact state that Terry E. Forcht is a majority shareholder of the holding company, holding more -- owning more than 80 percent of the shares of the holding company; is that correct?

A That's what it says.

Q Take a look at tab 6, which is Exhibit 30, Entitled Cash Management Agreement, another document produced by your co -- corporation. Is this record entitled, in fact, Cash Management Agreement?

A Yes, it is.

Q And do you see the paragraph entitled, Background?

A Yes.

Q In fact, does that state that First Corbin,

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which is the parent company, owns all the stock of the facility, Hillcrest? Is that correct?

A Yes. As parent, owns all of the outstanding shares of subsidiaries.

Q Okay. And just so that the record is clear, you said subsidiaries, plural. Let me scroll down to page 30-3. Is Hillcrest Nursing Home of Corbin Inc. listed as one of those subsidiaries?

A It is listed as -- on page 30-3, yes. 30 -- page 3.

Q In addition to other nursing homes, correct?

A There are other nursing homes listed, correct.

Q Who negotiated the terms of this Cash Management Agreement?

MR. HAMMOND: Yes, he's not going to talk about the finances or business operations of First Corbin Long Term Care or Hillcrest Nursing Home, Matt, so I'm going to instruct him not to answer.

MR. COMAN: What's your basis for that instruction and objection?

MR. HAMMOND: It's -- it's not discoverable. I also don't think it's on your list of topics here. So that's -- that's the basis.

MR. COMAN: It -- that it's not discoverable?

MR. HAMMOND: Not discoverable and it's not on

your list of topics, both yes.

MR. COMAN: But it -- you're wrong. It is in the list of topics covered in the inquiry and the notice.

MR. HAMMOND: Okay, where?

MR. COMAN: You can look for it yourself. Pages 2, 3, 4 --

MR. HAMMOND: Yeah, it's not on there.

MR. COMAN: It's in there.

MR. HAMMOND: Okay.

MR COMAN: It's in there. That's fine. You're instructing him not to answer. Let's move on. How about that?

MR. HAMMOND: Okay. All right. If you don't want to tell me where, because it's not in there, but go ahead.

MR. COMAN: Well, you can look. You can read. You're smart.

MR. HAMMOND: I did. I --

BY MR. COMAN:

Q Were there any documents --

MR. COMAN: Are you done yet?

MR. HAMMOND: No, you go ahead.

Q Were there any documents exchanged between First Corbin and Hillcrest relating to this particular

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Cash Management Agreement?

MR. HAMMOND: You can answer that one. In 2006 to 2007, from July 2006 to October of 2007. No --

MR. COMAN: No, that's not my question. My question is this, exactly what it was. You don't get to rephrase my questions. You can object, you can instruct him not to answer --

MR. HAMMOND: Okay.

MR. COMAN: -- but you don't get to rephrase my question.

BY MR. COMAN:

Q I'll go ahead and state the question again. The question was very plain. Were there any documents exchanged between First Corbin and Hillcrest relating to the agreement that is on the screen that is marked as Exhibit 30-1?

MR. HAMMOND: I'm going to instruct the witness to answer the question as it applies from July of '06 to October of '07. That's what stated in the notice for documents to search for, and that's what he's prepared to do here today. So he can answer the question --

MR. COMAN: That's not -- the -- the question is not related to the request for production of documents. This is a document that is signed, as

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you can see on page -- flip up here.

BY MR. COMAN:

Q I actually don't see a date. So there's no date. It's not confined to anything. I don't see a date that it -- when it was executed on it to see the signatures. So it's not -- my question is not limited. It's whenever this document was executed, that's the timeframe. And obviously it wasn't -- I don't doubt it was executed in 2006 and 2007. It doesn't say one way or the other. So that's my question. In relationship to the formation and the execution of this document, this record here, this Cash Management Agreement, were there any documents exchanged between First Corbin and the facility?

MR. HAMMOND: Yeah, same objection. Every topic on here says during the residency of plaintiffs, Bessie Morgan, so that's what he's prepared to talk about today. You can answer it from July of '06 to October of 2007, Wes.

A No, there weren't for that time period.

BY MR. COMAN:

Q Were there drafts of this agreement exchanged between the parties to be marked up?

MR. HAMMOND: Same objection. You can answer for the timeframe of July of '06 through October of

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2007, Wes.

A No, not during that time period.

BY MR. COMAN:

Q At any time?

MR. HAMMOND: Objection. Instruct the witness not to answer. Not covered on the list of topics.

Q Personally, Mr. Tipton, were you involved in this Cash Management Agreement?

MR. HAMMOND: You can answer the question from July of '06 to October of 2007, Wes.

A No. No, I was not for that time period.

Q Were you at any time?

MR. HAMMOND: Same objection. Instruct the witness not to answer.

Q Are you a signatory to this agreement?

A I don't appear to be, no.

Q Who is?

A Well, on the page that I'm seeing now, First Corbin, that looks like Terry Forcht's signature; Corbin Nursing Home, Charles Rapier (phonetic); Barbourville Nursing Home, Charles Rapier; Charles Rapier; Charles Rapier -- and that's on the page that I'm looking at. If -- if there's other --

Q I'll scroll to the next page. There you go.

A And Charles R. Rapier for the rest of the

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facilities as well.

Q Including Hillcrest; is that correct?

A Yes.

Q Is that the same Charles Rapier who signed as secretary/treasurer on behalf of First Corbin on trial Exhibit 36-11 regarding the certificate of adoption of bylaws?

A Yes, it is.

Q I'll show you on tab seven, which is Exhibit 74. This record reflects that First Corbin Long Term Care, Inc. changed his name to SEKY Holding Company, on about August 29, 2017; is that correct?

A Yes, that's what it says.

Q Were you the president at First Corbin at the time?

A Let's see if I was. Is it down here? Oh, no. According to this document, no.

Q Who was? Kathy Hall; is that correct?

A That's what it says, yes.

Q And do you know Kathy Hall?

A Yes, I do.

Q She's still with the company in some fashion.

A No. As far as -- no, she is not.

Q Let's look at tab 8, which is trial Exhibit 76, which is this just record from the Kentucky

secretary of state for SEKY holding Company; is that correct?

A Yes, it is.

Q What is the address listed for SEKY?

A 200 South Kentucky Street, PO Box 1450, Corbin, Kentucky 40702.

Q Okay. Scroll down. I'm trying to make it bigger, but since it's PDF, it's not the easiest. And --

A I can see it.

Q You can see it? Okay. And who are the officers listed?

A Scroll it up just a little bit.

Q When I do, it jumps it.

A Okay. Okay. Well, the officers on the page I'm looking at, president, myself, Wes Tipton. Secretary David Witt.

Q All right. I'll go to --

A That's who I can see right there. Okay.

Q Okay.

A And then Treasurer, Roger Alsip. Those are the officers. Director, Roger Alsip, myself, David Witt and assistant secretary, Jackie L. Willis.

Q Okay. I'm going back here. You've already just -- you've already testified as to who you're

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employed by. Who does David -- who employ -- which company employs David Witt, listed as a secretary?

A I -- I would not know.

Q And how about which company employs Roger Alsip?

A I -- I don't know.

Q And who's listed as Jackie -- I'm sorry. Jackie Willis is listed as assistant secretary for SEKY Holding. Which company employs her?

A I do not know that.

Q Okay. Take a look at Tab 9, which is Exhibit 75, the secretary of state listing for Hillcrest Nursing Home of Corbin Inc. Do you see that on your screen, Mr. Tipton?

A Yes.

Q Okay. What is the address listed for Hillcrest?

A It says Principal Office: PO Box 1450, Corbin, Kentucky 40702.

Q Is that the same address that you just read out for First Corbin or SEKY Holding?

A The PO box, correct.

Q Okay. And who are the officers listed on Exhibit 75, the current officers for Hillcrest?

A Myself, President; secretary, David Witt;

treasurer, Roger Alsip. On this page I'm also listed as a director.

Q Okay. Let me go to the next, page 76.

A And then Roger Alsip is a director, David Witt's director, and Jackie L. Willis is assistant secretary.

Q And besides yourself, you were -- is it correct that you do not know what company, or which company or companies, employs those other current officers; is that correct?

A That is correct.

Q But the officers for First Corbin, or SEKY Holding, are the same people that are current officers for Hillcrest, right?

A It -- it -- I think it was, yes.

Q Does First Corbin or SEKY Holding Company account for profits and losses at Hillcrest on their federal tax files?

MR. HAMMOND: Objection. Instruct the witness not to answer. He's not going to discuss the financial operation or assets, profits, liabilities, not discoverable.

BY MR. COMAN:

Q What percentage of Hillcrest shares does First Corbin SEKY Holding own.

MR. HAMMOND: You can answer that one, Wes.

A Well, it's a stock holding company. It owns all the stock or holds all the stock for Hillcrest Nursing Home.

Q So that'd be 100 percent?

A Yes.

Q Has First Corbin or SEKY Holding Company ever paid a dividend to Hillcrest?

MR. HAMMOND: Same objection, same instruction. Don't answer that one.

Q From 2006 through 2007, did First Corbin own anything other than Hillcrest and the other nursing homes that already enlisted on that cash management agreement?

MR. HAMMOND: Wes, you can answer that to the extent that deals with co-defendants. That's covered in the notice. Otherwise don't answer the question. But you can answer it to the extent that it references Management Advisors, the only other co-defendant in the case.

A Yes, for Hillcrest and Management Advisor.

BY MR. COMAN:

Q And it -- are those -- is that entity wholly owned by First Corbin?

A We're the stock holding company and hold all

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of the stock. Yes.

Q So 100 percent; is that correct?

A Correct.

Q I'm going to ask you to look at the notice page 2, topic number 3. Let me know when you have that in front of you, sir.

A Yes. Yes, I have it.

Q Okay. And the first sentence of topic number 3 reads, "The identity of each individual who, on behalf of the deponent," being First Corbin, "owned, supervised, or managed First Corbin during the timeframe of the residence." So during the timeframe of the residency, being that July 14, 2006 through October 1, 2007, who owned First Corbin?

MR. HAMMOND: Well, I'm going to -- going to, again, instruct him in regard to shareholders. He's not going to answer questions in regard to shareholders. But if you want to talk to him about who supervises or manages the company, he can answer those questions.

MR. COMAN: Well, now earlier Mr. Hammond you said it wasn't covered in the topic, so I clearly for the record showed that it is covered the topic. And so that's my question. It's not what you said, it's what I said. It's what my question was. Now

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if you want to instruct him to not answer, go ahead and do so now.

MR. HAMMOND: You're not making much sense, Matt. I'm instructing him not to answer based upon it not being discoverable. That's different from what we discussed earlier. He can answer the question to the extent you want to talk about operations, management, supervision. He's not going to discuss shareholders. Under Kentucky law, I don't think he has to. But you can answer the question as it deals with supervision, management of that company, Wes.

THE WITNESS: Can I go ahead?

MR. COMAN: Sure.

A Okay. At that time, Terry Forcht was the chairman/president; Rodney Shockley, the vice president; Chuck Rapier, or Charles Rapier, was the secretary; and Debbie Reynolds, vice president. They were the supervisors of the company, with Terry being the president, Terry Forcht.

MR. COMAN: And for the record, Mr. Hammond, and I just want to make it clear so that Judge Balue can make a ruling on this, is that you are instructing the witness to not answer to who -- strike that. You are instructing the witness,

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instructing First Corbin, to not reveal who owns First Corbin; is that correct?

MR. HAMMOND: Instructing him not to reveal information related to who the shareholders are of the corporation.

BY MR. COMAN:

Q So who owns First Corbin, Mr. Tipton?

MR. HAMMOND: Same objection, same instruction. Do not reveal the shareholders the corporation.

BY MR. COMAN:

Q Take a look at Tab 10, which is Exhibit 54-1.

A Okay.

Q Now, this is a -- this document's an organizational chart produced by First Corbin in this case; is that correct?

A It is an organizational chart, yes.

Q Okay. And this organizational chart reflects that First Corbin, and referred to on this document as First Corbin Healthcare Group, is a system that includes Management Advisors, Chairman Terry Forcht, Hillcrest Nursing Home, and others; is that correct?

MR. HAMMOND: Let me just object. This looks like it's a document from 2002. And I also don't think this document applies to First Corbin Long Term Care Incorporated, the -- the deponent here

today. But you can answer the question, Wes.

A It's an organizational chart for First Corbin Healthcare Group, and there's Management Advisors directly under it. Now, you -- you said something about Hillcrest. I -- I didn't catch that. What was the question about Hillcrest?

BY MR. COMAN:

Q Does it include Hillcrest, you see in the right-hand side in the box?

A Oh yeah. Yeah, yeah, in a box, and it has a dotted line coming back up to it, yes.

Q Okay. It includes Mr. Forcht listed as chairman; is that correct?

A For management -- it appears Chairman for Management Advisors, Inc.

Q What distinction, if any, is there between First Corbin Long Term Care, Inc. and First Corbin Healthcare Group?

A I don't know.

Q Okay.

A I'm not familiar with that.

Q Okay. These entities that are listed here on this organizational chart that were produced by your company, those are all entities that work under basically the same corporate umbrella; is that correct?

A Well, First Corbin Long Term Care holds their stock, the nursing home's stocks.

Q Right. Same owner --

A I think --

Q -- same system, same structure?

A Say it one more time.

Q Same owner -- it's part of the same system, correct?

A I -- I guess that's fair, yeah.

MR. COMAN: At this point I will reserve my right to continue this deposition based on the deficient responses that the defendant corporation has provided as instructed by its counsel. But with that reservation, I don't think I have any further are the questions at this time, Mr. Tipton.

THE WITNESS: All right. Thank you so much.

MR. HAMMOND: No questions.

MR. COMAN: All righty.

COURT REPORTER: All right. Off the record.

(DEPOSITION CONCLUDED AT 10:55 A.M.)

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COMMONWEALTH OF KENTUCKY AT LARGE

I do hereby certify that the witness in the foregoing transcript was taken on the date, and at the time and place set out on the Title page hereof by me after first being duly sworn to testify the truth, the whole truth, and nothing but the truth; and that the said matter was recorded digitally by me and then reduced to typewritten form under my direction, and constitutes a true record of the transcript as taken, all to the best of my skills and ability. I certify that I am not a relative or employee of either counsel, and that I am in no way interested financially, directly or indirectly, in this action.

MAGGIE PATTERSON,
COURT REPORTER / NOTARY
COMMISSION EXPIRES ON: 06/04/2022
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2017 WL 129071
Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

Marilyn HANSFORD, Individually and as Executor of the Estate of Lora Opal Stephens; Roger Stephens; Carol Creekmore; Brenda Martin; Marcus Stephens; R.L. Stephens, Jr.; Debbie Dixon; Joe Stephens; and Jimmy Stephens, Appellants
v.
James Michael STEPHENS, Appellee

NO. 2015–CA–001724–MR
|
JANUARY 13, 2017; 10:00 A.M.

APPEAL FROM McCREARY CIRCUIT COURT, HONORABLE PAUL K. WINCHESTER, JUDGE, ACTION NO. 13–CI–00237

Attorneys and Law Firms

BRIEFS FOR APPELLANT: Jessica A. Burke, Whitley City, Kentucky

BRIEF FOR APPELLEE: Andrew K. Long, Whitley City, Kentucky

BEFORE: DIXON, NICKELL, AND VANMETER,[1] JUDGES.

OPINION

VANMETER, JUDGE:

***1** This appeal is of a judgment following a trial in which the jury found that a purported will was not the will of the decedent, Lora Opal Stephens. We must decide whether the McCreary Circuit Court erred in making a number of procedural and evidentiary rulings, such that the jury verdict and resulting judgment should be reversed. We hold that the trial court did not err and therefore affirm its judgment.

I. Factual and Procedural Background.

Following Lora Opal Stephens' death in September 2013, the McCreary District Court, on October 13, 2013, admitted the decedent's purported will dated April 23, 2013, to probate and appointed the decedent's daughter, Marilyn Hansford, as executrix. The probated will identified the decedent's seven children, including Hansford, James Michael Stephens ("Stephens"), and the decedent's grandchildren who are the children of her deceased son, R. L. Stephens. The probated will left all the decedent's property to her children in equal shares and stated that her deceased son's children should receive his share.

Stephens filed this action the following month against Hansford, individually and as executrix, and the other beneficiaries,[2] seeking to set aside the probated will on the basis of lack of testamentary capacity, undue influence/duress, or fraud, as well as a number of other counts which are not pertinent to this appeal. Stephens claimed the decedent had executed a holographic will on July 24, 2009, by which she left the bulk of her estate to Stephens.

Following a trial held in August 2015, the jury returned a verdict that the probated will was not the will of the decedent. The trial court entered a Judgment upon Jury Trial in October 2015 in conformity with the jury's verdict adjudging that the document dated April 23, 2013, was not the will of the decedent, and dismissing all of the parties' other claims and counterclaims. This appeal follows; other facts shall be presented as discussed and addressed below.

II. Issues on Appeal.

On appeal, Hansford raises five issues: (1) the trial court erred in holding a jury trial despite the lack of a jury trial demand; (2) the trial court erred in admitting a voice

recording into evidence; (3) the trial court erred in admitting the testimony of Gidget Slaven; (4) the jury verdict should be reversed due to juror **misconduct**; and (5) the trial court erred in permitting introduction of irrelevant testimony. We discuss each of these issues in turn.

A. Lack of Jury Demand. Hansford argues that the trial court erred in submitting this case to a jury despite the lack of a jury demand by either Stephens or Hansford. We disagree.

***2** As an initial matter, Hansford has failed to state "with reference to the record showing whether the issue was properly preserved for review[.]" CR [3] 76.12(4)(c)(v). In *Ray v. Ashland Oil, Inc.*, 389 S.W.3d 140, 146 (Ky. App. 2012), we noted that we will entertain an argument not presented to the trial court only to avert a manifest injustice. In her reply brief, Hansford attempts to rectify this deficiency by reference to her June 5, 2014, motion to change venue to Whitley County. That motion, however, was designated Motion to Hold Jury Trial in Whitley County, and cannot by any stretch be read as an objection to a jury trial being held at all, only to a fear that McCreary County was not the proper place to hold that jury trial.[4]

Without unduly lengthening this opinion, we merely note that CR 39.03 states:

> **In all actions not triable of right by a jury** the court upon motion or of its own initiative may try any issue with an advisory jury; **or the court, with the consent of all parties noted of record, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right**.

(Emphasis added). In other words, while the parties in this case, by failing to demand a jury trial, may have waived that right, the trial court was certainly permitted to empanel a jury to try the issues, and the parties, by failing to object, are deemed to have consented. *Williams v. Whitaker*, 293 S.W.2d 627, 627–28 (Ky. 1956). Far from failing to object, however, Hansford, through counsel at a pretrial hearing held May 14, 2014, agreed to a jury resolution of the will contest issues.

B. Admission of Audio Recording. Hansford next complains of the admission of an audio recording of a telephone conversation between the decedent, Stephens and Marilyn Hansford which occurred on August 14, 2013. Specifically, Hansford objects that the recording was not properly authenticated, the original was not produced, and that the evidence contained in the recording was unduly cumulative and prejudicial.

The record reflects that the recording was played for the jury from Stephens' **attorney's** laptop computer. Stephens testified that he called his mother on August 14, 2013, spoke with her and Marilyn, and that he recorded the conversation on his cellular telephone.

Rulings on the admissibility of evidence are within the discretion of the trial court, and shall not be reversed absent clear abuse of discretion. *Simpson v. Commonwealth*, 889 S.W.2d 781, 783 (Ky. 1994); *see also* CR 61.01 (stating "[n]o error in either the admission or the exclusion of evidence ... is ground for granting a **new trial** or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice[ ]"); KRE [5] 103 (stating "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[ ]"). On appeal, we review evidentiary rulings under an abuse of discretion standard. *Ten Broeck DuPont, Inc. v. Brooks*, 283 S.W.3d 705, 725 (Ky. 2009). Abuse of discretion occurs when a trial court's decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Baptist Healthcare Sys., Inc. v. Miller*, 177 S.W.3d 676, 684 (Ky. 2005) (footnote omitted).

1. Lack of Authentication. Hansford argues that the recording was not authenticated. We disagree.

***3** Under KRE 901(a), "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." KRE 901(b) contains a number of illustrations to demonstrate authentication or identification with the meaning of the rule. The following provisions are pertinent to this case:

> (5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.
>
> (6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular place ... if:
>
> > (A) In the case of a person, circumstances, including self-identification, show the person answering to be the one called[.]

KRE 901(b). Professor Lawson has written that KRE 901(b)(5) codifies the rule that telephone conversation

may be authenticated by a witness's testimony that he or she "knew and recognized the voices of participants in [the] conversation." Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 7.10[1][b] (5th ed. 2013). In this case, Stephens testified that he called his mother on August 14, 2013, spoke with her and Marilyn, that he recorded the conversation, and that the recording accurately reflected the conversation as he remembered it. This testimony was sufficient to authenticate the recording under KRE 901. *See Brock v. Commonwealth*, 947 S.W.2d 24, 30 (Ky. 1997) (holding that KRE 901(a) "requires for authentication only that evidence be introduced sufficient to support a finding that the matter in question is what its proponent claims[ ]").

2. Original of Recording. Next, Hansford argues the copy of the recording that was produced by Stephens' counsel playing the recording from his laptop renders the recording inadmissible because the original form of the recording, presumably from Stephens' cell phone, was not introduced.

KRE 1002 states that to prove the contents of a recording, the original of the recording "is required, except as otherwise provided in these rules[.]" The immediately following rule provides such an exception. "A duplicate is admissible to the same extent as an original unless: (1) [a] genuine question is raised as to the authenticity of the original; or (2) [i]n the circumstances it would be unfair to admit the duplicate in lieu of the original." KRE 1003. A duplicate is defined as "a counterpart produced by the same impression as the original ... or by mechanical or electronic rerecording, ... or by other equivalent technique which accurately reproduces the original." KRE 1001(4).

Our review of the record establishes that the telephone rerecording was properly introduced into evidence. Hansford makes no credible argument as to the authenticity of the original recording, or to Stephens' testimony as to the circumstances surrounding the call or his recording of it.

3. Unduly Cumulative/Prejudicial. Finally, as to the August 14, 2013 telephone recording, Hansford argues that the trial court should have excluded it pursuant to KRE 403. This rule provides that "[a]lthough 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." Evidentiary rulings by the trial court balancing probative value against undue prejudice or presentation of cumulative evidence are subject to an abuse of discretion standard of review. *Staples v. Commonwealth*, 454 S.W.3d 803, 825 (Ky. 2014).

*4 Hansford's argument is that the decedent admittedly suffered from occurrences of dementia, but that the August 14, 2013, recording has no bearing on the decedent's state of mind on April 23, 2013 when she signed the will at issue. As noted by Stephens, however, the timing of the recording was relevant to discredit the testimony of the **attorney** who prepared the decedent's will and her power of **attorney** in favor of Marilyn, which power of **attorney** was executed the day after the telephone call. The **attorney** testified as to the decedent's lucidity on that date. Based on our review of the record, we are unable to say that the trial court abused its discretion under KRE 403 in admitting the recording into evidence.

C. Gidget Slaven's Testimony. Slavens testified on Stephens' behalf that in October 2010, some two and one-half years prior to the execution of the April 2013 will, she had a conversation with Marilyn while looking at an apartment for rent. During the conversation, they kept hearing a car horn blow. According to Slavens, Marilyn stated, in substance, that it was just her mom, she had Alzheimer's, and she probably just had to go to the bathroom. On appeal, Hansford argues that this testimony should have been excluded under KRE 403.

We note that in the trial court Hansford argued that the testimony should have been excluded as hearsay. Hansford omits this argument on appeal, and the statement appears clearly admissible under KRE 801A(b)(1) as a party's prior statement. Thus, we find that this issue, whether Slaven's statement should have been excluded under KRE 403, is not properly preserved for review since the trial court was not given an opportunity to rule on the now proffered basis for review. *See Reg'l Jail Auth. v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989) (holding that the Court of Appeals is "without authority to review issues not raised in or decided by the trial court[ ]").

D. Juror Misconduct. Hansford makes two claims regarding juror **misconduct**. First, that one juror slept through almost the entirety of the two-day trial. Second, two jurors had undisclosed relationships with Stephens which they failed to disclose during jury selection.

As to the sleeping juror, Hansford does not identify the juror but states that he was actively sleeping, that his inattentiveness was discussed among counsel and the trial court, but that no action was taken. We recognize that in *Ratliff v. Commonwealth*, 194 S.W.3d 258, 276 (Ky.

2006), the Court noted that "[a] juror's inattentiveness is a form of juror **misconduct**, which may prejudice the defendant and require the granting of a **new trial**." (citation and quotation omitted). The Court, however, also noted that " '[a]llegations of jury **misconduct**, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process.' " *Id.* (quoting *Tanner v. United States*, 483 U.S. 107, 120–21, 107 S.Ct. 2739, 2747–48, 97 L.Ed.2d 90 (1987)). Hansford fails to allege that she objected to the sleeping juror (other than engage in a general discussion), asked for corrective action, or moved for a mistrial. We hold that Hansford waived any complaint against juror **misconduct** based on the sleeping juror in this instance. *See Shrout v. Commonwealth*, 226 Ky. 660, 662, 11 S.W.2d 726, 727 (1928) (holding that "[t]he appellant could not sit by and see the juror sleeping, without asking the court to arouse him from his slumbers, and then complain about it after the trial was over[ ]").

As to juror bias, Hansford identifies one juror who, following the trial, stated a pre-existing acquaintance with and bias in favor of Stephens, and another unidentified juror who "appears to work with [Stephens'] sister-in-law." Appellants' Brief at 20. Hansford argues that the failure to disclose these relationships constitutes **misconduct** sufficient to warrant a **new trial**.

***5** We agree that Kentucky decisions support the proposition that "no vestige of suspicion of improper conduct by jurors be tolerated." *Leslie v. Egerton*, 445 S.W.2d 116, 118 (Ky. 1969). The **misconduct**, however, must be specifically identified as to juror name, description of the **misconduct**, including date, time, to whom disclosed or by whom observed, and supported by affidavit. *See id.* (holding that affidavit "that some unknown person claimed to have overheard an unknown juror's statement" discussing the case during a lunch break was not sufficiently specific to present a justiciable issue as to juror **misconduct**); *Dalby v. Cook*, 434 S.W.2d 35, 37–38 (Ky. 1968) (juror **misconduct** established on motion for **new trial** by affidavits establishing on afternoon of last day of trial, **attorney's** secretary discussed the facts of the case with identified juror).

In this case, Hansford filed no affidavits with the trial court and made no motion for a **new trial**. Juror **misconduct** is listed as a grounds for **new trial** under CR 59.01(b). Of course, a motion for a **new trial** must be filed within ten days of the entry of the judgment. CR 59.02. From the record, Hansford did not file a motion for **new trial** following the entry of the judgment on October 12, 2015. The *voir dire* for the trial was held on August 6, 2015. Hansford had over two months to discover the juror **misconduct** prior to the entry of the judgment, and yet took no action before the trial court. The allegations as made are insufficient to warrant the granting of a **new trial**.[6]

E. Irrelevant Testimony. Finally, Hansford complains that the trial court, over objection, permitted Stephens to testify as to a number of matters irrelevant to the issue of decedent's will, and that the length of Stephens' case compromised Hansford's ability to present her case in the remaining time allotted for the trial. Hansford fails to identify where in the record the objection was made so to preserve it for our review. CR 76.12(4)(c)(v); *see Dixon v. Commonwealth*, 263 S.W.3d 583 (Ky. 2008) (stating that reply brief reference to two hours of testimony was insufficiently specific under the rule). We therefore decline to address this issue.

III. Conclusion.

Based on the foregoing, the McCreary Circuit Court's judgment is affirmed.

ALL CONCUR.

All Citations

Not Reported in S.W. Rptr., 2017 WL 129071

Footnotes

1 Judge Laurence B. VanMeter authored this opinion prior to being elected to the Supreme Court of Kentucky. Release of this opinion was delayed by administrative handling.

2 The decedent's children, Marilyn Hansford, individually and as Executrix, Roger Stephens, Carol Creekmore, Brenda Martin, and Marcus Stephens, as well as R. L. Stephens, Jr., Debbie Dixon, Joe Stephens, and Jimmy Stephens (the

children of the decedent's deceased child, R. L. Stephens) were the defendants in the trial court and are the appellants in this court. We refer to the appellants collectively as "Hansford."

3 Kentucky Rules of Civil Procedure.

4 The record contains no explicit order denying Hansford's change of venue motion, and Hansford does not raise improper venue as an issue on this appeal.

5 Kentucky Rules of Evidence.

6 Even had Hansford only discovered the juror **misconduct** after the time for filing a motion for a **new trial** had closed under CR 59, CR 60.02(b) and 60.04 would have provided the means to pursue relief in the trial court. CR 60.02(b) affords a litigant the opportunity to move the trial court for relief from a judgment based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a **new trial** under Rule 59.02[.]" CR 60.04 sets forth the procedure to follow if a party files a CR 60.02 motion during the pendency of an appeal.

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2021 WL 298412
Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

Reba SLONE, Appellant/Cross-Appellee
v.
EQT PRODUCTION COMPANY, Appellee/Cross-Appellant

NO. 2019-CA-0884-MR AND NO. 2019-CA-1115-MR
|
JANUARY 29, 2021; 10:00 A.M.

APPEAL AND CROSS-APPEAL FROM FLOYD CIRCUIT COURT, HONORABLE JOHNNY RAY HARRIS, JUDGE, ACTION NO. 14-CI-00270

Attorneys and Law Firms

BRIEFS FOR APPELLANT/CROSS-APPELLEE: Timothy C. Bates, Hindman, Kentucky.

BRIEFS FOR APPELLEE/CROSS-APPELLANT: John Kevin West, Columbus, Ohio, Candace B. Smith, Lexington, Kentucky.

BEFORE: MAZE, TAYLOR, AND K. THOMPSON, JUDGES.

OPINION

TAYLOR, JUDGE:

***1** Reba Slone brings Appeal No. 2019-CA-0884-MR and EQT Production Company (EQT) brings Cross-Appeal No. 2019-CA-1115-MR from an August 3, 2019, judgment of the Floyd Circuit Court pursuant to a jury verdict in favor of EQT upon all claims. We affirm both the appeal and cross-appeal.

This appeal involves the leakage of hydrogen sulfide (H_2S) from a gas well owned by EQT and located in Floyd County, Kentucky. It is uncontroverted that at certain concentrations H_2S poses a danger to human health and life.

Slone resided in a mobile home located between 300 feet to 600 feet from the gas well owned by EQT. Around April 2013, EQT discovered that the well was leaking H_2S; at trial, EQT introduced evidence that the leakage from the well was caused by mine subsidence. Nevertheless, sometime in May 2013, EQT informed Slone of the leak and relocated her to a motel. EQT finally killed the well in June 2013 and eventually plugged the well in November 2013.

On April 10, 2014, Slone filed a complaint against, *inter alios*, EQT in the Floyd Circuit Court.[1] Slone claimed to have suffered myriad adverse health effects caused from the well's release of H_2S near her residence and that EQT breached numerous duties of care owed to her. In particular, Slone alleged:

> 5. On May 26, 2013, [Slone] was severely injured as a result of exposure to leaking gas from EQT Production Company's gas well located near Kentucky Route 777 at 3532 Turkey Creek, McDowell, Kentucky, wherein [Slone] resided.
>
> ....
>
> 8. That in addition to the duty of extraordinary care, the Defendant, EQT Production Company also, at the time of the incident complained of herein, owed a duty of ordinary care to individuals, including the Plaintiff, Reba Slone, who resided on the property through which EQT Production Company's gas wells and pipelines are situated and/or adjoining.
>
> 9. The Defendant, EQT Production Company was under a duty of care to construct and maintain their gas distribution system so as to prevent the escape of gas therefrom. However, they so carelessly and recklessly allowed the gas well and/or the lines running from the gas well in the vicinity of Reba Slone's home to become and remain in such a state of disrepair that EQT Production Company's natural gas escaped from their gas well and/or the lines running therefrom.
>
> 10. That the incident set out in paragraph 5 above was the result of the negligent and/or grossly negligent acts of the Defendant, EQT Production Company or their

employees, agents or servants, said negligent and/or grossly negligent acts including, but not being limited to, the following breaches of their duty of care owed to the Plaintiff, Reba Slone and to others similarly situated:

> A. EQT Production Company's failure to drill and/or install their well in a safe manner such that their natural gas could not escape from their gas well and/or the lines therefrom and cause injury or death to others and/or damage to the property of others.
>
> B. EQT Production Company's failure to maintain, monitor, repair and/or inspect their gas wells and/or the lines running therefrom so as to confine their natural gas within their gas wells and/or within the lines running therefrom to ensure that their gas well and/or lines running therefrom were not in such a state of disrepair that gas could escape from them, posing a potentially hazardous condition to the individuals who live on the property through which those wells and/or gas lines are situated.

***2** 11. That one or more of the individual acts of negligence and/or gross negligence committed by the Defendant, EQT Production Company was the direct and proximate cause of Reba Slone's exposure to gas and the severe permanent bodily injuries suffered by the Plaintiff, Reba Slone.

12. That on the date of the subject accident, Defendant, EQT Production Company knew, or in the exercise of reasonable care, should have known in the exercise of ordinary care that the failure to properly drill, install, maintain, monitor, repair and/or inspect their gas wells and/or the lines running therefrom, would cause leaks therein, creating a condition where gas might escape from their wells and/or their pipelines and leak posing a grave risk to any persons and/or property nearby. As a result, the Defendant, EQT Production Company negligently and/or in a grossly negligent manner failed to discover and repair such leaks in their gas well and/or lines running therefrom.

13. That a direct result of the negligence and/or gross negligence of Defendant, EQT Production Company in drilling, installing, maintaining, monitoring, repairing and/or inspecting their gas wells and/or the lines mining therefrom, Plaintiff, Reba Slone sustained serious and permanent bodily injuries which have caused her to suffer pain, suffering, mental anguish and inconvenience and will continue to suffer such pain, suffering, mental anguish and inconvenience in the future.

14. That a direct result of the negligence and/or gross negligence of Defendant, EQT Production Company in drilling, installing, maintaining, monitoring, repairing and/or inspecting their gas wells and/or the lines running therefrom, Plaintiff, Reba Slone has incurred, and will incur in the future, medical expenses and physician expenses.

15. That the acts of the Defendant, EQT Production Company which caused [Slone]'s exposure to gas complained of herein, constitute a wanton, malicious, and reckless disregard for the life, safety, and property of the Plaintiff, Reba Slone, and as such the [Slone] is entitled to punitive damages.

16. In total disregard of the duty owed to [Slone], and other members of the public, the Defendant, EQT Production Company, their agents, servants or employees, created and exacerbated a dangerous, extremely volatile, ultra-hazardous and potentially deadly condition due to their failure to properly monitor, detect, remedy, and warn [Slone] and others of the danger associated with escaping gas. These acts and failures to acts by Defendant, EQT Production Company, their agents, servants or employees, were grossly negligent and reckless, constituted a disregard for the rights, safety and position of others, including [Slone], and clearly exhibited a failure to exercise the degree of care required under the circumstances. These careless, negligent, reckless and unlawful acts and failures to act of the Defendant, EQT Production Company, their agents, servants or employees, were a substantial factor leading to the gas leak in question that resulted in the injuries and damages to [Slone] complained of herein.

Complaint at 2-6.

A jury trial was held in July of 2018, and the jury returned a unanimous verdict in favor of EQT. Slone filed a motion for a judgment notwithstanding the verdict and a motion for a **new trial**. Both motions were ultimately denied by the circuit court by order entered September 12, 2018. These appeals follow.

APPEAL NO. 2019-CA-0884-MR

***3** Slone initially contends that the circuit court committed reversible error by failing to give the jury a missing evidence instruction. Slone points out that EQT employees were instructed to take H_2S gas measurements

twice daily after discovering the leak. According to Slone, these H_2S gas measurements were taken at Slone's mobile home and at the wellhead. Slone argues that the measurements were recorded by EQT, but EQT failed to produce the record of the gas measurements taken before the well was killed in June 2013. Slone points out that EQT offered no explanation for the missing record. Slone believes the record of the daily H_2S measurements was pivotal evidence that could have demonstrated the concentration of H_2S she was exposed to by the leaking well.

To be entitled to a missing evidence instruction, a party must demonstrate:

> (1) the evidence is material or relevant to an issue in the case; (2) the opponent had "absolute care, custody, and control over the evidence;" (3) the opponent was on notice that the evidence was relevant at the time he failed to produce or destroyed it; and (4) the opponent, "utterly without explanation," in fact failed to produce the disputed evidence when so requested or ordered.

Norton Healthcare, Inc. v. Disselkamp, 600 S.W.3d 696, 731 (Ky. 2020) (quoting *Univ. Medical Cent. Inc. v. Beglin*, 375 S.W.3d 783, 792 (Ky. 2011)). It is unnecessary to present to "direct and conclusive evidence of intentional and bad faith destruction" of the missing evidence. *Beglin*, 375 S.W.3d at 789. However, where the proof demonstrates that the missing evidence was lost because of mere negligence, fire, natural disaster, or in the normal course of business, a missing evidence instruction is inappropriate. *Id.* at 791. And, we review the trial court's decision for an abuse of discretion. *Id.* at 791-92.

It is axiomatic that a missing evidence instruction is only appropriate where there is some proof at trial that evidence is actually missing. Here, Slone failed to introduce evidence at trial demonstrating that a document or documents existed recording daily H_2S gas measurements taken by EQT after the well started leaking. In her brief, Slone cites to the deposition of the past EQT Senior Safety Director, Jerry Hamilton, as proof that a document existed recording the daily H_2S measurements. In his deposition, Hamilton does state that he created such a document. Yet, Slone failed to produce him as a witness at trial, introduce into evidence the relevant portions of his deposition, or introduce relevant portions of his deposition by avowal. In fact, EQT only entered Hamilton's deposition in the record by avowal to preserve its objection to another evidentiary ruling by the trial court. Additionally, numerous EQT employees testified by avowal that their respective H_2S gas monitors never alarmed while around Slone's residence; thus, H_2S gas was not in high enough concentrations to pose a danger at the time to the employees that such took measurements. In the final analysis, the trial court possessed discretion as to the missing evidence instruction, and we are simply unable to conclude that the trial court abused its discretion by refusing to give a missing evidence instruction to the jury.

Slone next asserts that the trial court committed reversible error by admitting the testimony of EQT expert, George Schewe, concerning an air model that illustrated the dispersion of H_2S leaking from the well. Slone particularly argues that H_2S was documented at the wellhead at a concentration in excess of 500 ppm. Despite such measurement, Slone states that Schewe "arbitrarily used 100 ppm of H_2S as the concentration of gas emanating from the wellhead ... to build his model." Slone's Brief at 10. Slone maintains that it was clear error to introduce Schewe's air model and his opinion concerning H_2S concentrations at Slone's residence.

***4** It is well-established that "[t]he court's role is not to judge the correctness of the expert's conclusions; that assessment is for the jury." *Futrell v. Commonwealth*, 471 S.W.3d 258, 282 (Ky. 2015). Rather, the trial court is tasked with determining whether a witness is qualified to give expert testimony per a *Daubert* analysis.[2] Kentucky Rules of Evidence (KRE) 702; *Turner v. Commonwealth*, 544 S.W.3d 610, 616 (Ky. 2018).

In this case, Slone does not attack Schewe's qualifications to offer expert testimony. Rather, Slone alleges that Schewe utilized an incorrect H_2S concentration at the wellhead, and upon this basis, Schewe's opinions should have been excluded. We disagree. The H_2S concentrations at the wellhead did measure 500 ppm; however, the evidence did not establish that the H_2S concentrations at the wellhead remained at 500 ppm. Moreover, the correctness of Schewe's opinions, including the air model, goes to the weight of same, and may be properly challenged by cross-examination and by Slone's own expert's conflicting opinions. Therefore, we do not conclude that the trial court committed reversible error by admitting the testimony of Schewe at trial.

Slone also argues that the trial court committed reversible error "by allowing evidence of subsidence as a superseding intervening cause." Slone's Brief at 11. Specifically, Slone maintains:

> On the hillside above the subject well, there had been some subsidence of the ground – commonly referred to as a "slip." EQT sought to introduce evidence of this slip and testimony of prior underground mining in the vicinity to infer that the subsidence caused a pipe to break and this enabled H_2S to leak into the atmosphere. Prior to trial, [Slone] made a motion in-limine to

> exclude any suggestion or evidence that any other person or event was responsible for the H_2S gas leak.... The Court, however, withheld ruling on this issue. To do so was an error, and it prejudiced [Slone].
>
> An act or event cannot be a superseding cause if the original actor could have reasonably foreseen the resultant injury. Here, even if [EQT] could have shown that the H_2S leak was caused by land subsidence, it could not seriously argue that such was not foreseeable. Hillside subsidence in Eastern Kentucky is not an act or an event that is "extraordinary and unforeseeable." To the contrary, [EQT] was well aware of mining in the area and knew that hillside subsidence could impact its gas well. In fact, the possibility of land subsidence was just one more reason why EQT should have plugged its well prior to the 2013 leak....
>
> ***5** By withholding ruling on this issue, the Court allowed [EQT] to repeatedly question witnesses and introduce irrelevant and improper evidence throughout the trial to support the suggestion that it should be relieved of liability for the 2013 H_2S leak because the "real" cause was subsidence caused by mining.... The Court ultimately rejected [EQT's] proposed instruction allowing the jury to find this slip to be a superseding intervening cause relieving [EQT] of liability for [Slone's] exposure; but the Court only did so at the end of the trial after the jury had heard evidence of how the slip had been the cause of the leak.

Slone's Brief at 11-13 (citations omitted).

Relevant evidence is generally admissible under KRS 402. Relevant evidence is defined in KRE 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." But, relevant evidence may be excluded if the probative value of the evidence is outweighed by undue prejudice per KRE 403.

An appellate court's review of evidentiary issues requires a two-step analysis. Initially, our review of the trial court's ruling to admit or exclude evidence is limited to an abuse of discretion. *Clephas v. Garlock, Inc.*, 168 S.W.3d 389, 393 (Ky. App. 2004). An abuse of discretion occurs when the trial court's ruling is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). If the trial court abuses its discretion by admitting or excluding evidence, we must then determine whether said error constitutes harmless error or reversible error. To constitute reversible error, the substantial rights of a party must have been affected. KRE 103(a).

In this case, evidence of mine subsidence occurring at the well was relevant. This evidence offered an explanation for why a pipe cracked at the well allowing H_2S to leak and also refuted Slone's evidence that EQT's carelessness caused the leak at the well. Upon the whole, we simply do not believe that the trial court abused its discretion by admitting evidence of mine subsidence.

Slone next asserts that the trial court committed error by denying her motion for a directed verdict upon the issue of EQT's liability. In particular, Slone maintains "that a legally-cognizable duty existed and that duty had been breached by [EQT] was established as a matter of law because [EQT] failed to plug the subject well ... as mandated by Kentucky law [805 Kentucky Administrative Regulations (KAR) 1:070]." Slone's Brief at 18. Slone points to testimony that EQT stopped production at the well on February 2, 2011, and had no plans to restart production at the well. Per 805 KAR 1:070, Slone argues that EQT should have plugged the well after ceasing production, and its failure to do so constituted a violation of 805 KAR 1:070 that entitled her to damages. More particularly, Slone argues:

> [W]hen the duty violated is one established by law, and the harm is the type intended to be prevented by the statute or regulation, then causation is not a matter of factual dispute – it is established as a matter of law. Therefore, in such cases, unless a question is presented as to the comparative fault of a plaintiff or some other person, a plaintiff is entitled to a directed verdict on liability because there is no factual issue regarding causation for the jury to decide. In the case at bar, it was undisputed that [EQT] violated 805 KAR 1:070 and that this was the sole legal cause of [Slone]'s exposure to H_2S gas. In addition, the statute here was obviously enacted to protect the public and prevent the escape of gas. Thus, in this case [Slone] was undeniably entitled to a directed verdict on liability at the close of the evidence.

***6** Slone's Brief at 20 (citations omitted). Additionally, Slone argues that "even if no statute or regulation had been violated, the proof was nevertheless uncontroverted that [EQT's] actions were the sole legal cause of [Slone's] harm." Slone's Brief at 20.

The Kentucky Supreme Court has instructed that a "trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ." *Jewish Hosp. & St. Mary's Healthcare Inc. v. House*, 563 S.W.3d 626, 630 (Ky. 2018) (quoting *Argotte v. Harrington*, 521 S.W.3d 550, 554 (Ky. 2017)). It must be recognized that "[d]irected verdicts for

plaintiffs in negligence cases are rare, but when the undisputed evidence points unerringly to negligence of the defendant as the cause of the accident, a directed verdict for the plaintiff is proper." *Droppelman v. Willingham*, 169 S.W.2d 811, 814 (Ky. 1943). Upon appellate review of the denial of a directed verdict for a plaintiff, we must determine whether under the evidence as a whole a reasonable jury could not find in favor of defendant. Kentucky Rules of Civil Procedure (CR) 50.01. And, to prevail upon a negligence *per se* claim, a "violation [of the statute] must have been a substantial factor in causing the result." *McCarty v. Covol Fuels No. 2, LLC*, 476 S.W.3d 224, 228 (Ky. 2015) (quoting *Hargis v. Baize*, 168 S.W.3d 36, 46 (Ky. 2005)).

In the case *sub judice*, EQT introduced evidence that Slone was not exposed to a sufficient concentration of H_2S to have caused her injury. Additionally, EQT introduced evidence that many of Slone's alleged injuries were, in fact, chronic conditions for which she had previously sought medical treatment. In short, EQT introduced a sufficient quantum of evidence from which a reasonable juror could find that the release of H_2S from the well was not a substantial factor in causing injury to Slone. *See Estate of Moloney v. Becker,* 398 S.W.3d 459, 462 (Ky. App. 2013). Although Slone alleged violation of a regulation constituted negligence *per se*, Slone's alleged injury must still have been caused by such violation. *See McCarty*, 476 S.W.3d at 228. Consequently, we believe the trial court properly denied Slone's motion for directed verdict.

Slone further contends that trial counsel erred by denying his motion for **new trial** based upon **misconduct** by EQT's **attorney**. During closing argument, Slone points out that EQT's **attorney** made the following statements:

> The proof was, that after this leak occurred – "What did EQT do?" It had **monitoring**. It had people with **monitors** near the well and near the house.

Slone's Brief at 14 (emphasis added). According to Slone, these statements were highly prejudicial because the trial court had excluded evidence of hand-held gas monitoring conducted by EQT employees and evidence concerning the absence of an alarm that would indicate the presence of H_2S in higher concentrations. Slone believes that these statements improperly "reinforce[d] to the jury the false impression that daily continual monitoring had [shown] ... [she] had not been exposed to an H_2S gas." Slone's Brief at 14. As such, Slone maintains that she was entitled to a **new trial**.

Under CR 59.01(b), a **new trial** may be granted by the trial court based upon the **misconduct** of an **attorney**. It may constitute **misconduct** for an **attorney** during closing argument to refer to facts that were excluded by the trial court. *Jefferson v. Eggemeyer*, 516 S.W.3d 325, 340 (Ky. 2017). Where the trial court gives an admonition to the jury to disregard the improper facts alluded to during opening or closing argument, "the jury is deemed to follow an admonition unless it can be shown that there was an 'overwhelming probability that the jury' could not 'and there is a strong likelihood that the effect of the inadmissible evidence would be devastating....' " *Id.* (citation omitted).

*7 In this case, the record reveals that the trial court gave the jury an admonition, and there is no showing from the record in this case of an overwhelming likelihood the jury failed to follow the admonition or that the effect of EQT **attorney's** statements were devastating. *See id.* Rather, the **attorney** for EQT made an isolated reference during closing argument to gas monitoring near Slone's home. Although each case is reviewed based upon its unique facts, it is generally accepted that "[a]n isolated instance of improper argument ... is seldom deemed prejudicial." *Rockwell Int'l Corp. v. Wilhite*, 143 S.W.3d 604, 631 (Ky. App. 2003). Upon the whole, we do not believe the trial court erred by denying the motion for **new trial** based upon the improper closing argument of counsel for EQT.

Slone lastly argues that she was entitled to a **new trial** based upon another instance of **misconduct** by counsel for EQT. In particular, Slone states that the trial court excluded evidence concerning her alleged withdrawal from pain medicine as a cause of her physical symptoms. Nevertheless, under cross-examination, Slone argues that EQT improperly questioned Dr. Kevin Trangle "about pain medication withdrawal." Slone's Brief at 17. Slone believes that counsel for EQT committed **misconduct** by questioning Dr. Trangle about a matter that was previously excluded by the trial court.

We reviewed the video record as cited by Slone for the trial court's ruling that excluded evidence of her withdrawal from pain medication. At that hearing, Slone did request that such evidence be excluded at trial. But, the trial court did not rule upon the motion; rather, the court deferred a ruling until it could review additional medical records. The record later reveals that the issue of exclusion of such evidence was not brought to the trial court's attention again until after Dr. Trangle's testimony during trial. Consequently, we cannot say that counsel for EQT engaged in **misconduct** by his cross-examination of Dr. Trangle. In sum, we are of the opinion that the trial court did not commit reversible error warranting a **new trial**.

CROSS-APPEAL NO. 2019-CA-1115-MR

Considering our resolution of the direct appeal, the contentions of error raised by EQT are moot.

For the foregoing reasons, the Judgment of the Floyd Circuit Court is affirmed in Appeal No. 2019-CA-0884-MR and Cross-Appeal No. 2019-CA-1115-MR.

ALL CONCUR.

All Citations

Not Reported in S.W. Rptr., 2021 WL 298412

Footnotes

1 Reba Slone also named as a defendant North Star Mining, Inc., but the parties settled prior to trial.

2 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

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COMMONWEALTH OF KENTUCKY
WHITLEY CIRCUIT COURT
DIVISION 1
CIVIL ACTION NO. 09-CI-00072

ELECTRONICALLY FILED

WALTER HOSKINS, as Executor of the Estate of BESSIE MORGAN, deceased — PLAINTIFF

v. **ORDER GRANTING JNOV AND NEW TRIAL**

HILLCREST NURSING HOME OF CORBIN, INC., et al. — DEFENDANTS

*** *** *** ***

On motion of Plaintiff, alter Hoskins, as Executor of the Estate of Bessie Morgan, deceased, by and through counsel, for a judgment notwithstanding the verdict pursuant to CR 50.02, and a motion for new trial pursuant to CR 59, and the Court having considered the arguments and submissions of the parties and the applicable law and facts of record, and being otherwise sufficiently advised;

IT IS HEREBY ORDERED that Plaintiff's motion for a JNOV is GRANTED and this action will be set for a trial on damages only;

IT IS HEREBY ORDERED that Plaintiff's motion for a new trial is granted and this action will be set for a new trial on liability and damages.

ENTERED this _____ day of _____, 2023

_____
Honorable Judge, Whitley Circuit Court

TENDERED BY:

/s/ Matthew M. Coman
Stephen M. Garcia
Matthew Coman (PHV)
312 S. 4th Street, Suite 700
Louisville, KY 40202
Telephone: (502) 584-3805
Facsimile: (502) 584-3811
edocs@lawgarcia.com
Counsel for Plaintiff