COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
DIVISION IV
CIVIL ACTION NO. 21-CI-02998
Electronically Filed

VICKI LEMASTER, Individually, and as Court Appointed Administratrix of the ESTATE OF GARY LEMASTER — PLAINTIFF

VS. **MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, MOTION TO ALTER, AMEND, OR VACATE, AND MOTION FOR NEW TRIAL**

DAVID P. DUBOCQ, MD and FAMILY PRACTICE ASSOCIATES OF LEXINGTON, P.S.C. — DEFENDANTS

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

Comes the Plaintiff, Vicki LeMaster, Individually, and as Court Appointed Administratrix of the Estate of Gary LeMaster, by counsel, submits this Memorandum of Law in support of her Motion for Judgment Notwithstanding the Verdict (JNOV) under CR 50.02, or in the alternative, Motion to Alter, Amend, or Vacate under CR 59.05, or in the alternative, Motion for a New Trial under CR 59.01, and states as follows:

FACTUAL BACKGROUND

As this Court is aware, on October 11, 2020, Gary Anthony (Tony) LeMaster passed away of a myocardial infarction at Clark Regional Hospital in Winchester, Kentucky.[1] Prior to this date, on October 2, 2020, Mr. LeMaster had a scheduled doctor's appointment with his family practitioner, Dr. David Dubocq, at Family Practice Associates, PSC because he had been experiencing chest pain, elevated blood pressure, and an elevated pulse.[2] At the appointment, Mr.

[1] Death certificate of Gary Tony LeMaster issued May 14, 2024, certifying date of death on October 11, 2020, due to myocardial infarction, attached hereto as **Exhibit 1**.
[2] Deposition of Vicki LeMaster, March 14, 2022, P. 63, ll. 22-25, and Ms. LeMaster's relevant deposition testimony is attached collectively hereto as **Exhibit 2**; Dr. David Dubocq's treatment record of Gary Tony LeMaster dated October 2, 2020, attached hereto as **Exhibit 3**.

LeMaster had an EKG which revealed an acute coronary syndrome.[3] Notably, Dr. Dubocq did not advise Mr. LeMaster that he had recently had a heart attack.[4] Instead of referring Mr. LeMaster to an emergency department, Dr. Dubocq referred him out for a cardio stress test to be conducted in a few weeks.[5]

On October 11, 2020, Mr. LeMaster and his wife, Vicki LeMaster, were at home getting ready to attend church via Zoom.[6] As church was getting ready to begin, Mr. LeMaster grabbed his chest and yelled "Oh God!" before becoming unresponsive.[7] Ms. LeMaster called 911 and began giving him CPR.[8] City of Winchester Fire and EMS arrived at their home and transported Mr. LeMaster to Clark Regional Medical Center.[9] Shortly thereafter, Mr. LeMaster passed away because Dr. Dubocq failed to recognize his medical emergency and properly diagnose his abnormal EKG finding.[10]

After Mr. LeMaster died, Dr. Dubocq's office generated a treatment note dated November 4, 2020, which gave the impression that Mr. LeMaster had been seen on that date.[11] Obviously, that did not occur despite the record which indicated that it did.[12] This highlights one of the major issues in this case: the accuracy and reliability of Mr. LeMaster's medical records.[13] The accuracy and reliability of the October 2, 2020, record is likewise problematic with even the Defendants'

[3] Deposition of Dr. Brian Swirsky, March 20, 2023, P. 86, l. 18 – P. 88, 8, and Dr. Swirsky's relevant deposition testimony is attached collectively hereto as **Exhibit 4**.
[4] Deposition of Ms. LeMaster, P. 42, ll. 6-10.
[5] Deposition of Ms. LeMaster, P. 42, ll. 11-14.
[6] Deposition of Ms. LeMaster, P. 53, ll. 3-11.
[7] Deposition of Ms. LeMaster, P. 54, l. 22 – P. 55, l. 21.
[8] Deposition of Ms. LeMaster, P. 54, l. 22 – P. 55, l. 21.
[9] Deposition of Ms. LeMaster, P. 55, l. 24 – P. 56, l. 10.
[10] Deposition of Dr. Swirsky, P. 100, l. 10 – 101, l. 4; Deposition of Dr. Nitin Damle, March 30, 2023, P. 157, ll. 1-7; P. 158, ll. 9-19, and Dr. Damle's relevant deposition testimony is attached collectively hereto as **Exhibit 5**.
[11] Dr. Dubocq's treatment record of Gary Tony LeMaster dated November 4, 2020, attached hereto as **Exhibit 6**.
[12] Death certificate of Gary Tony LeMaster issued May 14, 2024, certifying date of death on October 11, 2020, due to myocardial infarction; Dr. Dubocq's treatment record of Gary Tony LeMaster dated November 4, 2020.
[13] Deposition of Dr. Swirsky, P. 87, l. 2 – 88, l. 8; *See also* P. 30, ll. 13-25; P. 83, l. 5 – 84, l. 2; Deposition of Dr. Damle, P. 156, ll. 13-16.

own medical expert describing the documentation as "not good."[14] Plaintiff's expert opined, "Dr. Dubocq failed to appropriately recognize the symptom complex and further explore and document the symptom complex of Mr. LeMaster…"[15] In fact, he further noted, "the history is wholly insufficient from a documentation standpoint…because it is absent information."[16]

Importantly, Dr. Swirsky opined "Had Mr. LeMaster been sent to the emergency room on October 2nd, 2020, and received cardiology consultation… he would have underwent diagnostic cardiac catheterization and received cardiac revascularization as appropriate, and survived and not died on October 11th, as he did, from a sudden cardiac death."[17]

PROCEDURAL HISTORY

This case was tried before a jury on May 20-24, 2024 ("first trial") and retried on July 14-17, 2025 ("second trial"). For the reasons stated herein and as evidenced by the record, Plaintiff has not received impartial treatment by the Court nor a fair trial. Plaintiff is entitled to judgment notwithstanding the verdict in her favor; for this Court to alter, amend, or vacate the verdict, or in the alternative a new trial with an impartial judge. To the latter point, Plaintiff has filed a Motion for Recusal contemporaneously with the instant Motion and adopts and incorporates it by reference as though fully set forth herein.

Throughout both trials, the Court improperly made facial expressions that appeared designed to prejudice the Plaintiff, though the extensiveness of these nonverbal communications and the prejudicial effect was much greater at the second trial.[18] At the first trial, the Court admonished the

[14] Deposition of Dr. John Corl, November 8, 2023, P. 38, ll. 1-13, and Dr. Corl's relevant deposition testimony is attached collectively hereto as **Exhibit 7**.
[15] Deposition of Dr. Swirsky, P. 100, ll. 10-14.
[16] Deposition of Dr. Swirsky, P. 87, ll. 22-25.
[17] Deposition of Dr. Swirsky, P. 93, ll. 10-16; *see also* Deposition of Dr. Nitin Damle, P. 157, ll. 15-18.
[18] Dr. Corl's Trial Testimony on July 16, 2025, at VR 12:25:10—12:26:11; *Id*. at VR 12:33:45—12:35:33; Dr. Cline's Trial Testimony on July 17, 2025, at VR 10:20:09—10:22:25.

Jury not to consider her facial expressions.[19] However, no such admonishment was given at the second trial despite the Court's facial expressions more strongly exuding disdain for Plaintiff's counsel and Plaintiff's witnesses (though no such admonishment would cure the prejudicial impact).

At the first trial, the Court interpreted Mr. LeMaster's EKG as "show[ing] there's nothing going on."[20] The trial Judge also made comments off the record[21] at the first trial that her own personal EKGs looked worse than Mr. LeMaster's EKG and even went so far at the second trial to claim she knew more about heart issues than anyone else in the courtroom at that time.

At the second trial, the Court made clear its partiality to Dr. Dubocq and defense counsel abundantly clear both verbally and non-verbally (i.e. statements on the record and facial expressions). The Court's nonverbal cues undoubtedly influenced the jury's perception of the evidence presented. Given the Court's obvious opinions about the merits of Plaintiff's case and numerous rulings that disregarded the evidence and controlling law, the Court's impartiality can be reasonably questioned and prejudice must be presumed.

Additionally, at the second trial, the Court interpreted Mr. LeMaster's EKG and stated "the EKG established there was no heart attack going on."[22] Despite being a hotly contested issue by the parties, the Court went a step further and stated, "There is no evidence [Mr. LeMaster] was having chest pain that day. It's undisputed."[23] The Court ignored the evidence contained within the October 2, 2020, record: "present chest pain (burning sensation relieved with rest)", and simply stated, "[Dr. Dubocq] explained what those [words] meant" and "he created the record." Plaintiff's counsel explained to the Court that "the medical record is one piece of evidence and Dr. Dubocq's

[19] Trial Transcript, May 24, 2024, P. 76, ll. 6-21; the relevant excerpts are attached collectively hereto as **Exhibit 8**.
[20] *Id.* at P. 67, ll. 10-11.
[21] Undersigned presumes the comments were made off the record since she has not located them within the record at this time.
[22] Dr. Corl's Trial Testimony on July 16, 2025, at VR 12:35:08—12:35:30.
[23] *Id.* at VR 12:34:00—12:34:15.

testimony is a different piece of evidence. And they don't have to be completely in harmony." Plaintiff's counsel also stated, "Does the jury have to believe [Dr. Dubocq] over the record? They're both pieces of evidence they can evaluate." Ultimately, over vigorous objections, the Court denied that the record said present chest pain and Plaintiff was prejudiced since she could not highlight this fact to the jury given the Court's ruling.

Moreover, the Court equated Defendants' interpretation of disputed facts with the truth and berated Plaintiff's counsel throughout the second trial to "tell the truth." At the pre-trial conference on July 11, 2025, the Court chastised Plaintiff's counsel about her closing argument in the first trial that highlighted the issue of poor documentation in Mr. LeMaster's records; the Court stated, "The Court finds it extremely unethical and inappropriate to say something different to a jury that is not the evidence in the case."[24] During that same pre-trial conference, in reference to Plaintiff counsel's cross-examination of Dr. Dubocq at the second trial, that Court stated, "What we are not going to do is put words in somebody's mouth that doesn't exist…and not through your continual cross and asking and asking and using the term 'a few days'[25] to a layperson when they're being deposed and you are a lawyer trying to set up exactly what you want. We are just not going to go down that road."[26] At one point in the second trial, during Plaintiff's cross-examination of a defense expert, the Court stated, "I know you're not going to like the answer necessarily but you're you're [sic] probably not going to get the answers you want, so just let him answer your question."[27] When facts are disputed, such as the facts of the instant case, attorneys are well in their right to elicit testimony on cross-examination in support of their interpretation of the facts.

[24] Pre-Trial Conference on July 11, 2025, VR at 09:37:22 – 09:37:37.
[25] When Mr. LeMaster experienced chest pain is a disputed issue in this case and reasonable minds can differ on whether he was experiencing chest pain at his appointment with Dr. Dubocq on October 2, 2020.
[26] Pre-Trial Conference on July 11, 2025, VR at 09:22:06 – 09:23:49.
[27] Trial Testimony, July 16, 2025, VR at 12:21:43 – 12:21:32.

After repeatedly making objections on behalf of the defense and interpreting disputed facts in a way that was favorable to the defense, the Court went so far as to suggest that Plaintiff's counsel was not smart enough to watch the trial transcripts from the first trial and do things differently in the second trial, even though efforts to do things differently were routinely repudiated despite being in conformity with the evidence and the law.[28]

Such actions manifest as bias and prejudice, and should the Judgment not be rectified, Plaintiff is entitled to a trial with a presiding judge who maintains impartiality and integrity in their judicial duties.

The Court's limitation of Plaintiff's theory of the case, exclusion of critical expert testimony, limitation of Plaintiff's cross-examination of defense witnesses, limitation on Plaintiff's closing arguments, numerous and significant errors of law, and comments on and off the record expressing an opinion concerning the merits of the proceeding demonstrate improper bias, warranting recusal, particularly because the testimony excluded or limited was central to the case. Such actions invaded the province of the jury, whose job is to interpret the evidence, weigh credibility, and apply the law.

LEGAL STANDARD

The legal standards for Judgment Notwithstanding the Verdict (JNOV) under CR 50.02, Motion to Amend, Alter, or Vacate under CR 59.05, and Motion for a New Trial under CR 59.01, are set forth below:

I. Judgment Notwithstanding the Verdict (JNOV)

CR 50.02, the rule that governs JNOV procedure, states in pertinent part:

> 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

[28] Trial Testimony, July 15, 2025, VR at 01:12:44 – 01:12:55.

> move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict...A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed.

A prerequisite to seeking JNOV "is that the moving party make a motion for directed verdict at the close of all the evidence." *Huddleston v. Murley*, 757 S.W.2d 216, 217 (Ky. App. 1988). A party that fails to seek a directed verdict at the close of all evidence has "no right" to seek JNOV subsequently. *Id.* Here, the Plaintiff moved for a directed verdict at the close of her case and Defendants' case and adopts and incorporates her arguments on the record as though fully set forth herein.

II. Motion to Amend, Alter, or Vacate

Under CR 59.05, the Court is also freely permitted to amend or vacate a judgment. "Generally, a trial court has unlimited power to amend and alter its own judgments." *Bailey v. Bailey*, 399 S.W.3d 797, 801 (Ky. App. 2013). The primary purpose of a motion to alter amend or vacate is not only to prevent unnecessary appeals, "but also to provide the circuit court with an opportunity to correct its own error." *Kentucky Workmen's Compensation Board v. Alexander*, 562 S.W.2d 670, 672 (Ky. App. 1978). According to the Kentucky Supreme Court in *Gullion v. Gullion,* "CR 59.05 does not set forth the grounds for the motion." Federal courts, in construing CR 59.05's federal counterpart, have elaborated on the grounds for relief:

> There are four basic grounds upon which a Rule 59(e) motion may be granted. **First, the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based.** Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. **Third, the motion will be granted if necessary to prevent manifest injustice.** Serious misconduct of

> counsel may justify relief under this theory. Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law.

Gullion v. Gullion, 163 S.W.3d 888, 893 (Ky. 2005) (emphasis added).[29]

When a court grants a Rule 59 new trial motion, the old judgment is of no effect and the new ruling supplants the old judgment. However, to grant a new trial, the court must enter a separate, written order. 12 Moore's Federal Practice - Civil § 59.19. When deciding whether to grant a new trial pursuant to FRCP 59, the court is free to independently weigh evidence, and a motion for a new trial does not require the trial judge to review evidence in the light most favorable to the verdict. *Jennings v. Jones*, 587 F.3d 430 (1st Cir. 2009). A court should be reluctant to set aside product of jury's conscientious deliberations *unless it would amount to miscarriage of justice* to allow the award to stand. *Mainelli v Haberstroh*, 237 F. Supp. 190 (M.D. Pa. 1964). **A new trial under FRCP 59(e) is "commonly granted" in cases where "improper conduct by [an] attorney or court unfairly influenced [the] verdict."** *Arthrocare Corp. v. Smithh & Nephw, Inc.*, 310 F.Supp.2d 638 (D.C. Cir. 2004) (vacated in part on other grounds) (emphasis added). A showing of manifest injustice under Rule 59(e) requires the existence of a fundamental flaw in the [judgment] that, without correction, would lead to a result that is both inequitable and not in line with applicable policy. *Meador v. Growse*, 2014 U.S. Dist. LEXIS 100141, at *13 (E.D. Ky. July 23, 2014).

[29] As referenced *supra*, "It is well established that Kentucky courts rely upon Federal case law when interpreting a Kentucky rule of procedure that is similar to its federal counterpart." *Curtis Green & Clay Green, Inc. v. Clark*, 318 S.W.3d 98, 105 (Ky. App. 2010) (citing *Newsome By and Through Newsome v. Lowe*, 699 S.W.2d 748 (Ky. App. 1985)); *Neb. Alliance Realty Co. v. Brewer*, 529 S.W.3d 307, 311 (Ky. App. 2017); *Lamar v. Office of Sheriff of Daviess County*, 669 S.W.2d 27, 31 (Ky. App. 1984); *Hensley v. Haynes Trucking, LLC*, 549 S.W.3d 430, 436 (Ky. 2018); *Summit Med. Group v. Coleman*, 2022 Ky. App. Unpub LEXIS 300, n.13 (May 27, 2022) ("Given the similarity between CR 23 and its federal counterpart and in the absence of controlling Kentucky precedent, we look to federal cases for guidance."); *see also* Kurt A. Philipps, Jr., 6 Ky. Prac. R. Civ. Proc. Ann. Rule 1, Comment 2 (Aug. 2017 update) ("The general pattern of the [Kentucky] Rules follows quite closely the mechanical and logical arrangement of the Federal Rules of Civil Procedure. The Kentucky Rules incorporate most of the fundamental concepts implicit in the Federal Rules.")

Under the federal interpretation of CR 59.05's counterpart, FRCP 59(e), the prevention of manifest injustice based on the serious misconduct of the Court is grounds for the Court to grant a motion to vacate a judgment and to order a new trial.

Here, as detailed *supra*, there is no question that what occurred amounted to serious misconduct which influenced the jury. There is similarly no question that should this Court's impartial rulings stand, such as ruling for the defense and against the Plaintiff on the exact same issue, it would necessarily result in manifest injustice. Allowing the judgment to stand would "lead to a result that is both inequitable and not in line with applicable policy." *Meador*, 2014 U.S. Dist. LEXIS at *13. Manifest injustice will result from Ms. LeMaster's prejudicial trial if the judgment were to stand. Therefore, under CR 59.05, the judgment must be vacated and a new trial ordered to prevent manifest injustice.

III. Motion for a New Trial

In the alternative that the Court does not grant the Plaintiff's Motion for Judgment Notwithstanding the Verdict or Motion to Alter, Amend or Vacate, then the Plaintiff requests that she be granted a new trial pursuant to CR 59.01 which provides that "[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.**

(emphasis added).

Pursuant to CR 59.01, because of irregularity in the proceedings of the court, jury or prevailing party, or an order of the court, or abuse of discretion, Ms. LeMaster was prevented from having a fair trial and is entitled to a new trial. Additionally, the Verdict was not sustained by sufficient evidence, or is contrary law. Further, there were errors of law occurring at the second trial and properly objected to by Plaintiff's counsel.

The Trial Verdict and Judgment was entered on July 30, 2025. It reflects that the Plaintiff made a Motion for a Directed Verdict at the conclusion of her case and the Defendants' case. Therefore, the Plaintiff is both procedurally correct and timely in bringing the instant Motions.

ARGUMENT

The statements and facial expressions made by the Court along with the rulings that ignored evidence and controlling law constitute egregious and improper conduct which resulted in a verdict rendered with prejudice to Ms. LeMaster. Therefore, pursuant to the Kentucky Civil Rules, and in the interest of a fair and impartial trial as guaranteed by the Kentucky Constitution, Ms. LeMaster's Motion for Judgment Notwithstanding the Verdict (JNOV) under CR 50.02, or in the alternative, Motion to Amend, Alter, or Vacate under CR 59.05, or in the alternative, Motion for a New Trial under CR 59.01 must be granted. Set forth below are manifest errors warranting relief:

I. Plaintiff was prevented from eliciting testimony from expert witnesses about key matters in dispute thereby hindering her ability to put forth her theory of the case.

The exclusion of expert testimony constitute grounds for a new trial because the exclusion affected the substantial rights of Plaintiff and is inconsistent with substantial justice. Kentucky law

provides that errors in the admission or exclusion of evidence, including expert testimony, warrants a new trial when the error results in prejudice that affects the outcome of the trial. Courts apply an abuse of discretion standard to determine whether the exclusion of expert testimony was improper and whether it caused substantial prejudice.

Substantial prejudice occurs when the exclusion creates a "substantial possibility" that the jury's verdict would have been different if the testimony had been admitted.[30] For example, in *Lukjan v. Commonwealth*, the exclusion of an expert witness's testimony was deemed not harmless because it left the defendant without any expert opinion to rebut the prosecution's evidence, raising a substantial possibility that the jury would have reached a different outcome.[31]

Importantly, when a trial court's exclusion of expert testimony is based on clearly erroneous findings or results in substantial prejudice, it constitutes grounds for a new trial. In *Quattrocchi v. Nicholls*, the appellate court found that the trial court abused its discretion by excluding expert testimony that was critical to the plaintiff's case, and the exclusion was not harmless because it likely affected the trial's outcome.[32]

The Court improperly gave Plaintiff a Hobson's choice[33] at the second trial by threatening to declare a mistrial and have Plaintiff's counsel "start from square one"[34] if counsel wanted to use the same theory of the case that they had used in the first trial: that Dr. Dubocq should have told Mr. LeMaster that he had a heart attack; that if Mr. LeMaster had been sent to the ER, the ER

[30] *Lukjan v. Commonwealth*, 358 S.W.3d 33, 39 (Ky. Ct. App. 2012).
[31] *Id*.
[32] *Quattrocchi v. Nicholls*, 565 S.W.3d 622 (Ky. Ct. App. 2018).
[33] A Hobson choice is defined as a situation in which you are supposed to make a choice but do not have a real choice because there is only one thing you can have or do.
[34] On the second day of the second trial, the Court erred in opining that Plaintiff had to amend her Complaint to more specifically describe her theory of the case in order to advance that theory at the second trial despite Kentucky following a notice pleading standard. Pursuant to CR 8.01(1)(a), a pleading setting forth a claim for relief "shall contain a short and plain statement of the claim showing that the pleader is entitled to relief." Plaintiff was not required to assert detailed facts to support her cause of action nor should she be prejudiced for doing exactly what the law requires.

would have undertaken measures that would have prevented his untimely death; and that Dr. Dubocq's deficient documentation called into question whether Mr. LeMaster was experiencing chest pain at the time of his appointment with Dr. Dubocq on October 2, 2020.[35] The Court likewise excluded crucial evidence that would have been used to advance the foregoing theory of the case and made other improper rulings amounting to reversible error, which are set forth in more detail below.

A. The Court erred in limiting, and on some hotly contested issues excluding altogether, the testimony of Dr. Swirsky, such that Plaintiff is entitled to relief.

On August 9, 2024, Defendants filed a Motion in Limine to prevent Plaintiff from introducing evidence critical of Dr. Dubocq for not telling Mr. LeMaster specifically that he had had a heart attack rather than an "abnormal EKG." Defendants alleged that such opinions were not disclosed in Plaintiff's CR 26 disclosure, notwithstanding the fact that they failed to object to any such questions at any relevant time and notwithstanding the fact that the Plaintiff's position was clear in the disclosures and general theory of the case. However, Ms. LeMaster properly disclosed the fact that her retained expert Dr. Swirsky would provide expert testimony on the standard of care provided to Mr. LeMaster and testimony to rebut Defendants' experts testimony on the standard of care.[36]

Per Plaintiff's CR 26 Disclosures filed on December 30, 2022, she disclosed Dr. Swirsky would provide expert testimony that Dr. Dubocq's failure to meet the standard of care caused the death of Mr. LeMaster.[37] Moreover, Plaintiff disclosed that Dr. Swirsky would provide testimony that Dr. Dubocq did not appreciate the EKG findings and, as a result, failed to immediately send

[35] Trial Record on July 15, 2025, at VR 1:09:18—1:23:12.
[36] Plaintiff's CR 26 Disclosures filed on December 30, 2022, attached hereto as **Exhibit 9**.
[37] Plaintiff's CR 26 Disclosures at 2.

Mr. LeMaster to the emergency room.[38] Dr. Swirsky's testimony that Dr. Dubocq should have informed Mr. LeMaster he had a heart attack directly concerns Dr. Dubocq's breach of the standard of care and Dr. Dubocq's inability to appreciate the EKG findings; that inability to appreciate the EKG findings obviously made it impossible for Dr. Dubocq to explain the significance and the seriousness of the EKG test result to Mr. LeMaster. Specifically, as seen in Defendants' Motion in Limine, Dr. Swirsky testified that to comply with the standard of care Dr. Dubocq should have informed Mr. LeMaster that he had a heart attack and, as such, he should have been immediately sent to the emergency room. Thus, Dr. Swirsky's testimony clearly concerned the standard of care, which was plainly disclosed in Plaintiff's CR 26 Disclosures and for which the Defendants could have fully addressed with Dr. Swirsky in his discovery deposition which was taken well before the first trial.

Additionally, the "law of the case" principles are applicable here as well. At the first trial, the Court ruled that Dr. Swirsky could provide testimony on Defendants' breach of the standard of care.[39] Shortly thereafter, Dr. Swirsky testified that Dr. Dubocq did not appreciate the EKG findings and should have informed Mr. LeMaster that the EKG showed he had had a heart attack.[40] After Dr. Swirsky provided this testimony, the Defendants did not object. Thus, Defendants waived any objection because they did not appeal the Court's ruling that Dr. Swirsky could provide testimony on the standard of care and they did not object to his specific testimony at the time it was given.[41]

[38] *Id.* at 3.
[39] Dr. Brian Swirsky Trial Testimony on May 22, 2024, VR 10:44:51 – 10:56:36.
[40] *Id.* at VR 11:09:21 – 11:11:36.
[41] *Thomas*, No. 2005—CA—002185—WC, 2006 WL 1360885 at *3 (Ky. Ct. App. 2006) (applying the "law of the case" doctrine to an administrative decision); *see also Whittaker*, 52 S.W.3d 567, 570 (Ky. 2001) (providing that failure to appeal an adverse determination by the Board established the "law of the case").

Moreover, Defendants sought to preclude Dr. Swirsky's testimony that Dr. Dubocq should have told Mr. LeMaster he had had a heart attack because the fact Dr. Dubocq did not inform Mr. LeMaster that he had a heart attack does not rise to the level of a standard of care violation. In a medical malpractice case, a plaintiff is generally "required to put forth expert testimony to show that the defendant medical provider failed to conform to the standard of care."[42] As the Court is aware, the element of duty is a question of law for the Court to decide.[43] However, a question as to the breach of the duty of care in a negligence case is an issue of fact.[44] Accordingly, whether Defendants breached the standard of care is a question for the jury to decide.[45] As a result, the Plaintiff is required to put forth expert testimony on the Defendants' breach of the standard of care and the jury must determine at trial, after considering the evidence, whether they breached the standard of care. The Defendants do not get to unilaterally decide what is or is not a violation of the standard of care.

On March 15, 2025, the Court sustained Defendants' Motion in Limine to prevent Plaintiff from introducing evidence critical of Dr. Dubocq for not telling Mr. LeMaster specifically that he had had a heart attack rather than an "abnormal EKG," but allowed Ms. LeMaster to supplement her CR 26 Disclosure. Although Plaintiff's CR 26 Expert Disclosures filed on December 30, 2022, were sufficient to place Defendants on notice of the opinions of Dr. Swirsky, Plaintiff filed her Amended CR 26 Expert Disclosures on March 20, 2025, in a good faith effort to comply with the Court's ruling and to allow Defendants yet another opportunity to depose her experts should they deem it warranted. However, when Defendants' filed a Motion to Strike Plaintiff's Supplemental

[42] *Blankenship v. Collier*, 302 S.W.3d 665, 670 (Ky. 2010) (*discussing Perkins v. Hausladen*, 828 S.W.2d 652, 655—56 (Ky. 1992)). There are two exceptions to this general rule. However, the exceptions discussed in *Perkins* are not applicable here.
[43] *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 248 (Ky. 1992).
[44] *Lewis v. B & R Corporation*, 56 S.W.3d 432, 438 (Ky. Ct. App. 2001).
[45] *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003).

CR 26 Disclosures on March 31, 2025, the Court ultimately entered an Order on May 13, 2025, striking same. This unfounded, continued refusal of the Court to allow the Plaintiff to put on her case in a manner consistent with the evidence is even more perplexing given that subsequently – on the day the second trial was to begin – the Court for the first time offered to declare a mistrial so the Plaintiff could start the whole process over and get additional experts/expert opinions. Again, given the fact that significant time and resources had been spent to have experts present to attend this trial on the day the trial started, giving such a "choice" was, in fact, no choice at all.

Ultimately, though, it is not the undersigned's duty to draft questions for Defendants' counsel and guide them on what questions they should ask Plaintiff's experts during discovery depositions. In any event, Defendants were placed on sufficient notice of Dr. Swirsky's opinion that Dr. Dubocq breached the standard of care and did not appreciate the EKG findings because Dr. Dubocq did not inform Mr. LeMaster that he had a "heart attack" since such testimony was elicited at the first trial, one year prior to the second trial, without objection from Defendants.

The testimony that Dr. Dubocq breached the standard of care and failed to appreciate the EKG findings because he did not tell Mr. LeMaster that he had a heart attack is relevant and crucial testimony concerning Dr. Dubocq's breach of the standard of care.

The Court further erred by not allowing Dr. Swirsky to testify about what an ER physician would have done to prevent Mr. LeMaster's untimely death had Dr. Dubocq sent him to the ER on October 2, 2020, for further assessment.[46] The Court took the position that Plaintiff was obligated to specifically disclose that Dr. Swirsky would testify about what an ER physician would do although Dr. Swirsky's opinions about the standard of care and causation necessarily incorporated same.[47] Notably, when a similar issue arose with a defense expert, the Court allowed

[46] Trial Record on July 15, 2025, at VR 1:09:18—1:23:12.
[47] *Id*.

that expert, Dr. David Cline, to testify about the standard of care for a primary care physician although he specialized in emergency medicine and was not disclosed as a primary care expert.[48]

The Court further erred by not allowing Dr. Swirsky to discuss that Mr. LeMaster had ongoing ischemic changes on the EKG; this was critical and relevant evidence for the jury to consider since Mr. LeMaster died of an ischemic heart-related death and the underlying issue could have been addressed had he undergone proper evaluation on October 2, 2020.[49] The Court sustained an objection by defense counsel when Dr. Swirsky was asked, "What happens if the heart lacks good blood supply?" by Plaintiff's counsel.[50] The Court reasoned that Plaintiff's counsel was required to show where that had been testified to previously or where it was in Dr. Swirsky's deposition.[51] Dr. Swirsky had previously testified that "[t]his was an ischemic heart-related death, as the cause of death."[52] However, Plaintiff's counsel has no control if defense counsel did not ask Dr. Swirsky that exact question during his discovery deposition, though it logically followed from Dr. Swirsky's disclosed opinion that Mr. LeMaster's death was an ischemic heart-related death.

Overall, Dr. Swirsky's testimony limited and/or excluded by the Court was disclosed in Plaintiff's CR 26 Disclosures and the question as to whether or not Dr. Dubocq breached the standard of care is a question for the jury and not the Court. Therefore, the Court erred in excluding such evidence at trial.

[48] Dr. Cline Trial Testimony on July 17, 2025, VR 9:22:17—9:23:14.
[49] Deposition of Dr. Swirsky, P. 71, ll. 10-16.
[50] Dr. Swirsky Trial Testimony on July 15, 2025, VR 02:24:43 – 02:25:07.
[51] *Id.* at 02:25:07 – 02:25:45.
[52] Deposition of Dr. Swirsky, P. 77, ll. 10-11.

B. The Court erred in limiting, and on some hotly contested issues excluding altogether, the testimony of Dr. Damle such that Plaintiff is entitled to relief.

On the second day of the second trial during Dr. Damle's direct examination in Plaintiff's case-in-chief, defense counsel objected to Plaintiff's counsel introducing crucial expert testimony concerning causation and arguing that had Dr. Dubocq sent Mr. LeMaster to the hospital, it likely would have prevented his premature death.[53] Defense counsel argued that Dr. Damle was precluded from providing the such testimony because he previously testified in his discovery deposition that he did not know exactly nor could anyone know exactly what would have occurred had Mr. LeMaster been referred to the ER on October 2, 2020, by Dr. Dubocq. The exchange is set forth below:

> Q. So as we sit here today, fair to say that Dr. Damle does not know exactly what would have occurred had Mr. LeMaster been referred to the ER on October 2nd?
> A. I don't think anybody knows.[54]

The Court sustained Defendants' objection thereby preventing Plaintiff from introducing crucial expert testimony concerning causation and arguing that had Dr. Dubocq sent Mr. LeMaster to the hospital, it likely would have prevented his premature death.[55] However, Dr. Damle should have been allowed to opine that Mr. LeMaster more likely than not would not have died had he been sent to the ER. This opinion was properly disclosed in Plaintiff's CR 26 Expert Disclosures filed on December 30, 2022, wherein Plaintiff stated, "Dr. Dubocq failed to interpret the electrocardiogram and understand the urgency of the electrocardiogram results, and had Gary LeMaster been referred to the emergency room, as he should have been, then he would not have succumbed to a premature and preventable death."

[53] Dr. Damle's Trial Testimony on July 15, 2025, VR 9:25:07—9:29:11.
[54] Deposition of Dr. Damle, P. 73, ll. 5-9.
[55] Dr. Damle's Trial Testimony on July 15, 2025, VR 9:25:07—9:29:11.

Additionally, in Dr. Damle's expert report that was attached to Plaintiff's CR 26 Expert Disclosures, he stated, "If Mr. LeMaster had been properly referred and the standard of care met, he more likely than not would have not succumbed to a premature and preventable death." Further, the Court's ruling imposed an unreasonable standard of proof upon Plaintiff, that she must know exactly what caused Mr. LeMaster's death, rather than the applicable legal standard (i.e. preponderance of the evidence or more likely than not).

C. The Court erred in excluding the deposition testimony of Defendants' experts in Plaintiff's case-in-chief, especially because she had the burden to survive Defendants' directed verdict motions.

The above-referenced excluded expert testimony and its prejudicial affect are discussed further below in Section III, but is noted here to adopt and incorporate the law cited *supra* in this section on when exclusion of expert testimony warrants a new trial.

D. The Court erred in excluding the trial testimony of Dr. Corl that Plaintiff's counsel attempted to elicit, such that Plaintiff is entitled to relief.

Plaintiff's counsel was prevented from eliciting testimony from Dr. John Corl, defense expert, on whether Mr. LeMaster's October 2, 2020, record provided "Present-Chest Pain" and whether mid-back pain is a sign or symptom of chest pain or heart attack. Specifically, Plaintiff's counsel asked Dr. Corl whether the October 2, 2020, record stated "Present—Chest Pain."[56] In turn, Defendants' counsel objected to the question because it was allegedly a mischaracterization of the evidence.[57] The Court ignored the plain language of the October 2, 2020, record and upheld the objection based upon its reliance Dr. Dubocq's testimony that Mr. LeMaster did not have chest pain on the date of the appointment, which is contrary to what is written in the plain language of the subject medical record.[58] Thereafter, Plaintiff's counsel asked Dr. Corl whether he is aware that back

[56] Dr. Corl's Trial Testimony on July 16, 2025, at VR 12:24:00—12:26:10.
[57] *Id.*
[58] *Id.*

pain is a sign or symptom of chest pain.[59] Although the Court acknowledged Dr. Dubocq provided testimony that back pain was a sign and symptom of cardiac issues, Defendants' counsel objected arguing testimony that back pain was a sign or symptom of a cardiac issue was not presented into evidence by anyone or any expert, and the Court upheld the objection.[60]

The Court's discretion is reviewed based upon its abuse of discretion and the test for abuse of discretion is whether the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.[61] First, the trial court's decision to disregard the documentary evidence of the October 2, 2020, record and only rely upon Dr. Dubocq's biased, self-serving testimony interpreting the record was unfair, unreasonable, and unsupported by sound legal principles. The Court chose to believe one piece of evidence over the other and, as a result, precluded Plaintiff's counsel from questioning and inquiring into the same. However, both were pieces of evidence, which the jury should consider and weigh during its deliberations. Plaintiff's counsel's question concerning whether the October 2, 2020, record factually stated "Present—Chest Pain" was in no way a mischaracterization of evidence. One can read the words on the record. To preclude the Plaintiff from developing this evidence and questioning the expert about Mr. LeMaster's chest pain was an abuse of the Court's discretion and reversible error.

Likewise, the Court's preclusion of questioning to Dr. Corl about back pain being a sign and symptom of a cardiac issue was unfair and against sound legal principles since Dr. Corl provided testimony on this issue at his deposition.[62] A party has the right to a thorough cross-examination of an opposing party's expert. Under KRS 611(b), a witness may be examined on any matter relevant

[59] *Id.* at VR 12:26:10—12:31:32.
[60] *Id.*
[61] *Torrence v. Commonwealth*, 603 S.W.3d 214, 228 (Ky. 2020); *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000).
[62] Deposition of Dr. Corl, P. 57, l. 14 – P. 58, l. 15.

to any issue in the case. Moreover, cross-examination extends to any matter relevant to any issue in the case.[63] In this matter, Dr. Dubocq testified that back pain was a symptom of a cardiac issue and Dr. Corl relied upon Mr. LeMaster's medical records in formulating his opinions. At his deposition, Dr. Corl was asked about his review of Ms. LeMaster's testimony about Mr. LeMaster's back pain as follows:

> Q. Question: "Do you recall what he told you about the chest and pain back?"
>
> And she answers "Yes," and goes on to say "That his chest was hurting when he was walking from his car to work."
>
> "Did he describe other symptoms?"
>
> "Just the back pain."
>
> "Do you know the location of the back pain?"
>
> Answer: "He told me it was his –like, under his scapula of his left side."
>
> Do you see that?
>
> A. Yes.
>
> Q: Would that be consistent with chest pain that has an origin in – of a cardiac nature"
>
> A. **Could be, because activity driven and it makes you wonder**.[64]

Both Dr. Dubocq and Dr. Corl testified that back pain are linked to and indicative of cardiac issues. Nevertheless, over Plaintiff's counsel's assertion that this testimony was developed, the Court upheld Defendants' objection. The testimony as to whether back pain could be a cardiac related event in this matter was clearly developed by counsel and concerns relevant and key issue in the case (i.e. Dr. Dubocq's failure to appreciate Mr. LeMaster's conditions/complaints that were made at the October

[63] *Wallace v. Leedhanachoke*, 949 S.W.2d 624, 625 (Ky. Ct. App. 1996).
[64] Deposition of Dr. Corl, P. 58, ll. 1—15.

2, 2020, visit). Plaintiff's counsel has a right at trial to question him about the issue and his former deposition testimony at the trial of this matter. By precluding the Plaintiff from doing so, the Court prevented Plaintiff from presenting evidence to the jury on Mr. LeMaster's signs and symptoms at the October 2, 2020, visit and committed reversible error.

II. Plaintiff was prevented from eliciting crucial expert testimony and making arguments about the November 4, 2020, record, such that Plaintiff is entitled to relief.

On July 7, 2025, Defendants filed a Motion in Limine to Preclude Plaintiff from Referencing the November 4, 2020, Appointment record that was generated after Mr. LeMaster's death. At the final pre-trial conference on July 11, 2024, though the Court allowed the record to be introduced into evidence at the second trial, the Court ordered that Plaintiff's counsel could not suggest that Dr. Dubocq falsified records despite that being a reasonable inference based on the evidence.[65] At the second trial, the Court further ruled that Plaintiff's counsel could not elicit testimony that suggested Dr. Dubocq did not take an adequate history just because the information was not in his treatment note. [66] The Court gave Dr. Dubocq the benefit of the doubt and stated that he could have obtained information from Mr. LeMaster and simply not documented that information. [67] It is not appropriate for the Court to make such assessments that are within the province of the jury.

Plaintiff was not permitted to elicit testimony nor argue that the documentation issues were a deviation from the standard of care that ultimately led to Mr. LeMaster's death.[68] Plaintiff should have been permitted to elicit testimony about Dr. Dubocq's poor documentation and the errors contained within that record that call into question Mr. LeMaster's other treatment records.

[65] Order entered on May 24, 2024, stating, "Defendants' motion to preclude Plaintiff from questioning the propriety of the medical record is SUSTAINED, in part, and OVERRULED in part. Plaintiff is not permitted to claim fraud or alteration as to the medical record but can contest the content of said records; Pre-trial conference on July 11, 2025, VR at 27:00 – 37:00.
[66] Dr. Michael Yaffe's Trial Testimony on July 16, 2025, VR 3:21:01—3:26:36.
[67] *Id*.
[68] *Id.*

Every piece of evidence, testimonial or documentary, is subject to credibility challenges. Arguably the single most important piece of evidence in this case is Dr. Dubocq's chart. Both parties, and especially Dr. Dubocq, rely heavily upon it for what it does and does not say. "A wide array of evidence is admissible only because it renders testimonial credibility more probable or less probable than it would be without the evidence." *Baker v. Kammerer,* 187 S.W.3d 292, 295 (Ky. 2006) (quoting Lawson, *Kentucky Evidence* § 5.05[3], at 82).

The November 4, 2020, record is highly relevant on the issue of credibility of Dr. Dubocq's testimony regarding his accuracy of Mr. LeMaster's condition, the consistency of his testimony with his own records, and the reliability of the records themselves. Dr. Dubocq's October 2, 2020, note from Mr. LeMaster's visit unequivocally says "Present--Chest Pain." Yet, Defendants adamantly have claimed Mr. LeMaster did not have chest pain that day and that the care Dr. Dubocq provided was appropriate.

Dr. Dubocq has testified about many things that are not in his record. He and his experts extensively discussed "preloading" of records, or copying and pasting from previous visits or histories. The Court will recall repeated testimony that Mr. LeMaster presented on October 2, 2020, with a chief complaint of ear pain, yet that chief complaint mirrors almost verbatim the same chief complaint of ear pain from the previous visit.

Some witnesses have claimed the records are thorough and accurate; others claim the documentation could and should have been better thereby creating a genuine dispute of material fact for the fact-finder, the jury, to evaluate. Many witnesses have discussed Mr. LeMaster's records going all the way back to 2014, referencing what they do or do not say. Arguably, the weight and credibility to give Dr. Dubocq's medical records is one of the considerations the Jury needed to make, but, Plaintiff was precluded from making fair arguments based on the fact that

the record clearly shows that Mr. LeMaster did report having "present" chest pain. The November 4, 2020, record is a critical piece of evidence in that assessment, as it shows that there are credibility issues replete throughout Dr. Dubocq's medical chart for Mr. LeMaster.

The November 4 record, attached hereto, is relevant to this issue for many reasons. Upon reviewing the record, it reads as if Mr. LeMaster actually presented to the office on November 4; that Dr. Dubocq actually saw and evaluated him, and; that Mr. LeMaster actually reported his conditions on that day—a major issue on the October 2 visit. The record notes Mr. LeMaster came in for his appointment for hypertension, diabetes management, and GERD.[69] The record also notes that Mr. LeMaster has "Present—Good general health lately" although he was dead at the time the record was generated.[70] There is no mention that Mr. LeMaster did not show up; that he was deceased, or that he previously reported ear pain or chest pain.

Dr. Dubocq signed the record at 11:32 a.m., after ostensibly taking all of Mr. LeMaster's history at 8:23 a.m. The record says Mr. LeMaster "comes . . . for his Well Adult examination."[71] Yet, he died almost a month earlier on October 11. It says his hypertension "is described as mild. There has been no associated chest pain…"[72] Yet, he was not there to describe his hypertension, and we know he had experienced chest pain and death. The record describes Mr. LeMaster experiencing numbness and tingling related to diabetes and "gerd is described as being located in the upper epigastrium and epigastrium."[73] This was impossible.

This documentation, obviously inaccurate on November 4 yet signed off upon, is critical evidence when both parties and their experts rely so heavily upon Mr. LeMaster's chart and

[69] *See* Dr. Dubocq's treatment record of Gary Tony LeMaster dated November 4, 2020.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*

medical record. Medical record-keeping is a *system* discussed extensively by experts in this case. The managing partner at Family Practice Associates, Dr. Reesor, provided testimony that the creation of records for things that did not occur should never happen.[74] Yet, again, Plaintiff was prejudiced by being precluded from eliciting such testimony in her case-in-chief.

III. Plaintiff was prevented from utilizing the deposition testimony of Defendants' expert witnesses in her case-in-chief contrary to the Kentucky Civil Rules, such that Plaintiff is entitled to relief.

The Court should also grant Plaintiff's motion for a new trial on the grounds that the trial court improperly excluded and precluded Plaintiff from utilizing the deposition testimony of the Defendants' expert witnesses. The Court should so hold because: (1) the Civil Rules and case law clearly allow Plaintiff to use the deposition testimony; and (2) the deposition testimony is competent evidence to sustain the Plaintiff's burden of proof, which the Plaintiff has the right and obligation to produce before directed verdict motions.

Kentucky Rules of Civil Procedure Rule 32.01 outlines when a party may use deposition testimony as affirmative evidence. It states in relevant part:

> *At the trial* or upon the hearing of a motion or an interlocutory proceeding, *any part* or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, *may be used* against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:…
>
> (c) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds the witness:
>
> (i) is at a greater distance than 100 miles from the place where the court sits in which the action is pending or out of the State, unless it appears that the absence of the witness was procured by the party offering the deposition; or…
>
> (vi) *is a practicing physician*, dentist, chiropractor, osteopath, podiatrist or lawyer…[75]

[74] Deposition of Dr. John Reesor, P. 47, ll. 18—P. 48, ll. 12, and Dr. Reesor's relevant deposition testimony is attached collectively hereto as **Exhibit 10**.
[75] Ky. R. Civ. P. 32.01.

(Emphasis added). The Rule directly authorizes the use of "parts" of depositions "at trial" in the fashion which Plaintiff sought to but was denied usage of deposition testimony. The witnesses which Plaintiff intended to introduce deposition testimony of easily meet the physician requirement of CR 32.01(c)(iv), the witnesses being tendered as expert witnesses during both trials of this case. Qualifying under Rule 32.01 is not an issue. This being satisfied, the law is clear that Plaintiff should have been allowed to use any parts of the deposition testimony during trial.

Not only does this rule authorize a party to use deposition testimony at trial, it further allows them to use specific selected excerpts from that deposition testimony without requiring that the whole deposition be used. The case of *Morgan v. Scott* makes it very clear that parties are allowed to utilize CR 32.01, and that parties are allowed to play selected portions of depositions.[76] In that case, the Court wrote "CR 32.01 specifically permits a party to play 'any part or all of a deposition…' So there was nothing inherently improper about the decision of Scott's counsel to play only selected portions of these depositions."[77] The Court developed this further, writing "[t]he only authority cited by Morgan is CR 30.02, which generally governs depositions; but nothing in that general rule contravenes CR 32.01's clear and specific allowance of the usage of edited videotaped depositions at trial."[78] (Plaintiff believes the prior trial testimony could also be used in this fashion, but, there is no case law or a rule directly on point; however that prior trial testimony should functionally be treated no differently than prior deposition testimony.)

That the witnesses were available to be called live during the Defendants' case in chief does nothing to change the rule. There is no language in the rule itself that would support such an argument, nor is there any case law to suggest the same. However, there is case law that indicates

[76] *Morgan v. Scott*, 291 S.W.3d 622 (Ky. 2009).
[77] *Id*. at 637.
[78] *Id*. at 638.

the availability of the witnesses is not a deciding factor in determining when a party is allowed to use deposition testimony at trial. In *Lambert v. Franklin Real Estate Co.*, the plaintiffs attempted to play the depositions of corporate designees under Rule 32.01(b).[79] While the trial court held that the witnesses had to qualify under both subsections (b) and (c) of Rule 32.01, this ruling was reversed by the Court of Appeals.[80] In reversing this decision, the Court of Appeals held that the plaintiffs only needed to meet the requirements of CR 32.01(b).[81] Notably, the Court of Appeals also held that the unavailability of a witness is not a requirement.[82] "Under CR 32.01(b), the testimony may be read to the jury even though a party is available to testify in person."[83]

Both CR 32.01(b) and (c) provide that the deposition testimony of a witness may be used for *any purpose* so long as the listed requirements are met. The unavailability of the witness is not among the requirements of either subsection of the Rule. Neither subsection makes any mention of such a requirement whatsoever. By preventing Plaintiff from using the deposition testimony of Defendants' expert witnesses because those witnesses were available for call at trial, the trial court judge inserted a requirement into Rule 32.01 that does not exist. As a result, the Plaintiff was prevented from using evidence which she were legally entitled to per the plain language of the Rules of Civil Procedure.

Additionally, Plaintiff properly reserved the right to use the deposition testimony of the Defendants' expert witnesses in Plaintiff's Rule 26 disclosure. Plaintiff complied with all procedural requirements of Rule 26, placing Defendant adequately on notice of Plaintiff's intention to use the deposition testimony of Defendants' witnesses at trial. Defendants' cannot claim that

[79] *Lambert v. Franklin Real Est. Co.*, 37 S.W.3d 770 (Ky. Ct. App. 2000).
[80] *Id*. at 779.
[81] *Id*.
[82] *Id*.
[83] *Id*.

they are victim to trial by ambush or a surprise, as all required information was properly disclosed prior to trial.

CR 32.01 and the case law interpreting it clearly allow parts of depositions as competent proof at trial so long as: (1) the testimony is admissible under the rules of evidence; (2) it is used against a party who was represented at the deposition; and (3) the witness is over 100 miles away from where the trial is taking place, out of state, *or* is a physician. Because there are no issues with any of these three requirements in this case, the trial court judge erred in holding that Plaintiff was not allowed to use the deposition testimony of Defendants' expert witnesses. Therefore, Plaintiff is entitled to a new trial.

The Plaintiff bears the burden to prove her case.[84] Plaintiff puts on her evidence first and is entitled to control the order and method of presentation of that evidence, subject to valid objections. At trial, the Defendants moved for directed verdict at the close of Plaintiff's proof pursuant to CR 50.01. Plaintiff is allowed the opportunity to present proof in the manner allowed by the Rules of Civil Procedure and the Rules of Evidence before such motion is made by the Defendant. This enables the court to take into account the full picture of all evidence available and, therefore, to make a more informed ruling on the directed verdict motion. The deposition testimony of Defendants' expert witnesses, as proof qualifying under CR 32.01, is proof upon which the Plaintiff is entitled to rely. When the trial court prevented Plaintiff from using the deposition testimony, it deprived Plaintiff of the opportunity to present evidence on which she was entitled to rely, subsequently deprecating the trial court's ability to make a fully informed decision on the directed verdict motions.

[84] CR 43.01 ("The party holding the affirmative of an issue must produce the evidence to prove it.").

In light of the fact that Plaintiff bore the burden of proof, the trial court preventing her from using the deposition testimony of Defendants' expert witnesses is particularly prejudicial to the Plaintiff. The only way that Plaintiff could assure the full picture of all the evidence from Defendants' expert witnesses came into the record was by playing their depositions. However, Plaintiff was outright denied this opportunity – which she is entitled to under the Civil Rules – at trial. Because of this, pieces of evidence vital to Plaintiff's case which Plaintiff had every right to enter onto the record were not taken into consideration by the trial court. It was wholly unfair to the Plaintiff to face dismissal of her claims during a motion for directed verdict before presenting all affirmative evidence which was clearly allowed by the Civil Rules. As such, the court should grant the Plaintiff's motion for a new trial.

IV. Plaintiff was prevented from being able to properly impeach Defendants' witnesses who clearly provided inconsistent statements at trial, such that Plaintiff is entitled to relief.

At the second trial of this matter, the Plaintiff was precluded from properly impeaching Defendants' witnesses. As two examples, she was precluded from impeaching Dr. Dubocq and Dr. Corl on inconsistent statements. During Plaintiff's questioning of Dr. Dubocq, Dr. Dubocq stated that it was not true that he didn't recognize the EKG showed a possible heart attack.[85] Thereafter, Plaintiff's counsel attempted to impeach Dr. Dubocq with his deposition testimony that provided:

> Q: Does what you see on the Exhibit 3, on that EKG of October 2020, indicate to you heart attack activity.
>
> Mr. Weber: Objection – objection to the form of the question. You may answer.
>
> A. **No**, especially since typically with an acute coronary syndrome there are reciprocal depression of the ST segments in leads 3 and F, which were not present on this. So form a strict standpoint, **this is**

[85] Dr. Dubocq's Trial Testimony on July 14, 2025, VR 3:37:00—3:37:43.

only a suspicious electrocardiogram and not diagnostic of anything.[86]

By Dr. Dubocq's own testimony, the EKG did not show a heart attack and the EKG was not diagnostic of a heart attack, which clearly contradicts his trial testimony that he recognized at the appointment the EKG showed a heart attack. After Plaintiff's attempt to impeach Dr. Dubocq, Defendants' counsel objected and the Court sustained their objection because it determined the EKG did not show present heart attack activity, which was **not** the question posed at trial or during Dr. Dubocq's discovery deposition testimony.[87]

As another example, during the cross examination of Dr. Corl, Plaintiff's counsel asked Dr. Corl that "it's not a coincidence that Tony died of a heart attack is it?"[88] In response, Dr. Corl provided that he didn't know.[89] Thereafter, Plaintiff's counsel attempted to impeach Dr. Corl with his former testimony that provided:

> Q: Dr. Corl, do you believe it was just a coincidence that Tony LeMaster died of a heart attack nine days after seeing Dr. Dubocq?
>
> A. **No.** I mean, I don't – first of all, I don't think we have a definitive answer of what the cause of death was.[90]

At the bench, the Court determined that Dr. Corl's testimony that he does not know whether it was a coincidence that Mr. LeMaster died of a heart attack was consistent with his answer during the first trial that it was not a coincidence Mr. LeMaster died of a heart attack.[91] In sum, the Court determined

[86] Deposition of Dr. Dubocq, April 4, 2022, P. 135, ll. 8—18, and Dr. Dubocq's relevant deposition testimony is attached collectively hereto as **Exhibit 11**.
[87] Dr. Dubocq's Trial Testimony on July 14, 2025, at VR 3:37:43—3:42:29.
[88] Dr. Corl's Trial Testimony on July 16, 2025, at VR 12:05:13—12:06:40.
[89] *Id.*
[90] Trial Transcript, May 24, 2024, P. 33, ll. 14—19.
[91] Dr. Corl's Trial Testimony on July 16, 2025, at VR 12:06:58—12:08:24.

that a "No" answer is consistent with an "I don't know" answer. The two answers are not the same and, therefore, inconsistent.

It has long been the law in Kentucky that the credibility of any witness may be impeached by showing the witness has made prior inconsistent statements to weigh the credibility of the witnesses.[92] As mentioned above, the Plaintiff's theory of the case is founded upon Dr. Dubocq's inability to appreciate the EKG findings and send Mr. LeMaster to the emergency room. The United States Supreme Court has determined evidentiary errors are harmless if the judgment was not substantially swayed by the error.[93] By not allowing the Plaintiff to impeach Dr. Dubocq on his prior inconsistent statement that he did not appreciate the EKG as showing a heart attack, the jury was undoubtedly substantially swayed by the error. Similarly, it was an error to prevent Plaintiff's counsel from impeaching Dr. Corl. Dr. Corl provided sworn testimony that he did not believe it was a coincidence that Mr. LeMaster died of a heart attack nine days after his visit to Dr. Dubocq and Plaintiff was prevented from impeaching him on the same, which provides evidence to the jury that Dr. Corl believed it was likely Mr. LeMaster had a significant heart condition that could have been caught and that Mr. LeMaster's life would have been preserved if the seriousness of his condition was recognized and he had been sent to the ER by Dr. Dubocq on October 2, as he should have been at the time of his October 2, 2020, appointment. Thus, the Court's errors substantially swayed the jury's judgment, which makes it reversible error.

V. 911 audio evidence relevant to proving Plaintiff's pain and suffering damages was improperly excluded, such that Plaintiff is entitled to relief.

Prior to trial, the Court overruled Plaintiff's Motion to Admit Additional Segments from the 911 call, which provided audio evidence of Mr. LeMaster groaning multiple times while his

[92] *Jett v. Commonwealth*, 436 S.W.2d 788 (Ky. 1969); KRE 613.
[93] *Kotteakos v. United States*, 328 U.S. 750 (1946).

son, Ben LeMaster, can be heard urging him to keep fighting.[94] Specifically, the Plaintiff requested the Court admit the following segments from the 911 call: (1) 2:30—3:12 and (2) 5:50—6:02. The additional segments totaled only 54 additional seconds. Thereafter during trial, the Court granted Defendants' Motion for Directed Verdict as to Mr. LeMaster's pain and suffering based upon the exclusion of this evidence and its determination that a heart attack is not a painful event. Even Defendants' expert, Dr. Corl, acknowledged that a heart attack was in fact a painful event.[95]

Under Kentucky Rules of Evidence, the segments identified above from the 911 call were relevant to the case at hand as they speak to Mr. LeMaster's pain and suffering. Per KRE 401, relevant evidence is evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. In the first segment listed above from the 911 call, Mr. LeMaster groans as he gasps for air and in response his son Ben LeMaster yells "you've got this," informs the 911 operator that Mr. LeMaster is "breathing," and the 911 operator tells Ben to "keep him awake." The groaning and gasping are at best direct evidence of pain and suffering, and at worst, evidence from which the jury reasonably can infer pain and suffering, especially given Ben's assertion Mr. LeMaster was breathing and the operator's admonition to keep him breathing.

In the second segment, Ben tells his father to "keep fighting," which indicates Mr. LeMaster was still breathing. Thus, approximately six minutes into the 911 call, Mr. LeMaster was still fighting while suffering a heart attack. This is evidence the jury is allowed to consider in evaluation of a pain and suffering claim that likely could have been omitted with a referral to the emergency room for management.

[94] Additional Segments of the 911 call, attached hereto and identified as **Exhibit 12** and **Exhibit 13**.
[95] Dr. Corl's Trial Testimony on July 16, 2025, VR 12:10:23—12:12:00.

While KRE 403 provides that the Court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay of needless presentation of cumulative evidence, which Defendants likely will argue, the culling of this call to the 54 seconds of evidence directly linked to the pain and suffering claim eliminated any prejudicial effect. The introduction of the segments would not have caused undue delay or needless presentation of cumulative evidence. Rather, the additional segments are concise and would have provided evidence to the jury to support Mr. LeMasters' suffering. Moreover, the evidence would have not mislead or confused the jury. Rather, the evidence supports the facts that Mr. LeMaster was alive after he had a heart attack, he grasped for air as he died, and he suffered for at least six minutes after the heart attack. As such, it was grossly prejudicial to preclude the Plaintiff from introducing these portions of the 911 call to the Jury, particularly when the Defendants had already moved for summary judgment and subsequently moved for directed verdict on the issue during trial.

Prior to trial, the Defendants argued that Ms. LeMaster's testimony that Mr. LeMaster did not appear to be conscious and Ben's testimony that Mr. LeMaster did not respond to him yelling supports their claim that Mr. LeMaster did not suffer or have pain when he had a heart attack. Ms. LeMaster is not a medical professional, which Defendants would certainly argue in other contexts. Second, the 911 call occurred on October 11, 2020, two years before Ms. LeMaster's or Ben's deposition in the midst of processing trauma while attempting to re-live the likely worst day of their lives. The evidence presented in the 911 call as to Mr. LeMaster's state of being (i.e. Mr. LeMaster was breathing and fighting for his life) is deemed especially reliable as a matter of law to the degree that universal rules of evidence provide for hearsay exceptions for (1) present sense

impression[96] and (2) excited utterances[97] because statements that occur while an individual is immediately experiencing a starling event are inherently reliable. There is no dispute Mr. LeMaster called for Ms. LeMaster after the heart attack; he was conscious. There is no dispute heart failure is a progressive event. And again, contrary to the Court's determination, there is no dispute that a heart attack is a painful event. Defendants' expert Dr. Corl testified as such.[98]

The evidence to support the claim is there and, in presenting the merits of the case, Plaintiff has the right to prove each element of her case by competent evidence of her choosing and the denial of this "substantial right" was reversible error.[99]

VI. Plaintiff was improperly limited in closing argument.

The Plaintiff was also improperly limited during closing argument. Specifically, the Court prevented counsel from playing 3 minutes and 50 seconds of video snippets of witnesses' trial testimony at closing[100] and prevented Plaintiff's counsel from using power-point slides concerning trial testimony, exhibits that were introduced into evidence, and an outline of the issues presented at trial.[101]

There is no blanket prohibition against counsel from playing selected portions of former testimony for a jury during closing argument.[102] While it is within the trial court's discretion, the *Morgan* Court determined the trial court must use its discretion to make sure the video segments are not overly lengthy and are not a misrepresentation of the witnesses' testimony.[103] The proposed

[96] KRE 802(1).
[97] KRE 802(2).
[98] Dr. Corl's Trial Testimony on July 16, 2025, VR 12:10:23—12:12:00.
[99] *Davis v. City of Winchester*, 206 S.W.3d 917 (Ky. 2006).
[100] Trial Record, July 17, 2025, at VR 9:08:11—9:11:44.
[101] The Court's determination to prevent the Plaintiff from using the power-point slides occurred off the record. During Mr. Gardner's closing, the Court requested a bathroom break for the jurors at approximately 1:50 p.m. Thereafter, everyone was off the record until approximately 2:00 p.m. During this 10 minute span, the Court precluded Plaintiff's counsel from using his prepared slide show.
[102] *Morgan v. Scott*, 291 S.W.3d 622, 636 (Ky. 2009).
[103] *Id.*

video segments were not lengthy. Rather, the total time for the segments was a mere 3 minutes and 50 seconds. Although the trial was four days, the parties presented a vast amount of documentary and testimonial evidence during the course of the trial. As a result, during closing arguments, it is important for the parties to be able to highlight key portions of the evidence for the jury to highlight key information that should not be lost in the weeds. Moreover, the proposed video segments were taken directly from the witnesses' testimony. As a result, by playing the snippets, the witness testimony would not be misinterpreted. Rather, the jury can hear the evidence straight from the witnesses' mouth. Thus, the videos snippets would only serve to aid the jury.

During trial, parties have a "wide-latitude" during closing statements to argue their respective cases, to comment on the evidence and draw reasonable inferences therefrom, and draw attention to the weakness in the opposing party's case."[104] During Plaintiff's closing arguments, Plaintiff's counsel commented on the July 24, 2020, record and compared it to the October 2, 2020, record in an attempt to show that much of the information in the History of Present Illness sections of the two records were similar and drew an inference that the sections were mostly preloaded.[105] Both records were introduced into evidence and Plaintiff's counsel attempted to draw a reasonable inference from the records that much of the information was the same. However, the Court precluded Plaintiff's counsel from drawing the inference during closing arguments. During a bench conference on this issue, the Court told Plaintiff's counsel, "You've misstated four facts and I've written them all down…if you don't stick to the truth and what the doctor said…I'm gonna probably stop you in about five minutes if you don't stay with the truth of the facts and the evidence that's been submitted."[106] Of course, it appears that the "truth of the facts" as interpreted by the Court is

[104] *Ordway v. Commonwealth*, 391 S.W.3d 762, 796 (Ky. 2013).
[105] Trial Record, July 17, 2025, at VR 1:47:44—1:48:00.
[106] *Id.* at 01:48:23 – 01:48:53.

synonymous with Dr. Dubocq's interpretation of the facts, a Defendant who has every reason to not be forthcoming, rather than the plain language of the medical records admitted into evidence.

Separately, the Court precluded Plaintiff's counsel from referring to a visual-aid for the jury (i.e. power-point slides) that would have provided an outline of the Plaintiff's case and the damaging evidence to the Defendants' case. The power-point slides were based solely on the evidence presented at trial, whether documentary evidence or testimony, and sought to highlight the weaknesses in Defendants' case. Ultimately, the Court only allowed Plaintiff's counsel to show a slide show of picture of Ms. LeMaster and Mr. LeMaster.

As with other evidentiary rulings, the Court's discretion is reviewed based upon its abuse of discretion and the test for abuse of discretion is whether the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.[107] The Court's decision to prevent Plaintiff's counsel during closing arguments to refer to documents that were admitted into evidence, highlight key deposition testimony, and present an outline of her case was fundamentally unfair, unreasonable, and unsupported by sound legal principles. Kentucky law has long provided that if the trial court prevents a party from arguing the evidence before the jury, it is cause for a new trial.[108] A litigant has a right to be heard by herself and by counsel and, if that right is denied, reversible error has been committed.[109] Considering the above, it is reversible error for the Court to prevent Plaintiff's counsel from arguing the evidence before the jury and is grounds for a new trial.

[107] *Torrence v. Commonwealth*, 603 S.W.3d 214, 228 (Ky. 2020); *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000).
[108] *Belmore v. Caldwell*, 5 Ky. 75 (Ky. 1810).
[109] *Aetna Oil Co. v. Metcalf*, 298 Ky. 706 (Ky. Ct. App. 1944).

VII. The jury instructions were not based on the evidence given the absence of "prudent," despite expert testimony at trial establishing the standard of care.

Dr. Dubocq is held to the standard of care to act as a reasonably prudent physician acting under similar circumstances. Prior to trial, Defendants' expert Dr. Yaffe and Plaintiff's experts Dr. Damle and Dr. Swirsky defined the standard of care. Dr. Yaffe testified that the "standard of care is what a **reasonable and prudent physician** would do or not do under the same or similar circumstances."[110] Similarly, Dr. Damle testified that the standard of care is "what **a prudent, experienced, educated physician** would do in the care of a patient"[111] and Dr. Swirsky testified the standard of care is "[w]hat a **reasonably prudent physician** would do in a similar circumstance for a similar patient."[112] Therefore, Plaintiff's and Defendants' experts have defined the standard of care as "a reasonably prudent physician."

At trial, the Plaintiff's experts also testified that the standard of care for Dr. Dubocq is the degree of care and skill expected of a reasonably prudent physician engaged in in general practice of medicine and acting under similar circumstances as those presented in this case.[113] Other than their deposition testimony, the Defendants' experts did not provide any additional testimony on the applicable standard of care for physicians.

While the court instructed the jury that the applicable standard of care for a physician is defined as "the degree of care and skill ordinarily expected of a reasonably competent physician," the evidence developed in this matter only supports the phrase "a reasonably prudent physician." Therefore, in accordance with the evidence in this matter, the jury instruction concerning Dr.

[110] Deposition of Dr. Yaffe, July 27, 2023, P. 48, ll. 14—17, and Dr. Yaffe's relevant deposition testimony is attached collectively hereto as **Exhibit 14**.
[111] Deposition of Dr. Damle, P. 78, ll. 4-9.
[112] Deposition of Dr. Swirsky, P. 34, ll. 16-19.
[113] Dr. Damle's Trial Testimony on July 15, 2025, VR 9:18:00—9:18:22; Dr. Swirsky's Trial Testimony on July 15, 2025, VR 2:17:30—2:17:58.

Dubocq's standard of care should have been a "reasonably prudent physician" instead of a "reasonably competent physician."

In a medical malpractice action in Kentucky, a plaintiff is required by law to put forth expert testimony to inform the jury of the applicable medical standard of care.[114] Through this evidence, the standard of care is established for the jury to consider when it renders its verdict. Moreover, Kentucky law provides that jury instructions must be (1) based upon the evidence presented; and (2) properly state the law.[115] The jury instructions' function is "'only to state what the jury must believe **from the evidence**…in order to return a verdict in favor of the party who bears the burden of proof."[116] In this matter, the jury instruction defining Dr. Dubocq's standard of care as the degree of care exercised by a reasonably prudent physician is supported by the evidence presented by Plaintiff and Defendants. Experts for both parties have defined the standard of care as a "reasonably prudent physician." There was absolutely no evidence developed in this matter that the standard of care is a "reasonably competent physician." Thus, the jury instruction including the phrase "reasonably prudent physician" is the only phrase that has been supported by the evidence.

Further, the Court must determine whether the jury instruction properly states the law. The Kentucky Court of Appeals has determined has determined that a jury instruction defining a physician's standard of care as "the degree of care and skill of a reasonably prudent physician…accurately reflects Kentucky law."[117] Therefore, the only standard of care definition that complies with the evidence presented in this matter and accurately reflects Kentucky law is "the degree of care and skill expected of a reasonably prudent physician." As a result, the Court

[114] *Blankenship v. Collier*, 302 S.W.3d 665, 675 (Ky. 2010).
[115] *Howard v. Com.*, 618 S.W.2d 177, 178 (Ku. 1981).
[116] *Id*. (quoting *Webster v. Commonwealth, Ky.*, 508 S.W.2d 33, 36 (1974)).
[117] *Dornbusch v. Miller*, 2013 WL 4710327 at *11-13 (Ky. Ct. App. 2013).

incorrectly instructed the jury that the standard of care for Dr. Dubocq is defined as "a reasonably competent physician."

VIII. The Court improperly denied Plaintiff's Motions for Cause to strike two jurors that admitted they had sympathy for healthcare professionals due to close personal relationships and expressed hesitation when asked the magic question about whether they could be fair and impartial.

Plaintiff was denied for-cause strikes of prospective jurors that demonstrated bias, forcing Plaintiff to use peremptory challenges on those jurors while forgoing peremptory challenges on jurors who ended up serving on the jury.

In *Montgomery v. Commonwealth*, 819 S.W.2d 713, 717 (Ky. 1991), the Kentucky Supreme Court found that "cases should be reversed on appellate review where the trial court fails to sustain challenges for cause in circumstances in which, even though there is no admission of actual bias or prejudice, *such may be implied or reasonably inferred*." (emphasis added).

The *Montgomery* Court recognized that, regardless of what else a prospective juror may say when answering leading questions, a juror should be excluded where there are "other circumstances and relationships which create a reasonable inference of prejudice." *Id*. Moreover, the *Montgomery* Court expressly rejected the idea that a juror can be rehabilitated through other statements, stating as follows:

> One of the myths arising from the folklore surrounding jury selection is that a juror who has made answers which would otherwise disqualify him by reason of bias or prejudice may be rehabilitated by being asked whether he can put aside his personal knowledge, his views, or those sentiments and opinions he has already, and decide the case instead based solely on the evidence presented in court and the court's instructions. This has come to be referred to in the vernacular as the "magic question." But, as Chief Justice Hughes observed in *United States v. Wood*, 299 U.S. 123, 146, 57 S.Ct. 177 (1936), "impartiality is not a technical conception. It is a state of mind." A trial court's decision whether a juror possessed "this mental attitude of appropriate indifference" must be reviewed in the totality of circumstances.

> […]
>
> It makes no difference that the jurors claimed they could give the defendants a fair trial. As we held in *Pennington v. Commonwealth*, 316 S.W.2d 221, 224 (1958), "it is the probability of bias or prejudice that is determinative in ruling on a challenge for cause."

Montgomery v. Commonwealth, 819 S.W.2d 713, 717-18 (Ky. 1991).

The Kentucky Supreme Court recently bolstered its holding in *Montgomery*, removing all doubt as to whether a juror whose bias is uncertain should be excused, ruling such jurors must be excused:

> When there is uncertainty about whether a prospective juror should be stricken for cause, the prospective juror should be stricken. The trial court should **err on the side of caution by striking the doubtful juror**; that is, if a juror falls within a gray area, he should be stricken.

Ordway v. Commonwealth, 391 S.W.3d 762, 780 (Ky. 2013) (emphasis added).

The Kentucky Supreme Court has long recognized that the improper loss of a party's peremptory challenges violates a substantive, and not a procedural, right and requires reversal. *See Ky. Farm Bureau Mut. Ins. Co. v. Cook*, 590 S.W.2d 875, 877 (Ky. 1979).

As a result, Plaintiff did not receive a fair trial, suffered harm as a result, and a new trial is proper under CR 59.01(a).

IX. The Court improperly allowed Dr. Dubocq to testify as an expert and provide testimony on his compliance with the standard of care.

At the second trial of this matter, Plaintiff's counsel objected to Defendant Dr. Dubocq providing any expert testimony on the breach of the standard of care because he was not disclosed as a standard of care expert and testified at his deposition that he was not an expert.[118] Over the

[118] Trial Record, July 16, 2025, VR 3:59:00— 4:02:55; *see also* Defendants' CR 26.02 Expert Disclosure identifying Dr. Yaffe, Dr. Corl, and Dr. Cline as Experts, attached hereto as **Exhibit 15**; *see also* Deposition of Dr. Dubocq, P. 139, ll. 4-14.

Plaintiff's objection, the Court determined that Dr. Dubocq, as a lay witness, could testify that he complied with the applicable standard of care.[119] Thereafter, Dr. Dubocq testified as to his treatment of Mr. LeMaster and that his treatment complied with the applicable standard of care.[120]

> KRE 701 provides:
>
> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is **limited** to those opinions or inferences which are:
>
> (a) Rationally based on the perception of the witness;
> (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and
> **(c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.**

According to the Kentucky Rules of Evidence, a lay witness cannot provide testimony based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 because the individual is not an expert. KRE 702 allows an expert to provide testimony, using scientific, technical, or other specialized knowledge, on the standard of care. However, the expert must be disclosed as such in the CR 26 Disclosure. In Kentucky, the rule is that "expert testimony is required in a malpractice case to show that the defendant failed to confirm to the required standard."[121] Further, if a witness "seeks to offer an opinion about inferences that may be drawn from [the] information, then that witness must be presented as an expert witness under KRE 702."[122] Therefore, in order for Dr. Dubocq to provide testimony using his specialized knowledge and drawing inferences from his treatment of Mr. LeMaster, he must have been disclosed and qualified as an expert, which he was not. (Defendants' CR 26 disclosures do not list Dr. Dubocq as such and they were never amended to do so; when expert questions were asked of him in his

[119] *Id.*
[120] Dr. Dubocq's Trial Testimony on July 14, 2025, VR 4:05:11—4:14:44.
[121] *Jarboe v. Harting*, 397 S.W.2d 775, 778 (Ky. 1965).
[122] *Torrence v. Commonwealth*, 603 S.W.3d 214, 228 (Ky. 2020).

discovery deposition, Defense counsel refused to allow Dr. Dubocq to answer them as no decision had then been made as to whether he would be called upon to give expert testimony and, as such, Plaintiff had no ability to cross-examine him on same.)

The proper standard of review in Kentucky for a trial court's evidentiary rulings is abuse of discretion.[123] The test for abuse of discretion is "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles."[124] The Court's determination to allow a lay witness, who was never disclosed as an expert, to testify as to whether or not he breached the standard of care was arbitrary, unreasonable, unfair, and certainly not supported by sound legal principles (i.e. Kentucky Rules of Evidence and Kentucky case law).

As seen above, Dr. Dubocq testified that he was not an expert and he was equally not disclosed as an expert in Defendants CR 26 Disclosure. As such, the Plaintiff was not afforded an opportunity to discover his undisclosed expert opinions such as his determination he did not breach the standard of care, which is unfair. It is equally unfair that the jury was allowed to hear his testimony that he complied with the standard of care because he is not an expert. Similarly, the Court would not allow Plaintiff's expert, Dr. Swirsky, to provide expert testimony as to the procedure an emergency room physician would follow when a patient presents to the emergency room with a prior heart attack and ongoing ischemia because Plaintiff's expert disclosure was too broad and he was an emergency room cardiology physician and, in the Court's opinion, not an emergency room physician, although he had worked in an emergency room for several years and his CV lists him as an "Emergency Room Physician." While unfairly limiting Dr. Swirsky, the Court allowed Dr. Dubocq's undisclosed expert opinion to be presented to the jury as there was no issue with it whatsoever. Undoubtedly, the Court applied a different evidentiary standard for

[123] *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000).
[124] *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

the Plaintiff than what was applied to the Defendants. Such was a routine course of dealing with this Court in this case.

Further, the Court's decision was contrary to the Kentucky Rules of Evidence and law. KRE 701 plainly provides that a lay witness cannot provide any testimony based upon his scientific, technical, or specialized knowledge as a doctor. Thus, it was improper to allow him to provide testimony on the breach of the standard of care for a physician. His testimony that he did not breach the standard of care, drawn from his treatment of Mr. LeMaster, is specifically reserved for an expert. Dr. Dubocq has **never been qualified as an expert**. Yet, the Court allowed him to provide expert testimony at the trial of this matter. In doing so, the Court abused its discretion by allowing a lay witness to provide expert testimony.

Ms. LeMaster was prejudiced by the foregoing, such that Ms. LeMaster was not afforded a fair and impartial trial as guaranteed by the Kentucky Constitution, therefore LeMaster's Motion must be granted.

CONCLUSION

Wherefore, based upon the reasons stated above, Plaintiff, Vicki LeMaster, Individually, and as Court Appointed Administratrix of the Estate of Gary LeMaster, respectfully requests the Court GRANT her Motion for Judgment Notwithstanding the Verdict (JNOV) under CR 50.02, or in the alternative, Motion to Amend, Alter, or Vacate under CR 59.05, or in the alternative, Motion for a New Trial under CR 59.01 to prevent manifest injustice. Further, the reasons set forth herein clearly demonstrate how Ms. LeMaster's ability to properly present her case was substantially prejudiced.

NOTICE

Please take notice that the foregoing motion will come for hearing before the Fayette Circuit Court on August 29, 2025, at the hour of 10:00 a.m. or as soon thereafter as counsel may be heard.

Respectfully submitted,

RICHARDSON LAW GROUP, PLLC

/s/ Melissa Thompson Richardson
Melissa Thompson Richardson
Thomas Wright
771 Corporate Drive, Suite 900
Lexington, Kentucky 40503
Telephone: (859) 219-9090
Facsimile: (859) 219-9292
Email: Melissa@RichardsonLawGrp.com
TWright@RichardsonLawGrp.com
COUNSEL FOR PLAINTIFF,
VICKI LEMASTER, Individually, and as Court appointed Administratrix of THE ESTATE OF GARY LEMASTER

CERTIFICATE OF SERVICE

This is to certify that the foregoing has been served on this the 8th day of August, 2025 by mailing and/or emailing a true and accurate copy to the following:

Clayton L. Robinson
Jonathan D. Weber
Robinson & Weber, PSC
101 Prosperous Place, Suite 100
Lexington, KY 40509
crobinson@robinsonweber.com
jweber@robinsonweber.com
cmadsen@robinsonweber.com
Counsel for Defendants,
David P. Dubocq, MD, and Family Practice Associates of Lexington, P.S.C.

/s/ Melissa Thompson Richardson
COUNSEL FOR PLAINTIFF,
VICKI LEMASTER, Individually, and as Court appointed Administratrix of THE ESTATE OF GARY LEMASTER

7623.007193C:\NRPortbl\Golden_and_Walters\HHALL\1579169_1.docx