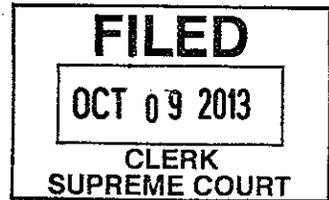


COMMONWEALTH OF KENTUCKY  
SUPREME COURT  
NO. 2012-SC-000707-D



IRA BRANHAM, INDIVIDUALLY AND AS  
ADMINISTRATOR OF THE ESTATE OF  
PEGGY BRANHAM, DECEASED

APPELLANTS

v. ON APPEAL FROM KENTUCKY COURT OF  
APPEALS, NO. 2010-CA-2292 & 2011-CA-0028  
FAYETTE CIRCUIT COURT, NO. 08-CI-1856

TROY C. ROCK, M.D., ET AL.

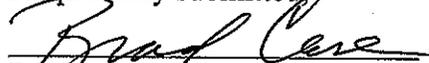
APPELLEES

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**BRIEF OF APPELLEES**

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Respectfully submitted,

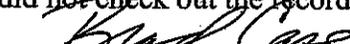


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**CERTIFICATE OF SERVICE**

It is hereby certified that a true and accurate copy of the foregoing was mailed on October 9<sup>th</sup>, 2013, to: Samuel P. Givens, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Paula R. Goodwine, Fayette Circuit Court, 382 Robert F. Stephens Courthouse, 120 North Limestone Street, Lexington, KY 40507; Stephen M. O'Brien, III, 271 West Short Street, Suite 200, Lexington, KY 40507; and Cory M. Erdmann, Erdmann & Stumbo, PLLC, 1000 Commercial Drive, Suite 3, Richmond, KY 40475. It is further certified that Appellees did not check out the record on appeal.



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### STATEMENT CONCERNING ORAL ARGUMENT

This is a case that could be resolved on the law cited in the Court of Appeals opinion and this Appellees' Brief, without the need for oral argument. All issues raised by Appellant can be determined by applying a rule of evidence or established precedent directly on point. Contrary to Appellant's contention, this appeal does not involve any "somewhat unsettled questions in the law of the Commonwealth." The Appellees welcome oral argument, however, if the Court believes it would be helpful.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

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COUNTERSTATEMENT OF POINTS AND AUTHORITIES ..... i

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## COUNTERSTATEMENT OF THE CASE

The Appellant, Ira Branham (“Branham”), appeals a judgment in favor of four University of Kentucky physicians entered after unanimous jury verdicts following a seven-day medical malpractice trial. Branham sued several UK-related defendants. Two of them, University of Kentucky Medical Center (“UKMC”) and University Hospital at the Albert B. Chandler Medical Center, Inc. (the “Hospital Corporation”), were dismissed before trial on sovereign immunity grounds. Four others were dismissed on other grounds.<sup>1</sup> The case proceeded to trial against two ER physicians, Dr. Troy Rock and Dr. Lee Britt, and two radiologists, Dr. Jason Keszler and Dr. Calixto Pulmano (collectively, the “UK physicians”).<sup>2</sup> Branham alleged that the UK physicians should have diagnosed an injury to his wife’s aorta during an emergency room visit and that this diagnosis would have prevented her death two days later.

The case arose from an automobile accident involving Branham and his wife, Peggy Branham (“Mrs. Branham”). On April 24, 2007, Mrs. Branham was involved in a single-vehicle collision as an unrestrained passenger in a pick-up truck driven by her husband. The passenger-side airbag deployed, and Mrs. Branham hit her head on the windshield. (Branham’s brief at 1.) According to Branham’s testimony and the medical records, his wife may have experienced a brief loss of consciousness, after which she was conscious and able to communicate. (VR; 11/12/10; 14:52:16; Joint Ex. 1 and Joint Ex. 2.)

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<sup>1</sup> Branham did not appeal the orders dismissing these defendants, Dr. Shane O’Keeffe, Dr. Andrew Bernard, Murray Clark, and Kentucky Medical Services Foundation, Inc.

<sup>2</sup> At the time of trial, Dr. Pulmano was the only defendant still practicing at UKMC. Dr. Rock was working for the group that staffed the ER at St. Joseph Hospital (Rock, VR; 11/16/10; 16:32:01), Dr. Britt had returned home to Tupelo, Mississippi and was practicing in the ER at Northern Mississippi Medical Center (Britt, VR; 11/16/10; 14:55:14), and Dr. Keszler was about to begin a radiology fellowship at The Ohio State University in Columbus. (Keszler, VR; 11/15/10; 18:14:30.)

Mrs. Branham was transported by ambulance to Mary Chiles Hospital ("Mary Chiles") in Mt. Sterling, where she received care from Dr. Regina Forster, an ER physician. (Mary Chiles records, Joint Ex. 1.) Dr. Forster was involved in Mrs. Branham's care for about two hours, during which Mrs. Branham was in stable condition. (VR; 11/10/10; 11:26:13.) She treated Mrs. Branham only for small cuts on her forehead and hand. (VR; 11/10/10; 11:27:18.) Mrs. Branham did not exhibit signs and symptoms of the aortic injury from which she would ultimately die two days later. She did not have any visible signs of chest trauma. (VR; 11/10/10; 11:28:17.) Dr. Forster ordered CT scans of Mrs. Branham's head and neck, which did not reveal any injuries. (VR; 11/10/10; 11:27:18.) Dr. Forster decided to transfer Mrs. Branham to UKMC "out of an abundance of caution." (VR; 11/10/10; 11:24:49 and 11:31:55.) At the time of the transfer, Mrs. Branham's vital signs were stable, her color had improved, and she was fully alert, moving all limbs, and "neurologically intact." (VR; 11/10/10; 11:29:26.)

Mrs. Branham continued to be asymptomatic at UKMC, where she received appropriate care based on her condition at the time. She arrived at the UKMC ER at 8:00 p.m. in stable condition. (UKMC records, Joint Ex. 2.) She was seen and examined by Dr. Rock, an attending ER physician, and Dr. Britt, an ER resident. (*Id.*) In addition to repeat laboratory tests, Drs. Rock and Britt ordered a chest x-ray, a test that had not been done at Mary Chiles. (*Id.*)

Dr. Keszler, a radiology resident, interpreted the chest x-ray. He did not see any signs of traumatic internal bleeding or injury to organs in the chest, such as the lungs, heart, or aorta. (VR; 11/15/10; 18:33:26.) He did, however, perceive "an approximate

3.5 cm mass-like density in the left lower lobe which is worrisome for neoplasm.”<sup>3</sup>  
(Radiology Report, Joint Ex. 2; VR; 11/15/10; 18:25:44) He called Dr. Britt at 10:00 p.m. and reported his findings. (VR; 11/15/10; 18:41:02.)<sup>4</sup>

Mrs. Branham remained in the ER for over two hours, during which Drs. Rock and Britt interacted with her on multiple occasions. (Rock, VR; 11/16/10; 16:53:52; Britt, VR; 11/16/10; 15:44:08.) Mrs. Branham remained in stable condition and voiced no complaints. (UKMC records, Joint Ex. 2; Rock, VR; 11/16/10; 16:54:10; Britt, VR; 11/16/10; 15:41:51 and 15:21:38.) Aside from left hip/leg pain rated at 5/10, Mrs. Branham did not complain of any pain or other symptoms. (Rock, VR; 11/16/10; 16:59:10; Britt, VR; 11/16/10; 15:41:51 and 15:21:38.) Mrs. Branham received no pain medication at UKMC or at Mary Chiles. (Britt, VR; 11/16/10; 16:24:42.) Her vital signs were stable at the time of admission and discharge. (Rock, VR; 11/16/10; 16:55:55; Britt, VR; 11/16/10; 16:21:27; UKMC records, Joint Ex. 2.) Drs. Rock and Britt did not perceive any signs or symptoms of active internal bleeding or any injury in the chest such as an aortic tear or rupture. (Rock, VR; 11/16/10; 16:53:52; Britt, VR; 11/16/10; 15:36:52.) Thus, they did not believe that an immediate chest CT was indicated. (Rock, VR; 11/16/10; 17:00:26; Britt VR; 11/16/10; 16:46:16.)

Mrs. Branham's lab results showed a low but stable blood count, which the physicians thought could represent chronic anemia. (UKMC records, Joint Ex. 2.) The lab results also reflected elevated blood sugar, which the physicians thought could be

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<sup>3</sup> A neoplasm is a tumor that can be benign or malignant.

<sup>4</sup> The next morning, in accordance with standard practice at UKMC, Dr. Keszler reviewed all of the radiology images he had interpreted during his shift with an attending radiologist, Dr. Pulmano. (Keszler, VR; 11/15/10; 18:28:56; Pulmano, VR; 11/15/10 and 18:57:16.) Dr. Pulmano agreed with Dr. Keszler's interpretation of Mrs. Branham's chest x-ray, including the finding that there were no signs of traumatic internal injury in the chest. (Pulmano, VR; 11/15/10; 18:58:31.)

undiagnosed diabetes. (*Id.*) Mrs. Branham reported that she had not been to a doctor in 15 years. (*Id.*; Rock, VR; 11/16/10; 16:46:25.) Mrs. Branham was discharged at 10:30 p.m. with instructions to follow-up with her family physician within a week for further evaluation. (UKMC records, Joint Ex. 2.)

Mrs. Branham died suddenly at home on April 26, 2007, approximately 36 hours after discharge from UKMC. The cause of death was not immediately known. A medical examiner, Dr. John C. Hunsaker, III, conducted an autopsy and determined that Mrs. Branham died of a ruptured aorta through “a process which developed over less than [*sic*] 2 days after the collision and eventuated into frank rupture of the mural tear of the aorta.” (VR; 11/10/10; 9:36:15, 10:17:49; autopsy report, Plaintiff’s Ex. 1.) Dr. Hunsaker could not offer an opinion regarding Mrs. Branham’s “level of injury” at the scene of the accident or at UKMC. (VR; 11/10/10; 10:18:30.)

In support of his claims, Branham called three expert witnesses: Dr. Eric Larson, an ER physician; Dr. Richard Freeman, a cardiothoracic surgeon; and Dr. Peter Julien, a cardiothoracic radiologist. The plaintiff also presented medical testimony from three additional physicians: Dr. Hunsaker, the medical examiner; Dr. Forster, the ER physician at Mary Chiles; and Dr. David Westerfield, a radiologist who read the CTs obtained at Mary Chiles.

Through his experts, Branham alleged that the ER physicians, Drs. Rock and Britt, should have ordered a chest CT and consulted a surgeon based upon the history of a motor vehicle accident and the results of the lab tests, diagnostic imaging, and vital signs obtained at both Mary Chiles and UKMC. (Larson, VR; 11/12/10; 11:28:40; Freeman, VR; 11/10/10; 13:29:27.) Branham also alleged that the radiologists, Drs. Keszler and

Pulmano, should have suspected a possible aortic injury and recommended an immediate CT scan. (Julien, VR; 11/15/10; 9:18:27.)

Even Branham's experts acknowledged that Mrs. Branham had an exceedingly rare presentation for an aortic injury. Plaintiff's ER expert, Dr. Larson, conceded that the vast majority of motor vehicle trauma patients do not suffer an aortic injury. (VR; 11/12/10; 11:15:01.) Branham's experts agreed that those accident victims who sustain a traumatic aortic injury rarely get to the hospital because 70-80% of them die at the scene of the accident. (Freeman, VR; 11/10/10; 14:15:26; Larson, VR; 11/12/10; 11:15:30.) Branham's experts also conceded that those accident victims with aortic injuries who do make it to the hospital nearly always present with significant injuries (unlike Mrs. Branham, who did not). (*Id.*) In addition, Branham's experts agreed that the imaging obtained at UKMC – a chest x-ray – is the standard initial screening test in the ER for diagnosis of internal injury or bleeding in the chest. (Larson, VR; 11/12/10; 11:28:13; Julien, 11/15/10; 10:59:33.)

The four defendants presented the testimony of five expert witnesses: Dr. O. John Ma, Chair of Emergency Medicine at Oregon Health & Sciences University; Dr. Bruce Janiak, the Vice-Chair of Emergency Medicine at Medical College of Georgia; Dr. Michael Foley (by videotape), a radiologist in private practice in Tampa; Dr. Dennis Whaley, a radiologist in private practice in Lexington; and Dr. Addison May, a trauma surgeon at Vanderbilt University. Through these experts, the defendants established that CT scans should be obtained only when clinically indicated, that a CT scan was not indicated for Mrs. Branham while she was at UKMC, and that the UK radiologists properly interpreted the chest x-ray. (Foley, VR; 11/16/10; 9:13:24 and Whaley, VR;

11/15/10; 16:49:14.) The UK physicians also established that it was reasonable for the ER physicians to suspect that Mrs. Branham suffered from chronic conditions (not a traumatic aortic injury) and that it was reasonable to discharge her with instructions for follow-up care. (Ma, VR; 11/15/10; 13:06:14; May, VR; 11/16/10; 11:19:45; Janiak, VR; 11/17/10; 9:39:48.) Defense experts also testified that Mrs. Branham's aortic injury might not have shown up on a chest CT at UKMC if one had been done. (Whaley, VR; 11/15/10; 17:37:15; Foley, VR; 11/16/10; 10:17:34.)

After hearing six days of evidence, the jury returned unanimous verdicts in favor of all four UK physicians. Branham appealed the judgment for the physicians and the prior order dismissing UKMC and the Hospital Corporation. In a unanimous unpublished opinion, the Court of Appeals affirmed the trial court's judgment in every respect. (Court of Appeals Opinion, Branham's App. 2.)

### ARGUMENT

**I. The trial court did not abuse its discretion by excluding collateral evidence concerning Dr. Rock's medical license.**

Branham's first argument on appeal is that the trial court abused its discretion by excluding evidence that Dr. Rock entered into an agreed order with the Kentucky Board of Medical Licensure ("KBML") arising out of a grievance filed against Dr. Rock for writing prescriptions without having formed a doctor/patient relationship.<sup>5</sup> Branham cites no Kentucky precedent in which a trial court was reversed for excluding this type of evidence on a collateral issue involving a physician-defendant's medical license. To the contrary, this Court's precedent establishes that the admission of such evidence would

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<sup>5</sup> These evidentiary issues are reviewed under the abuse of discretion standard, which requires a showing that the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Baptist Healthcare Sys., Inc. v. Miller*, 177 S.W.3d 676, 684 (Ky. 2005).

likely have been reversible error. The Court of Appeals correctly affirmed the trial court's ruling excluding this evidence.

**A. Background**

In May 2005, two years before the events at issue, Dr. Rock entered into an agreed order with the KBML. (R.1283.) The agreed order arose from a grievance that was filed against Dr. Rock for "providing prescriptions to individuals without there being a doctor/patient relationship." (R.924.) The three individuals involved were acquaintances of Dr. Rock whom he believed had legitimate medical conditions. (R.1072.) The charges against Dr. Rock had nothing to do with the care of patients in the ER, the diagnosis of traumatic aortic injury, or any other issue pertinent to this case. The KBML did not deem the charges serious enough to restrict Dr. Rock from prescribing medications or continuing to practice medicine. (*Id.*)<sup>6</sup> The terms of the agreed order expired in May 2007, over three years before the trial of this case. (*Id.*) Dr. Rock has not had any other licensure issues, and he has never had his privileges limited at any hospital. The trial court excluded Dr. Rock's disciplinary order, and the Court of Appeals affirmed this ruling. (R.1291, ¶20; Ct. of App. Op., Branham's App. 1 at 6-12.)

**B. Dr. Rock's disciplinary order was inadmissible "propensity" evidence.**

The trial court did not abuse its discretion by excluding the evidence concerning Dr. Rock's agreed order with the KBML. This evidence was inadmissible for several reasons. First, fundamental principles of evidence law prohibit Branham from introducing evidence of other alleged "bad acts" by Dr. Rock in an effort to establish that

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<sup>6</sup> Under the agreed order, Dr. Rock agreed for a two-year period to only prescribe controlled substances to patients in compliance with applicable standards of practice, to complete a course on prescribing controlled drugs, to maintain a controlled substances prescription log, to permit the KBML to inspect the log and other relevant records, to pay the costs of the investigation (\$150), and to refrain from violating state statutes delineating physician misconduct (KRS 311.595 and KRS 311.597). (R.1124-R.1130.)

it was more likely that Dr. Rock was negligent when he treated Mrs. Branham.<sup>7</sup> This type of “propensity” evidence is squarely prohibited by KRE 404(b).

Rule 404(b) states in pertinent part, “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Rule 404(b) “codified a long held, ‘well known fundamental rule that evidence that a defendant on trial committed other offenses is never admissible unless it comes within certain exceptions.’”<sup>8</sup> *Commonwealth v. Ramsey*, 920 S.W.2d 526, 528 (Ky. 1996) (quoting *Jones v. Commonwealth*, 198 S.W.2d 969, 970 (Ky. 1947)). Unlike many evidentiary rules, KRE 404(b) is “*exclusionary* in nature, and as such, any exceptions to the general rule that evidence of prior bad acts is inadmissible should be closely watched and strictly enforced because of [its] dangerous quality and prejudicial consequences.” *Id.* (internal references omitted and emphasis added).

Although the Kentucky Rules of Evidence are relatively new, Rule 404(b)’s prohibition on propensity evidence has long been a part of Kentucky evidence law. More than 50 years ago, this Court’s predecessor explained,

[E]vidence of other acts, even of a similar nature, of the party whose own act or conduct or that of his agents and employees is in question....is not competent to prove the commission of a particular act charged against him, unless the acts are connected in some special way, indicating a relevancy beyond mere similarity in certain particulars.

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<sup>7</sup> The door swung both ways in this regard. The trial court reasonably excluded evidence of Branham’s criminal history related to his cockfighting enterprise, which he had referred to in his deposition as “raising chickens.” (Order, R.1291, ¶6; Defendants’ Reply in Support of Motions *In Limine*, R.1198-R.1200.) The UK physicians acknowledged that Branham’s criminal history, just like Dr. Rock’s disciplinary order, was inadmissible character evidence. The court properly excluded all of this irrelevant evidence to keep the trial from devolving into a battle of character assassination on collateral matters.

<sup>8</sup> As this Court has explained, KRE 404(b) applies to civil defendants as well as criminal ones. *Smith v. Commonwealth*, 312 S.W.3d 353, 362 (Ky. 2010).

*Massie v. Salmon*, 277 S.W.2d 49, 51(Ky. 1955) (quoting 20 AM. JUR. EVIDENCE § 302). In *Moore v. Bothe*, 479 S.W.2d 634, 635-636 (Ky. 1972), the former Court of Appeals explained, "It is a general rule of law in this Commonwealth that evidence of other acts, even of a similar nature, of the party whose own conduct is in question is not competent to prove the commission of a particular act charged against him unless his former acts are connected in some special way with the particular act, indicating a relevancy beyond mere similarity." See also *Baker v. Hancock*, 772 S.W.2d 638, 640 (Ky. App. 1989) ("Similarly, evidence of other negligent acts should be excluded when offered to prove negligence on a particular occasion.").

In *Price v. Bates*, 320 S.W.2d 786, 788-89 (Ky. 1959), a negligence action arising from a motor vehicle accident, this Court's predecessor held that the trial court abused its discretion by admitting testimony regarding the defendant truck driver's accident history.

The Court of Appeals explained that

courts have generally refused to permit the cross-examination of a driver in civil actions as to prior arrests or convictions for traffic offenses, on the ground that the introduction of such evidence would lead to a consideration of collateral issues having no bearing on the question of a driver's negligence in the accident under consideration.

*Id.* at 789. Accordingly, the Court found that the evidence in question was "not only highly incompetent but of such prejudicial nature that, standing alone, it constitutes a sufficient reason for reversal of the judgment in this case." *Id.* at 789.

Under KRE 404(b) and this precedent, it would likely have been reversible error for the trial court to admit evidence concerning Dr. Rock's agreed order with the KBML. The trial court's exclusion of this evidence was consistent with the "exclusionary nature" of KRE 404(b). Branham attempted to do exactly what Rule 404(b) and this Court's case

law prohibit when he sought to introduce evidence concerning Dr. Rock's disciplinary issue to suggest it was more likely that he committed medical malpractice when caring for and treating Mrs. Branham. This is precisely what Rule 404(b) prohibits. Branham did not identify any exception to Rule 404(b) that would allow him to introduce this inflammatory, irrelevant evidence.<sup>9</sup>

Although there appears to be no published Kentucky medical negligence case addressing the prohibition on "other acts" evidence, decisions from sister states and federal courts confirm that alleged prior bad acts by a physician are not admissible in medical negligence cases. *Laughridge v. Moss*, 163 Ga. App. 427, 294 S.E.2d 672, 674 (Ga. App. 1982) (App. 1) ("The trial court did not err in disallowing evidence of an alleged previous act of medical malpractice on the part of appellee. The general rule in a suit for negligence is that evidence of similar acts or omissions on other and different occasions is not admissible."); *Bair v. Callahan*, 664 F.3d 1225, 1229 (8<sup>th</sup> Cir. 2012) (App. 2) ("Evidence concerning [Dr.] Callahan's past treatment of other patients is not admissible under *Rule 404(b)*."); *Cerniglia v. French*, 816 So. 2d 319, 322-25 (La. App. 2002) (App. 3) (holding that evidence of prior similar acts was not admissible in a medical negligence case against a surgeon); *Jones v. Tranisi*, 212 Neb. 843, 326 N.W.2d 190, 192 (Neb. 1982) (App. 4) (holding that evidence of a prior similar act was not relevant for the purpose of proving the defendant doctor's negligence in performing operation at issue); *Persichini v. William Beaumont Hosp.*, 238 Mich. App. 626, 607 N.W.2d 100, 105-06 (Mich. App. 1999) (App. 5) (holding that mistrial was proper where

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<sup>9</sup> KRE 404(b) provides that evidence of other bad acts may be admissible "[i]f offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." None of these exceptions applies here.

plaintiff's counsel asked defendant-physician, who was also testifying as an expert on his own behalf, whether he had been sued multiple times for malpractice).

In short, the trial court's exclusion of evidence concerning Dr. Rock's agreed order with the KBML was perfectly consonant with KRE 404(b), this Court's precedent, and overwhelming authority from other jurisdictions. The Court of Appeals correctly held that trial court's exclusion of this evidence was not an abuse of discretion.

**C. The disciplinary order would have been inadmissible even if Dr. Rock were a retained expert (which he was not), rather than a defendant.**

Branham argues that he should have been permitted to cross-examine Dr. Rock on the disciplinary action because Dr. Rock testified as an expert witness. The trial court and Court of Appeals properly rejected this argument.

First, Dr. Rock did not actually testify as an "expert witness" within the meaning of the civil rules and rules of evidence. Although Dr. Rock was included in the UK physicians' Civil Rule 26 disclosure,<sup>10</sup> he did not end up giving expert testimony at trial. Because all of Dr. Rock's testimony pertained to his personal experience with the medical issues in the case and his care and treatment of Mrs. Branham, his testimony would not be considered expert testimony. *See, e.g., Charash v. Johnson*, 43 S.W.3d 274, 280 (Ky. App. 2000) (physician-defendants are not considered expert witnesses

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<sup>10</sup> The disclosure for Dr. Rock, which is identical in substance to the disclosures for the other UK physicians, stated that Dr. Rock "is expected to render expert opinions about his care and treatment of Ms. Branham as reflected in the medical records, his written discovery responses and his deposition testimony. Dr. Rock is further expected to testify consistently with the above-identified opinions that he and other healthcare providers at UKMC met or exceeded the standard of care in their treatment of Ms. Branham during her visit to the UKMC emergency department on April 24, 2007." (Defendants' CR 26.02(4)(a) expert witness disclosure, R. 381, p. 2.)

when they testify only about “the facts they had learned and the opinions they had formed based on first-hand knowledge and observation.”<sup>11</sup>

Even if Dr. Rock were considered an expert witness, evidence of his disciplinary action would not be admissible. This Court and the Court of Appeals have held that evidence of a disciplinary action regarding an expert’s medical license is inadmissible if the disciplinary action is irrelevant to the expert’s proffered testimony. *Reece v. Nationwide Mut. Ins. Co.*, 217 S.W. 3d 226, 232 (Ky. 2007); *Morrow v. Stivers*, 836 S.W.2d 424, 428-29 (Ky. App. 1992). In *Morrow*, an oral surgeon appealed a plaintiff’s verdict in a medical malpractice case. The trial court prohibited the oral surgeon from impeaching the plaintiff’s medical expert regarding a five-year suspension of his license for passing hepatitis to patients. *Morrow*, 836 S.W.2d at 429. The Court of Appeals affirmed under “[t]he general rule is that a witness cannot be cross-examined on a collateral matter which is irrelevant to the issue at hand.” *Id.* (citations omitted). The court stated:

The crucial question then is whether the evidence excluded in this case is collateral. We think it is. The matter of having hepatitis and thus not practicing for a time **does not reflect on his knowledge or ability to testify on the matters at hand, i.e., the causation of Stivers’s condition and any deviation by Dr. Morrow from the standard of care.** Further, the inflammatory effect, if the jury heard testimony such as that Dr. Harris [the expert] may have had sex with his patients, although unproven, would outweigh any probative value it might have. There was no abuse of discretion in excluding this evidence.

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<sup>11</sup> In *Charash*, the physician-defendants sought to give opinion testimony that was based on events that occurred *after* they provided care to the plaintiff and were therefore outside of their personal knowledge. The Court of Appeals held that the trial court properly excluded those opinions because they were expert opinions that had not been disclosed under CR 26. *Id.* at 281. The court held that physician-defendants in a medical malpractice case are “experts” within the meaning of CR 26.02(4) only “when testifying about events beyond those they personally observed.” *Id.* at 281.

*Id.* (emphasis added.)

Citing *Morrow*, this Court reached a similar conclusion in *Reece*. In that case, a plaintiff who suffered injuries in a car accident sued an insurance carrier to collect underinsured motorist benefits. *Reece*, 217 S.W.2d at 227. She presented her treating pain management specialist, Dr. Thurman, as an expert witness to testify on the permanency of her lumbar spine injury. *Id.* at 228. Two weeks after his deposition, the KBML entered an emergency order suspending Dr. Thurman's license "for improperly prescribing Oxycontin which allegedly caused the death of a patient." *Id.*

This Court held that the trial court erred by allowing evidence of the license suspension:

We agree with the Court of Appeals that the evidence of Dr. Thurman's medical license suspension was a collateral matter irrelevant to his treatment of *Reece* and to her claims for personal injury in this case. The salient facts are virtually the same as those in *Morrow*, 836 S.W.2d 424, and we see no reason why the holding in *Morrow* that the medical license suspension was a collateral matter would not apply here. **In both cases the reason for the license suspension had no relation to the case in which they were testifying and was likely to be highly inflammatory.**

*Id.* at 232 (emphasis added).

Here, as both the trial court and the Court of Appeals correctly found, *Reece* and *Morrow* support the exclusion of Dr. Rock's disciplinary order. The disciplinary order concerned the prescription of narcotics to three acquaintances outside of the ER setting, an issue that is not in any way relevant to the medical issues related to Dr. Rock's care in this case (i.e., the care of car accident patients in the ER and, more specifically, the ordering of chest CT scans for them). Like the passing of hepatitis to patients in *Morrow*

and the improper Oxycontin prescription in *Reece*, the disciplinary order regarding Dr. Rock's prescriptions is a collateral matter. As the Court of Appeals explained, "Dr. Rock's prior improper practice of writing prescriptions without first establishing a doctor/patient relationship 'has no bearing on his knowledge or ability to testify on the matters at hand,' *i.e.*, whether he deviated from the applicable standard of care by failing to diagnose Peggy's aortic injury, thereby causing Peggy's death." (Ct. of App. Op., Branham's App. 2 at pp. 9-10.)

Furthermore, *Morrow* and *Reece* recognize that evidence concerning restrictions on a physician's license can be highly inflammatory and prejudicial. This concern is particularly acute when the physician is a defendant being sued for alleged malpractice. See Section I.B., *supra*. Dr. Rock's disciplinary order, which has no probative value because it does not address the medical care at issue in this case, was thus properly excluded under KRE 403.

In an effort to distinguish *Morrow* and *Reece*, Branham relies extensively on the Court of Appeals' opinion in *Estate of Judith Burton v. The Trover Clinic Found., Inc.*, No. 2009-CA-1595-MR, 2011 Ky. App. LEXIS 94, 2011 WL 8318231 (Ky. App. 2011), *disc. rev. granted* Aug. 15, 2012. (See Branham's brief, pp. 15-18.) As Branham concedes, the *Trover Clinic* decision is not precedential because it is a non-final opinion that is currently under review by this Court. In addition, as the Court of Appeals correctly found, "*Trover Clinic* hinders, not supports, Branham's position." (Ct. of App. Op., Branham's App. 2 at p. 10 n. 4.)<sup>12</sup>

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<sup>12</sup> The Court of Appeals' opinion aptly describes how its non-final opinion in *Trover Clinic* actually undermines Branham's argument: "In *Trover Clinic*, the plaintiff brought a medical negligence and credentialing suit against defendant Dr. Trover (among others) claiming Dr. Trover misread the decedent's CT scan in late 2003 and 2004 resulting in the decedent's death. Subsequent to the decedent's death, the

The remaining cases cited by Branham are not controlling and are readily distinguishable. Branham cites *Underhill v. Stephenson*, 756 S.W.2d 459 (Ky. 1988), a case in which this Court held that a party should have been able to cross-examine an opposing medical expert on a pending malpractice case. The only Kentucky authority cited in that opinion is CR 43.06, which was repealed in 2005. Also, the Court devoted only one paragraph to its ruling on this issue, and there is no analysis of whether the malpractice case concerned issues similar to those on which the expert was testifying. Thus, *Underhill* is distinguishable on its facts, and its viability is questionable given the subsequent decisions in *Morrow* and *Reece*.

Branham also cites an unpublished opinion, *Hodes v. Ireland*, 2009 Ky. Unpub. LEXIS 87 (Ky. 2009). Resort to unpublished opinions is unwarranted because *Reece* represents this Court's controlling precedent on the issue. CR 76.28(4)(c) ("unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court.") Regardless, *Hodes* is inapplicable. In *Hodes*, this Court allowed evidence of disciplinary action against an expert's license where the expert testified on direct examination that he "never had any restrictions" on his licenses. 2009

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KBML suspended Dr. Trover's medical license as a result of a complaint that Dr. Trover misread another CT scan in 2004. *Id.* at \*19. In distinguishing the facts of *Trover Clinic* from *Morrow* and *Reece*, this Court noted that the 2004 complaint giving rise to the defendant's license suspension was 'both close in time to [plaintiff's] misread CT scans of late 2003 and 2004 and relevant thereto.' *Id.* at \*20. Of particular importance was that Dr. Trover's subsequent disciplinary case rested on the same type of alleged negligence — improperly reading CT scans — for which he was being sued in *Trover Clinic*. *Id.* at \*19-20. Because of the relevant and temporal proximity between the conduct giving rise to Dr. Trover's license suspension and the underlying facts of that case, this Court concluded the trial court exceeded its discretion in limiting the cross-examination of the defendant concerning the recent suspension of his medical license. *Id.* As explained, in the case sub judice, there is a complete absence of a temporal or relevant proximity between Dr. Rock's prior disciplinary case for improperly writing prescriptions, and the alleged negligence for which he was being sued, i.e., failing to properly diagnose an aortic injury. If *Trover Clinic* were citeable, it would nevertheless be clearly distinguishable."

Ky. Unpub. LEXIS at \*3-4. In fact, the expert's licenses in two states had been subject to disciplinary action, and he misrepresented to one of the state boards that he was retiring. *Id.* at \*3. Thus, the Court found that this evidence was relevant to the expert's "character for truthfulness." *Id.* at \*3-4. The Court held that the trial court "did not abuse [its] sound discretion in permitting the cross-examination *in this context under all the circumstances of this case.*" *Id.* at \*5 (emphasis added).

*Hodes* is distinguishable because it involved a non-party expert, not a defendant-physician like Dr. Rock. In addition, unlike the expert in *Hodes*, Dr. Rock was forthright with the KBML during its investigation (R.1124; R.1154-R.1155; R.1162), and he disclosed his disciplinary order at his deposition. (R.924-R.925.) Most important, the court in *Hodes* simply *upheld* the trial court's exercise of discretion; it did not reverse the trial court.<sup>13</sup>

**D. The disciplinary order is not admissible as to Dr. Rock's knowledge of the standard of care.**

Next, Branham argues that he should have been permitted to question Dr. Rock about the disciplinary order because it reflects generally on his knowledge regarding the applicable standard of care. As Branham recognizes, there is no Kentucky law supporting this position. (Branham's brief, pp. 13, 20.) Even in the context of *non-party* expert witnesses, this Court and the Court of Appeals held in *Reece* and *Morrow* that a

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<sup>13</sup> The last source Branham cites on this issue is an unpublished decision evidentiary ruling from a federal trial court, *Ferris v. Tennessee Log Homes, Inc.*, 2010 U.S. Dist. LEXIS 26272 (W.D. Ky. 2010). This ruling not only has no precedential value, but also is readily distinguishable. In *Ferris*, a federal district court permitted cross-examination of an expert appraiser on three prior disciplinary actions in which a licensing board found that he had failed to comply with appraisal standards. 2010 U.S. Dist. LEXIS 26272 at \*2-3. Citing *Morrow* and cases from other states, the district court only permitted the cross-examination after finding that "the mistakes alleged to have been made in [the expert's] assessment of the [plaintiffs'] property are related to the same types of mistakes he admittedly made in the assessment of the properties for which he was disciplined." *Id.* at \*8. *Ferris* is distinguishable because the subject of Dr. Rock's disciplinary order has nothing to do with any aspect of his care and treatment of Mrs. Branham.

physician's disciplinary action can be admissible *only* if it pertains to the medical care at issue in the litigation. A physician's knowledge of some other area of medicine, wholly unrelated to the issues involved in the case, is not relevant and is not admissible.

The only authority cited by Branham on this issue is a distinguishable South Dakota case, *Mousseau v. Schwartz*, 756 N.W.2d 345 (S.D. 2008). Branham interprets *Mousseau* too broadly. The case is actually consistent with *Morrow* and *Reece* in that the disciplinary actions against the defendant-neurosurgeon, Dr. Schwartz, were admitted only because they related to the same type of alleged malpractice – mistakes in particular type of spinal procedure – for which he was being sued. *Id.* at 350. In addition, *Mousseau* is distinguishable in a key respect because in South Dakota, the legal standard for a medical negligence claim entails an inquiry into the physician's *knowledge* of the standard of care. *Id.* at 352-353. In Kentucky, in contrast, a physician's "knowledge" of the standard of care is not an issue; rather, the plaintiff is required to show that the physician failed to exercise the degree of care and skill expected of a reasonably competent physician acting under similar circumstances. *Rogers v. Kasdan*, 612 S.W.2d 133, 136 (Ky. 1981). With Kentucky precedent directly on point, there is no need to resort to a decision of a different state's court rendered under a drastically different legal standard and set of facts.

Furthermore, other courts addressing this issue have consistently rejected arguments that alleged prior bad acts by a physician are admissible under the "knowledge" exception of Rule 404(b) because they demonstrate the physician's alleged lack of knowledge of the standard of care. *See, e.g., Bair v. Callahan*, 664 F.3d 1225, 1229 (8<sup>th</sup> Cir. 2012). In *Bair*, the Eighth Circuit held that knowledge (or alleged lack

thereof) of the standard of care “is not the kind of ‘knowledge’ Rule 404(b) contemplates.” *Id.* at 1229. The “knowledge” exception in Rule 404(b) applies only when a witness’s knowledge of a particular fact is directly at issue in a case. In contrast, a physician sued for medical negligence is presumed to have knowledge of the standard of care as a result of his or her training and experience; the issue is whether the physician complied with the standard of care under the facts of the particular case. *Id.* As the Eighth Circuit explained in *Bair*, allowing a party to introduce other bad acts evidence to show a defendant-physician’s alleged lack of knowledge of the standard of care would really just be a back-door way to introduce inadmissible propensity evidence: “We believe the South Dakota Supreme Court’s decision in *Kostel* misinterprets Rule 404(b)’s reference to ‘knowledge’ by allowing parties to introduce evidence showing only propensity to commit malpractice.” *Id.* (criticizing *Kostel v. Schwartz*, 2008 SD 85, 756 N.W.2d 363, 376 (S.D. 2008)). Likewise, Branham’s argument that Dr. Rock’s issues with prescription writing are relevant to his knowledge of the standard of care is really just a back-door effort to introduce prohibited propensity evidence. The trial court and Court of Appeals correctly saw through this argument.

**E. The disciplinary order cannot be introduced as to Dr. Rock’s alleged “character for untruthfulness.”**

Finally, Branham argues that he should have been permitted to raise Dr. Rock’s disciplinary order to show his alleged “character for untruthfulness.” The Court of Appeals properly declined to address this argument on the ground that Branham failed to cite any authority in support of it. (Ct. of App. Op., Branham’s App. 2 at 11-12.) Again before this Court, Branham does not cite to any authority in this section of his brief.

(Branham's brief at 22-23.) The applicable rule, KRE 608 affirms that the trial court has discretion under the facts of each case whether to permit such an inquiry:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, **in the discretion of the court, if probative of truthfulness or untruthfulness**, be inquired into on cross-examination of the witness: (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified....

KRE 608(b). This Court has recognized that this type of impeachment evidence will rarely survive the KRE 403 balancing test. *Metcalf v. Commonwealth*, 158 S.W.3d 740, 745 (Ky. 2005) ("It would be a rare occurrence, we think, when the prejudicial effect of evidence of 'other bad acts' would not substantially outweigh the impeachment value of such evidence, and this case is not that rare occurrence.").

Regardless, contrary to Branham's suggestion, Dr. Rock did not testify dishonestly about his disciplinary order when he disclosed it at his deposition. Unlike the expert in *Hodes*, Dr. Rock disclosed his licensure issue. He then gave a general description of the matter, as he was asked to do, beginning his answer by stating, "Well, to make a long story very short...." (R.924) Dr. Rock was never presented with the order and asked to testify on its details. Nor was Dr. Rock asked specific questions about the number of prescriptions involved or the number of people for whom he wrote them. He was asked generally what happened, and he gave a general answer. His comment that there were "no restrictions" placed on his license is also accurate in that the KBML did not restrict him from writing prescriptions or from continuing to practice medicine. Dr.

Rock complied with the terms of the order in all material respects. The only issue of non-compliance concerned a two-month delay in completing a course on prescribing controlled substances, which did not result in an extension of the disciplinary order or any other material consequences.

Under these facts, it cannot be said that the trial court abused its discretion by excluding collateral evidence related to Dr. Rock's medical license under KRE 404(b), KRE 403, KRE 608(b), and this Court's strong precedent prohibiting "other bad acts" evidence.

**II. The trial court properly excluded evidence that Dr. Britt failed an exam in medical school.**

Branham's second argument on appeal is that the trial court abused its discretion by not allowing him to introduce evidence that Dr. Britt failed to pass a test on the first two attempts between his second and third years of medical school. Dr. Britt went on to graduate on time from the University of Mississippi Medical Center. (R.1230.) He then completed an emergency medicine residency at the University of Kentucky without incident. (R.1231.) Following his residency, Dr. Britt returned to Mississippi, where he practices in the ER at North Mississippi Medical Center in Tupelo. (Britt, VR; 11/16/10; 14:55:14.)

Branham cites no authority that would authorize the introduction in a medical negligence case of evidence that a physician failed an examination in medical school. The Court of Appeals correctly rejected Branham's argument and found that the fact that Dr. Britt failed an exam between his second and third years of medical school was "collateral and irrelevant." (Ct. of App. Op., Branham's App. 2 at 12.) As the Court of Appeals put it, "The mere fact that Dr. Britt did not initially pass his medical licensing

examination in or about 2000 or 2001 is not indicative of or relevant to Dr. Britt's knowledge of the standard of care when he treated Peggy in April of 2007." (*Id.*) Because this evidence had no probative value and carried the risk of substantial prejudice, it was well within the trial court's discretion to exclude it under KRE 403.

The Court of Appeals' ruling is consistent with overwhelming precedent from other jurisdictions holding that evidence that a physician failed an examination is not relevant to whether the physician complied with the standard of care on a particular occasion. As stated by one state appellate court, "the courts of other jurisdictions have uniformly held that a physician's inability to pass a medical board certification exam has little, if any, relevance to the issue of whether the physician complied with the standard of care required in his or her treatment of a patient.... *In other words, the physician's failing the test is irrelevant to the issue of his negligence in a malpractice case.*" *Gipson v. Younes*, 724 So. 2d 530, 531-532 (Ala. App. 1998) (emphasis supplied) (App. 6). Maryland's high court explained the rationale for this general rule: "There could be many reasons why a physician failed all or part of a board certification examination; the fact of failure makes it neither more nor less probable that the physician complied with or departed from the applicable standard of care in the diagnosis or treatment of a particular patient for a particular condition." *Lai v. Sagle*, 373 Md. 306, 321-322 (Md. 2003) (App. 7). There is a broad consensus among state and federal courts on this issue.<sup>14</sup>

Consistent with this broad consensus and KRE 403, this Court should affirm the trial court's exclusion of evidence that Dr. Britt failed a medical school examination.

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<sup>14</sup> See also *Campbell v. Vinjamuri*, 19 F.3d 1274, 1276-77 (8th Cir. 1994) (App. 8); *Marsingill v. O'Malley*, 58 P.3d 495 (Ala. 2002) (App. 9); *Douglas v. University Hosp.*, 150 F.R.D. 165, 171 (E.D. Mo. 1993) (App. 10); *Jackson v. Buchman*, 338 Ark. 467, 996 S.W.2d 30, 34 (Ark. 1999) (App. 11); *Williams v. Memorial Medical Center*, 218 Ga. App. 107, 460 S.E.2d 558, 560 (Ga. Ct. App. 1995) (App. 12); *Beis v. Dias*, 859 S.W.2d 835, 838-39 (Mo. Ct. App. 1993) (App. 13).

**III. The trial court gave the proper jury instructions for a medical malpractice case and did not err by declining to give the inapplicable instruction from *Deutsch v. Shein*.**

As the Court of Appeals recognized, the trial court gave the standard jury instructions that have been used for many years in medical malpractice cases.<sup>15</sup> The trial court correctly instructed the jury on the standard of care (i.e., it was the duty of the physicians in treating Ms. Branham and diagnosing her condition to exercise the degree of care and skill expected of a reasonably competent physician specializing in their respective fields acting under similar circumstances). As to each UK physician, the court asked the jury to answer this interrogatory: "Do you believe from the evidence presented in this case that [the defendant] failed to comply with this duty and that such failure was a substantial factor in causing Peggy Branham's death?" (Judgment, R. 1523.) This method of instructing juries in medical malpractice cases has been the unquestioned law of Kentucky since being confirmed 32 years ago in *Rogers v. Kasdan*, 612 S.W.2d 133, 136 (Ky. 1981). See also 2-23 Palmore & Cetrulo, *Kentucky Jury Instructions*, § 23.01 ("If you are satisfied from the evidence that D failed to comply with this duty and that such failure was a substantial factor in causing P's injuries, you will find for D.") (App. 14). Because there was no error in the court's jury instructions, the judgment for the UK physicians should be affirmed.

Branham argues that the trial court should have given jury instructions patterned after those given in *Deutsch v. Shein*, 597 S.W.2d 141 (Ky. 1980). Branham's proposed instruction states, "Do you believe from the evidence that [the defendant] failed to

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<sup>15</sup> "It is within a trial court's discretion to deny a requested instruction, and its decision will not be reversed absent an abuse of that discretion." *Office v. Wilkey*, 173 S.W.3d 226, 229 (Ky. 2005). The question on appeal is not whether the trial court's instructions "best stated the law, but rather whether the delivered instructions misstated the law." *Id.* at 230.

observe this duty and that such failure was a substantial factor *in the failure to diagnose Peggy Branham's aortic injury?*" (R.1333, emphasis added). This Court, however, has for good reason limited this type of instruction to the facts of *Deutsch*, where a defense of superseding intervening cause was asserted and the trial court determined as a matter of law that the intervening cause was *not* a superseding cause. *Miller ex. rel. Monticello Baking Co. v. Marymount Med. Ctr.*, 125 S.W.3d 274 (Ky. 2004).

*Miller* is directly on point. In *Miller*, this Court rejected the exact argument that Branham makes in this case. The trial court in *Miller* gave the standard medical negligence instruction, and the jury returned a verdict for the defendant-hospital. *Id.* at 277. On appeal, the plaintiff, like Branham in this case, argued the court should have given an instruction patterned after *Deutsch*. *Id.* at 278. This Court rejected the plaintiff's argument and held that the given instructions were proper. *Id.* The Court held that the *Deutsch*-type instructions apply "only when there is a claim of a superseding intervening cause and the trial court has held that the intervening event was not a superseding cause." *Id.* at 287. If the defendant does not assert this defense, the standard "injury" instruction is required. *Id.* Palmore agrees: the *Deutsch* instruction represents a "narrow exception to the general rule that the question to be put to the jury is whether the defendant's negligence is a substantial factor in causing Plaintiff's injuries." Palmore, *supra*, § 23.07 Comment, App. 15.

The "narrow exception" of *Deutsch* does not apply in this case because the UK physicians did not assert a defense of superseding intervening cause. Branham's argument would make sense only if the UK physicians had argued that Mrs. Branham's death had resulted from some event that took place after Branham's aortic injury, and the

trial court had found that the event was not a superseding cause. But the UK physicians made no such claim, so there was no reason for the trial court to give the *Deutsch* instruction.

**IV. The trial court did not abuse its discretion by permitting the four physician-defendants to call five expert witnesses.**

Branham argues that the trial court erred “in failing to limit the Defendants’ [*sic*] to the same number of experts as called by Branham, or alternatively, in not permitting Branham to call rebuttal expert witnesses.” (Branham’s brief, p. 38.)

Branham’s argument is unsupported by precedent; he cites no case in which a trial court was reversed for allowing a party to call a particular number of expert witnesses. As the Court of Appeals correctly found, the trial court did not abuse its discretion by permitting the four UK physicians to call five expert witnesses. The Court of Appeals rightly concluded that the number of experts called was reasonable because the case “involved four defendants and included a host of complex medical issues covering at least three specialties: emergency medicine, radiology, and surgery.” (Ct. of App. Op., App. 1, p. 15.) As the court found, it was not an abuse of discretion for the trial court to allow two experts in radiology and ER medicine in light of the fact that Branham sued two defendants in each specialty. (*Id.*) In addition, each side called the same total number of non-party medical witnesses. The Court of Appeals correctly recognized that the trial court “was in a superior position to determine whether” the testimony by the UK physicians’ experts was needlessly cumulative and found that it was not. (*Id.* at 16.)

As Branham acknowledges, the standard of review on this issue is abuse of discretion. The trial court has broad discretion in regulating the course of trial, including the number of expert witnesses called by the parties. See e.g., *Washington v. Goodman*,

830 S.W.2d 398, 400 (Ky. App. 1992) (rejecting the plaintiff's argument that the trial court erred by allowing the physician-defendant to call multiple expert witnesses); see also *Coal Resources, Inc. v. Gulf & Western Indus., Inc.*, 865 F.2d 761, 769 (6th Cir. 1989) ("limiting experts 'because of mere numbers, without reference to the relevancy of their testimony' is an abuse of discretion."); *Adams v. Cooper Indus.*, 2006 U.S. Dist. LEXIS 75565, \*32-34 (E.D. Ky. Oct. 17, 2006) ("expert testimony is not rendered cumulative simply based on the number of witnesses who offer evidence at a trial.") (App. 16).

The trial court acted well within its broad discretion when it denied Branham's motion *in limine* to limit the number of defense experts. At trial, Branham called a total of six medical witnesses to support his case. He presented three retained experts, Dr. Larson, an ER physician; Dr. Freeman, a cardiothoracic surgeon; and Dr. Julien, a radiologist. He also called the medical examiner who performed the autopsy (Dr. Hunsaker) and two treating physicians involved in Ms. Branham's pre-UKMC care (Dr. Forster, an ER physician, and Dr. David Westerfield, a radiologist).

The UK physicians also called a total of six medical witnesses. They called two ER experts, Dr. Ma and Dr. Janiak, to support the care of Drs. Rock and Britt; two radiologists, Dr. Whaley and Dr. Foley to support the chest x-ray interpretation of Drs. Keszler and Pulmano; and a trauma surgeon, Dr. Addison May, to discuss both liability and causation issues. The UK physicians also played a short deposition of Dr. Christine Riley, a treating radiologist who read Ms. Branham's neck CT performed at Mary Chiles.

This was not an unusual or excessive amount of expert testimony for a multi-defendant malpractice/wrongful death case involving complex medical issues. It was

well within the trial court's discretion to allow four defendants to call five expert witnesses. As the Court of Appeals recognized, the defense experts' testimony was not unreasonably lengthy. The longest direct examination of a defense expert (Dr. Foley) lasted just over an hour, and the direct examinations of the other defense experts lasted under an hour. (Trial Video Log, R.1479-R.1480, R.1487, R.1507). In fact, the trial video log reflects that the defendants completed their case in under three days, both sides presented their cases in about the same amount of time, and both sides spent about the same amount of time presenting testimony from experts and non-party physicians. (R.1469-R.1471; R.1475-R.1481; R.1487-R.1488; R.1507-R.1508.)

Moreover, the defense experts' testimony was not unreasonably duplicative or cumulative. Defendants' two ER experts were Drs. Ma and Janiak. Dr. Ma presented his testimony from a more academic perspective, having relied on an extensive literature search. (VR; 11/15/10; 13:33:44.) He testified about the appropriate head-to-toe exam of an ER patient like Branham, which Dr. Janiak did not do. (VR; 11/15/10; 13:24:30.) Relying on a leading ER medicine textbook of which he is an editor, Dr. Ma discussed in detail a long list of signs/symptoms of aortic transection and how Ms. Branham did not have any of them. (VR; 11/15/10; 13:34:21.) He also more extensively discussed the relevance, or lack thereof, of the small pleural effusion (i.e., collection of fluid) shown on the chest x-ray. (VR; 11/15/10; 13:49:01.) Specifically, he testified that Mrs. Branham's effusion was most likely not related to an aortic injury. (VR; 11/15/10; 13:53:53.)

In contrast, Dr. Janiak did not rely on any literature. He presented a more practical perspective based upon his 37 years of experience in the field. (VR; 11/17/10; 9:39:48.) He testified more extensively than Dr. Ma on rebutting Branham's claim that

the blood pressure and hematocrit readings at Mary Chiles were indicative of aortic injury. (VR; 11/17/10; 9:47:25.) He also focused, more than Dr. Ma, on the basis for ordering CT scans in the ER, rebutting plaintiff's suggestion that CTs should be liberally ordered for patients like Ms. Branham. (VR; 11/17/10; 9:54:07.) Finally, he discussed in more depth than Dr. Ma the standard of care for an incidental finding of a lung mass in the ER and the appropriateness of discharge with instructions for follow-up care in that setting. (VR; 11/17/10; 9:58:02.)

Similarly, the testimony of the UK physicians' two radiology experts, Drs. Whaley and Foley, was not unduly duplicative. Dr. Foley's testimony was presented by video deposition. (VR; 11/16/10; 9:13:24.) Unlike Dr. Whaley, he gave lengthy testimony on the anatomy of the lungs, mediastinum, and aorta, diagramming the structures that would be shown on a chest x-ray. (VR; 11/16/10; 9:32:42.) He reviewed in more depth than Whaley the reasonableness of identifying a mass-like density on Ms. Branham's chest x-ray. (VR; 11/16/10; 9:59:35.) He also described the multiple layers of the aorta and the possibility that a tear to the outer layer would not be visible on a CT or chest x-ray. (VR; 11/16/10; 10:17:34.)

Dr. Whaley, in contrast, began by describing the classic findings of a traumatic aortic injury on a chest x-ray, none of which were present on Mrs. Branham's chest x-ray. (VR; 11/15/10; 16:53:11.) He then explained the normal findings on Mrs. Branham's chest x-ray, using films placed on a lightbox. (VR; 11/15/10; 16:56:40.) Next, he rebutted point-by-point the testimony of plaintiff's expert Dr. Julien, something Dr. Foley could not do in a video deposition taped weeks earlier. (VR; 11/15/10; 17:07:59.) Dr. Whaley reviewed the CT images from Mary Chiles and could explain the presence of

fluid in the chest with a demonstration to the jury. (VR; 11/15/10; 17:27:28.) The defense experts' testimony was not unreasonably duplicative or cumulative.

Under these circumstances, the trial court exercised sound discretion in not granting a *pre-trial* motion to limit the number of defense experts. Before and during trial, the trial court was in the best position to gauge whether the testimony of the experts for either side was unduly duplicative or cumulative based on its overall knowledge of the case. Branham did not raise any objections at trial claiming that the testimony of any defense experts was, or would be, unreasonably duplicative or prejudicial. The record does not support a finding that the trial court abused its broad discretion in regulating the number of defense expert witnesses.

Branham does not cite a case in which a trial court was reversed for failing to limit the number of experts allowed to testify for a party. As the Court of Appeals recognized, the principal case on which he relies, *F.B. Insurance Co. v. Jones*, 864 S.W.2d 926 (Ky. App. 1993), is distinguishable. In that case, Farm Bureau raised an arson defense in an insurance coverage case brought by two homeowners after a fire. *Id.* at 927. The insurer "procured lengthy and repetitive testimony from three different arson investigators and at least one of their assistants" on the cause of the fire. *Id.* at 929. The trial court – during trial and not on a motion *in limine* – prohibited Farm Bureau from calling a fire marshal as yet another expert because further testimony would be "cumulative and useless." *Id.* The Court of Appeals affirmed the ruling upon a finding that the experts testified on the same issue and their testimony was "lengthy and repetitive." *Id.*

In this case, Branham did not raise an objection at trial alleging that any defense experts' testimony would be unreasonably duplicative; he only raised the issue in a pretrial motion. Also, the defendants in this case did not attempt to offer the same "lengthy and repetitive" testimony of four experts on the exact same issue, as in *F. B. Insurance*. There was only one defendant in *F.B. Insurance* and one narrow issue (the cause of a fire), whereas there are four defendants in this case and a host of complex medical issues covering at least the specialties of emergency medicine, radiology, and surgery. Importantly, the appellate court in *F.B. Insurance* merely affirmed a trial court's ruling limiting the number of experts; it did not *reverse* a decision to allow an expert to testify, as Branham asks this Court to do. *F.B. Insurance* does not support Branham's argument that the trial court abused its discretion by declining to limit the number of defense experts.

The other case cited by Branham, *Ford Motor Company v. Zipper*, 502 S.W.2d 74, 78 (Ky. 1973), contains no discussion of allegedly cumulative or repetitive expert testimony and has no application to this case. Thus, Branham has cited no case supporting his position that the trial court abused its discretion by not limiting the number of defense experts in this type of multi-defendant, multi-issue case.<sup>16</sup>

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<sup>16</sup> In the alternative, Branham summarily contends that the trial court abused its discretion "by failing to permit [Branham] to call rebuttal expert witnesses." Branham provides no further explanation of or support for this cursory argument. The Court of Appeals properly declined to address it, noting, "It is not our function as an appellate court to research and construct a party's legal arguments, and we decline to do so here." (Ct. of App. Op., Branham's App. 2 at p. 13, n.5 (quoting *Hadley v. Citizens Deposit Bank*, 186 S.W.3d 754, 759 (Ky. App. 2005)). Regardless, Branham could not make any meritorious argument concerning alleged rebuttal experts. Six months after his expert disclosure deadline, Branham disclosed one alleged rebuttal witness, Dr. Richard Freeman, a cardiothoracic surgeon. (R.755-R.757.) The record demonstrates that the trial court reasonably exercised its discretion in striking the disclosure of this expert because he was not disclosed to offer true rebuttal testimony, only to reiterate opinions expressed by Branham's other experts. (R.1193.) And, in any event, the trial court eventually permitted Dr. Freeman to testify after Branham decided not to call one of his previously disclosed experts, Dr. Calland. (Hearing, VR; 7/6/10; 13:34:02; R.1291, ¶27.)

V. **Sovereign immunity bars all claims against the University of Kentucky for medical negligence.**

Branham argues that this Court should overrule *Withers v. University of Kentucky*, 939 S.W.2d 340 (Ky. 1997), and reverse its longstanding recognition that the University of Kentucky is immune from claims of medical negligence.<sup>17</sup>

Branham presents no reason for this Court to disregard stare decisis and fundamentally change longstanding well-settled jurisprudence. To the contrary, this Court's recent immunity cases have only *strengthened* the University's entitlement to immunity from medical negligence claims.

Branham's attempt to alter the jurisprudential landscape should be rejected for four reasons. First, the Court need not even reach the issue of the University's immunity because it should affirm the judgment in favor of the UK physicians, rendering Branham's immunity challenge moot. Second, this Court's decisions clearly establish that the University has immunity from medical negligence claims. Third, stare decisis

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<sup>17</sup> The University's immunity from medical negligence claims applies regardless of how the plaintiff identifies the University in the lawsuit. Branham named as defendants University of Kentucky Medical Center ("UKMC") and University Hospital of the Albert B. Chandler Medical Center, Inc. (the "Hospital Corporation"). For purposes of immunity, it does not matter under what name the University is sued in medical negligence cases, whether that be the University of Kentucky, UKMC, or the Hospital Corporation. In this case, the plaintiff named the entities as defendants only so that he could assert claims of vicarious liability based on the care provided by the UK physicians. As this Court recognized in *Withers*, the University of Kentucky Medical Center (UKMC) is operated by the University of Kentucky. And in *Frederick v. University of Kentucky Medical Center*, 596 S.W.2d 30 (Ky. 1980), the defendant was UKMC, and this Court found that UKMC was entitled to immunity.

The concept is no different for the Hospital Corporation. As the University noted in its motion to dismiss before the trial court, the Hospital Corporation, despite its name, never actually owned or operated the medical center or employed any UK physicians. (Memorandum in Support of Motion to dismiss, R. 1272, p. 2, n.1.) Additionally, the entity was administratively dissolved on August 29, 2008. (*Id.*) The Court may take judicial notice of this fact based on public filings with the Secretary of State. (*See* Articles of Dissolution,

[https://app.sos.ky.gov/ftshow/\(S\(g53mpvyttqpc1bbwp53nhibe\)\)/default.aspx?path=ftsearch&id=0229849&ct=09&cs=999999](https://app.sos.ky.gov/ftshow/(S(g53mpvyttqpc1bbwp53nhibe))/default.aspx?path=ftsearch&id=0229849&ct=09&cs=999999).) Regardless, there is no legal basis for avoiding the University's immunity by suing the Hospital Corporation. In *Autry v. Western Ky. University*, 219 S.W.3d 713 (Ky. 2007), this Court held that the WKU Student Life Foundation, Inc. ("the Foundation"), an entity created to hold title to dormitories operated by Western Kentucky University, was entitled to immunity because the Foundation had "no truly independent existence from WKU." *Id.* at 719. This Court found that the Foundation's delegation of dorm management responsibilities to WKU was "tantamount to WKU delegating to itself." *Id.* The reasoning of *Autry* would apply equally to the Hospital Corporation.

counsels against overruling *Withers*. Fourth, there is no legal support for Branham's argument that the immunity afforded to the University should be abrogated because the Hospital Corporation and UKMC are the "real parties in interest" under Civil Rule 17.01.

**A. The Court need not reach the issue of the University's immunity if it affirms the judgments in favor of the UK physicians.**

As a threshold matter, the Court need not reach this issue if it affirms the judgment on the jury verdicts in favor of the UK physicians. Branham pursued only vicarious liability claims against UKMC and the Hospital Corporation. (Complaint, R.15-R.17.)<sup>18</sup> He did not pursue claims of independent hospital negligence against UKMC or the Hospital Corporation.

Therefore, if this Court affirms the judgment in favor of the UK physicians, then that judgment extinguishes the claims for vicarious liability asserted against UKMC and the Hospital Corporation. See *Cohen v. Alliant Enters., Inc.*, 60 S.W.3d 536, 539 (Ky. 2001) ("Clearly, if the agent did not act negligently, there can be no vicarious liability imputed to the principal."); *Copeland v. Humana of Ky.*, 769 S.W.2d 67, 69-70 (Ky. App. 1989). The Court of Appeals correctly found that Branham's challenge to the University's sovereign immunity was moot because it had affirmed the judgment in favor of the UK physicians. (Court of Appeals' opinion, p. 21.) This Court should do the same after affirming the judgment below.

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<sup>18</sup> As this Court acknowledged in *Withers*, the University's immunity does not extend to its employees, including physicians. *Withers*, 939 S.W.2d at 342 n.1.

**B. The University of Kentucky has immunity for medical negligence claims.**

If this Court decides to address the issue of whether the University has immunity, then long standing decisions of this Court require a finding that the University has immunity for medical negligence claims.

**1. The Commonwealth's sovereign immunity extends to the University.**

As this Court stated, "pure sovereign immunity, for the state itself, has long been the rule in Kentucky." *Comair, Inc. v. Lexington-Fayette Urban County Airport Board*, 295 S.W.3d 91, 94 (Ky. 2009). The principle of sovereign immunity was applied to the Commonwealth as early as 1828. *Greene v. Commonwealth*, 349 S.W.3d 892, 899 (Ky. 2011). Sovereign immunity is a "fundamental" common law concept that recognizes an inherent attribute of the sovereign state – immunity from suit. *Comair*, 295 S.W.3d at 94.<sup>19</sup> This immunity is a "bedrock component of the American governmental ideal...." *Caneyville Volunteer Fire Dept. v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 799 (Ky. 2009).

The Commonwealth's sovereign immunity extends to the University of Kentucky, an institution of the Commonwealth that performs integral functions of government. As this Court very recently stated, "whether an agency of the state is entitled to the immunity of the state is determined by whether the agency performs an integral state function."

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<sup>19</sup> Although this Court has stated that sovereign immunity is a common law concept (as opposed to a question of Kentucky constitutional law), the Supreme Court of the United States has held that the States' sovereign immunity in their courts is derived from the structure of the United States Constitution. See *Alden v. Maine*, 527 U.S. 706, 714-730 (1999). To the extent that the issue of the University's sovereign immunity could be construed as a constitutional issue, the Constitutional Avoidance Canon applies, and this Court should refrain from addressing the issue. See *Louisville/Jeff. Co. Metro Gov. v. TDC Group, LLC*, 283 S.W.3d 657, 660 (Ky. 2009) (noting that it is "the long-standing practice of this Court . . . to refrain from reaching constitutional issues when other, non-constitutional grounds can be relied upon") (internal citations omitted).

*Commonwealth v. Kentucky Retirement Systems*, 396 S.W.3d 833, 837 (Ky. 2013). When an entity is entitled to the sovereign immunity of the Commonwealth, the entity is said to possess “governmental immunity.” *Greene*, 349 S.W.3d at 899.

In *Comair*, this Court stated that the “obvious starting point” for determining the immune status of an entity is the previous case law related to the entity’s immune status. *Comair*, 295 S.W.3d at 95. The prior case law concerning the University of Kentucky uniformly confirms that the University possesses immunity from claims of medical negligence at the University. Even before *Withers*, the Court of Appeals recognized in *Frederick v. University of Kentucky Medical Center*, 596 S.W.2d 30 (Ky. 1980), that the University is immune from suit for medical malpractice claims. *Withers*, 939 S.W.2d at 343. In *Withers*, this Court squarely held that the University of Kentucky is entitled to immunity in medical negligence cases. *Id.* at 343. The appellants in *Withers* argued that the University should be stripped of immunity because the University’s medical activities constitute a propriety function, as opposed to a governmental function. This Court disagreed, stating:

The answer to this contention is simple. The operation of a hospital is essential to the teaching and research function of the medical school. Medical school accreditation standards require comprehensive education and training and without a hospital, such would be impossible. Medical students and those in allied health sciences must have access to a sufficient number of patients in a variety of settings to insure proper training in all areas of medicine. Such is essential to the mandate of KRS 164.125(1)(c).<sup>20</sup>

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<sup>20</sup> KRS 164.125(1) states that, “The University of Kentucky shall provide:… (c) Upon approval of the Council on Postsecondary Education, doctoral and post-doctoral programs and professional instruction including law, medicine, dentistry, education, architecture, engineering, and social professions.”

*Withers*, 939 S.W.2d at 343 (footnote omitted). The Court held that the application of immunity to the University in medical negligence cases is neither discretionary nor subject to any exceptions. *Id.* at 344.

## 2. Recent case law strengthens the University's immunity.

In its most recent immunity cases, this Court has moved away from strict adherence to the two-part "*Berns* test" to the more fundamental "governmental function" test.<sup>21</sup> See, e.g., *Caneyville*, 286 S.W.3d at 802 ("The real thrust of...*Berns*...is whether the entity carries out an integral government function."); *Comair*, 295 S.W.3d at 99 ("The more important aspect of *Berns* is the focus on whether the entity exercises a governmental function, which that decision explains means a 'function integral to state government'."). As this Court recently explained, "In *Comair*, we drew upon, but refocused, the *Berns* test for determining immunity status with a test that focuses on whether the entity exercises a governmental function, which [*Berns*] explains means a 'function integral to state government.'" *Wilson v. City of Central City*, 372 S.W.3d 863, 869 n.10 (Ky. 2012) (internal citations omitted). In its most recent pronouncement on the subject, the Court stated, "As this Court has repeatedly held...whether an agency of the state is entitled to the immunity of the state is determined by whether the agency performs an integral state function." *Ky. Retirement Systems*, 396 S.W.3d at 837.

This recent refinement of the immunity test only strengthens the conclusion that the University is immune. This Court has repeatedly affirmed that education, and higher education in particular, is an essential state government function and a matter of state-wide concern. In *Prater*, this Court, citing *Withers*, held that "education is an integral aspect of state government and that activities in direct furtherance of education will be

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<sup>21</sup> This test is named for the case of *Kentucky Center for the Arts v. Berns*, 801 S.W.2d 327 (Ky. 1991).

deemed governmental rather than proprietary.” *Prater*, 292 S.W.3d at 887. The Court explained that its holding in *Withers* was rooted the essential role of furthering the mission of the UK College of Medicine: “In [*Withers*]... we held that notwithstanding the fact that the University of Kentucky Medical Center competes with private hospitals, its essential role in the teaching mission of the University of Kentucky College of Medicine rendered its activities governmental.” *Id.*

This Court’s decisions in *Autry* and *Yanero* likewise confirm that providing public education is a core state government function. *Autry*, 219 S.W.3d at 718; *Yanero*, 65 S.W.3d at 520. The recognition that education is an essential state government concern is not new. As this Court’s stated long ago, “[p]ublic education has always been regarded as a matter of state concern....” *Commonwealth ex rel. Baxter v. Burnett*, 35 S.W.2d 857, 858 (Ky. 1931). Higher education, in particular, has “long been recognized as a governmental function.” *Hutsell v. Sayre*, 5 F.3d 996, 1002 (6th Cir. 1993).<sup>22</sup>

The University remains entitled to immunity from medical negligence claims because the provision of medical education and a teaching hospital are instrumental to the University’s core governmental function of serving as the principal state institution of higher education. This conclusion is evident from the statutes analyzed by this Court in *Withers*. KRS 164.100, which establishes the University of Kentucky as the principal state institution of higher education, states that the University “shall be maintained by the state with such endowments, incomes, buildings and equipment as will enable it to do work such as is done in other institutions of corresponding rank, both undergraduate and

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<sup>22</sup> In *Hutsell*, the United States Court of Appeals for the Sixth Circuit held that the University and its employees in their official capacity were entitled to Eleventh Amendment immunity. In analyzing the claim of Eleventh Amendment immunity, the Sixth Circuit extensively discussed the University’s entitlement to sovereign immunity under Kentucky law. *Id.* at 1000-03. In *Withers*, this Court favorably cited that portion of the Sixth Circuit’s analysis. *Withers*, 939 S.W.2d at 342-343.

postgraduate, and embracing the work of instruction as well as research.” KRS 164.125 directs, “The University of Kentucky shall provide...[u]pon approval of the Council on Postsecondary Education, doctoral and post-doctoral programs and professional instruction including...medicine....” KRS 164.125(1)(c). As this Court noted in *Withers*, the operation of UKMC is “essential to the mandate of KRS 164.125(1)(c)” because “[t]he operation of a hospital is essential to the teaching and research function of the medical school.” *Withers*, 939 S.W.2d at 343. The medical school could not exist without UKMC. As the Court explained, “Medical school accreditation standards require comprehensive education and training and without a hospital, such would be impossible. Medical students and those in allied health sciences must have access to a sufficient number of patients in a variety of settings to insure proper training in all areas of medicine.” *Id.*

Finally, the College of Medicine and Hospital are essential to the University’s ability to fulfill the directive of KRS 164.125(2) that the University of Kentucky “shall be the principal state institution for the conduct of statewide research and statewide service programs,” including “industrial and scientific research...and research related to the doctoral, professional, and post-doctoral programs offered within the university.” The statute authorizes UK to create the infrastructure necessary to further its statutorily mandated research and service functions: “The University of Kentucky...*may establish and operate centers* and utilize state appropriations and other resources *to carry out the necessary research and service activities throughout the state.*” KRS 164.125(2) (emphasis supplied).

The University also clearly satisfies the second requirement for immunity, that it be an agent of an immune entity. In *Comair*, this Court explained and refined the “second prong” of the *Berns* test. The Court stated that to determine if an entity is an agency of a clearly immune entity like the state or a county, the Court looks to the origins of the entity. “This inquiry can be as simple as looking at the ‘parent’ of the entity in question, i.e., was it created by the state or a county, or in a city?” *Comair*, 295 S.W.3d at 99. Here, the “parent” of the University is clearly the Commonwealth. KRS 44.073(1) declares that the University is an agency of the state. KRS 164.100 establishes the University as the principal state institution of higher education and declares that it “shall be maintained by the state...” Additionally, as the Sixth Circuit observed in *Hutsell*, the University’s Board of Trustees operates under the control of the central state government. *Hutsell*, 5 F.3d at 1002. As the court explained, “[p]olicy-making for the University is vested in the State Council on Higher Education, not the Board...UK as a state university reports through the State Council on Higher Education to the Office of the Governor.” *Id.* (citing KRS 164.020(1)-(9) and KRS 12.028(1)). The University is plainly an arm of the Commonwealth that performs an essential state government function. As such, the University of Kentucky, however denominated, is entitled to governmental immunity for medical negligence claims.

**C. Stare decisis requires affirming *Withers*.**

As this Court recently explained, “Stare decisis requires this Court to follow precedent set by prior cases, and this Court will only depart from such established principles when ‘sound legal reasons to the contrary’ exist.” *Taylor v. Ky. Unemployment Ins. Comm’n*, 382 S.W.3d 826, 832 (Ky. 2012). In Kentucky, “[u]nlike some jurisdictions, stare decisis has real meaning to this Court.” *Yeoman v.*

*Commonwealth*, 983 S.W.2d 459, 469 (Ky. 1998). Stare decisis serves an important purpose: “to ‘ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion.’” *Cook v. Popplewell*, 394 S.W.3d 323, 330 (Ky. 2011) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265-265 (1986)). As the United States Supreme Court explained in *Vasquez*, stare decisis “permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.” *Vasquez*, 474 U.S. at 266. This Court explained the importance of stare decisis more than 175 years ago:

In the supreme court of a State, as this is, possessing, with but few exceptions, appellate judicial power co-extensive with the State, the influence which its decisions must have, is evident. Its mandates are conclusive, and even its dicta are attended to in all the inferior courts. No sooner is a decision published, than it operates as a pattern and standard in all other tribunals, and as a matter of course, all other decisions conform to it. If in this court, a settled course of adjudication is overturned, then the trouble and confusion of reversing former causes succeeds in the inferior tribunals; and even the credit and respect due to this court is shaken....

*Tribble v. Taul*, 23 Ky. 455, 456 (Ky. 1828).

By operation of stare decisis, this Court’s precedent is “entitled to great weight, and is adhered to unless the principle established is clearly erroneous.” *Cook*, 394 S.W.3d at 330. A party seeking to overrule precedent therefore bears “the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective.” *Vasquez*, 474 U.S. at 266. A decision is entitled to particular weight as precedent when it has been relied on by intervening decisions and thus “deliberately sanctioned by review and repetition.” *See*

*Matheney v. Commonwealth*, 191 S.W.3d 599, 624-25 & n.4 (Ky. 2006) (Cooper, J. dissenting). Precedent should not be overturned unless there are “sound legal reasons” for changing the settled law. *Taylor*, 382 S.W.3d at 832. There are two key reasons why stare decisis requires affirming *Withers*.

First, with respect to whether a particular entity has sovereign immunity, stare decisis should be absolute. The General Assembly has plenary authority to waive the University’s sovereign immunity. *See Withers*, 939 S.W.2d at 344. As a general matter, this Court has found that decisions regarding statutory interpretation should not be revisited because the legislature may enact legislation if it disagrees with the Court’s interpretation of a statute. *See Bd. of Comm’rs v. Ky. Utils. Co.*, 101 S.W.2d 414, 416 (Ky. 1936) (“It is our duty to consider the ordinances antedating that of 1935 as we interpreted them in those cases, and not as if they were now presented to us for the first time.”); *see also Matheney v. Commonwealth*, 191 S.W.3d 599, 621 (Cooper, J., dissenting) (“The U.S. Supreme Court views statutory precedent as ‘per se entitled to great weight.’”). Just as this Court does not revisit decisions regarding statutory interpretation, it should not revisit immunity decisions that may be overruled by legislation.

Second, when a decision has become an integral part of legal tapestry, stare decisis counsels against revisiting the decision. Pulling a thread risks unraveling the entire tapestry. In the sixteen years since *Withers* was decided, this Court has favorably cited it in twenty-eight published majority opinions.<sup>23</sup> Many of those decisions have

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<sup>23</sup> *Stinson v. Commonwealth*, 396 S.W.3d 900, 905 (Ky. 2013); *Commonwealth v. Ky. Ret. Sys.*, 396 S.W.3d 833, 836 (Ky. 2012); *Osborne v. Keeney*, 399 S.W.3d 1, 22 (Ky. 2012); *Greene v. Commonwealth*, 349 S.W.3d 892, 905 (Ky. 2011); *Madison County Fiscal Court v. Ky. Labor Cabinet*, 352 S.W.3d 572, 575 (Ky. 2011); *Comair*, 295 S.W.3d at 98; *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887

specifically cited to *Withers*' recognition of the University's immunity. For example, in *Prater*, this Court relied on *Withers* for the propositions that "education is an integral aspect of state government and that activities in direct furtherance of education will be deemed governmental rather than proprietary." *Prater*, 292 S.W.3d at 887. In *Autry*, this Court recognized *Withers* as precedent in evaluating Western Kentucky University's claim of immunity in a dormitory fire case. *Autry*, 219 S.W.3d at 717 ("WKU is a state agency because it serves as a central arm of the state performing the essential function of educating state citizens at the college level and because it receives money from the state treasury in support of this function."). In *Comair*, which contains the Court's most recent extensive discussion of sovereign immunity, this Court favorably cited its earlier immunity analysis in *Withers*. *Comair*, 295 S.W.3d at 98.

*Withers* is a particularly important thread in public university law. For the last sixteen years, the Fayette Circuit Court and the Kentucky Court of Appeals have consistently relied on *Withers* as binding precedent in disposing of claims made against the University. Three years after *Withers*, the Court of Appeals affirmed a judgment dismissing the University on immunity grounds, finding that "[t]his issue has been settled by the Supreme Court, which held in *Withers v. University of Kentucky* that UKMC enjoys sovereign immunity." *Charash v. Johnson*, 43 S.W.3d 274, 276 (Ky. App. 2000)

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(Ky. 2009); *Caneyville*, 286 S.W.3d at 802 (Ky. 2009); *Jones v. Cross*, 260 S.W.3d 343, 347 (Ky. 2008); *Light v. City of Louisville*, 248 S.W.3d 559, 563 (Ky. 2008); *Autry v. Western Ky. Univ.*, 219 S.W.3d 713, 717 (Ky. 2007); *Stratton v. Commonwealth*, 182 S.W.3d 516, 519 (Ky. 2006); *Lewis v. Jackson Energy Coop. Corp.*, 189 S.W.3d 87, 94 (Ky. 2005); *Lopez v. Commonwealth*, 173 S.W.3d 905, 2005 Ky. LEXIS 327 (Ky. 2005); *A.W. v. Commonwealth*, 163 S.W.3d 4, 6 (Ky. 2005); *Grayson County Bd. of Educ. v. Casey*, 157 S.W.3d 201, 203 (Ky. 2005); *Schwindel v. Meade County*, 113 S.W.3d 159, 165-66 (Ky. 2003); *Commonwealth v. Hale*, 96 S.W.3d 24, 29 (Ky. 2003); *Prater v. Commonwealth*, 82 S.W.3d 898, 901 (Ky. 2002); *Commonwealth v. Whitworth*, 74 S.W.3d 695, 699 (Ky. 2002); *Yanero v. Davis*, 65 S.W.3d 510, 521 (Ky. 2001); *Commonwealth Bd. of Claims v. Harris*, 59 S.W.3d 896, 901 (Ky. 2001); *Reyes v. Hardin County*, 55 S.W.3d 337, 342 (Ky. 2001); *Kea-Ham Contr. v. Floyd County Dev. Auth.*, 37 S.W.3d 703, 706 (Ky. 2000); *Hale v. Combs*, 30 S.W.3d 146, 150 (Ky. 2000); *Department of Corrections v. Furr*, 23 S.W.3d 615, 616 (Ky. 2000); *Collins v. Commonwealth Natural Resources & Emtl. Protection Cabinet*, 10 S.W.3d 122, 124 (Ky. 1999); *Franklin County v. Malone*, 957 S.W.2d 195, 203-04 (Ky. 1997).

(footnote omitted). Six years later, the Court of Appeals again relied on *Withers* as binding precedent. See *Garrison v. Leahy-Auer*, 220 S.W.3d 693, 697 (Ky. App. 2006) (“Since this Court is required to follow the precedent of our Supreme Court and since the Supreme Court in *Yanero* did not modify *Withers*, we are still bound by *Withers*.”). The University’s immunity, recognized in *Withers*, has become settled law, relied on by trial courts and the University in handling medical negligence claims involving care rendered at UKMC. Claims against the University in this context have not been extinguished entirely. As contemplated by *Withers*, medical negligence claims against the University may be filed and prosecuted before the Board of Claims. See KRS 44.072 and 44.073.

**D Branham presents no viable grounds for abrogating the University’s immunity from medical negligence claims.**

Branham does not offer any reason for abrogating the University’s immunity from claims of medical negligence. Branham primarily argues that under the old *Berns* test – which has been “refocused” by this Court – the University is not entitled to immunity because its medical center supposedly does not operate under the control of the “central state government.” (Branham’s brief, pp. 27-29.) Branham contends that the medical center operates “autonomously under the Board of Trustees of the University of Kentucky, not under the ‘central state government.’” (*Id.*, p. 28.) This is inaccurate. As set forth above, policy-making for the University is the responsibility of the State Council on Higher Education. Even more important, Branham ignores the fact that in *Withers*, this Court already analyzed the University’s immunity from medical negligence claims under the *Berns* test and concluded that the University was entitled to immunity. Branham offers no reasonable basis for this Court to reverse *Withers*.

Branham's second argument is that the University's immunity should be "removed or limited" because UKMC and the Hospital Corporation were allegedly the "real parties in interest" under Civil Rule 17.01. As a threshold matter, Branham waived this argument because he did not raise it before the trial court or the Court of Appeals. This Court recently stated, "It has long been this Court's view that specific grounds not raised before the trial court, but raised for the first time on appeal will not support a favorable ruling on appeal. Most simply put, '[a] new theory of error cannot be raised for the first time on appeal.'" *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011). In other words, "it is the accepted rule that a question of law which is not presented to or passed upon by the trial court cannot be raised here for the first time." *Id.* at 589. A reversal of a lower court's opinion "must be based on the trial court's failure to properly apply the law that was argued to it, not that which might or should have been." *Id.* at 590.

Regardless, the "real party in interest" rule cannot be read to circumvent a party's established right to immunity. Branham contended that UKMC and the Hospital Corporation were a "real parties in interest" because the University provides insurance coverage to UK physicians through the UKMC Medical Malpractice Compensation Fund established by KRS 164.939 *et seq.* Branham's argument is precisely contrary to this Court's 16-year-old precedent in *Withers*, which addressed this very issue and held that the Compensation Fund does not abrogate the University's immunity.

Branham offers no legal authority suggesting that an immune entity like the University can be brought back into a case at trial as an alleged "real party in interest" under CR 17.01. For good reason, there is no precedent sanctioning this maneuver. If this maneuver were permitted, it would eviscerate the immunity afforded to the

governmental agency. See *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 888 (Ky. 2009) (“In sum, unlike other defenses, immunity is meant to shield its possessor not simply from liability but from the costs and burdens of litigation as well.”).

There is no precedent supporting Branham’s interpretation of CR 17.01.<sup>24</sup> Civil Rule 17.01, which was adopted in 1953, has never been applied to directly or indirectly strip an entity of its sovereign immunity. By its plain language, CR 17.01 governs which party is the proper *plaintiff* to bring an action. It states that “[e]very action shall be prosecuted in the name of the real party in interest....” The rule simply requires “prosecution of an action *by* the real party interest.” *Brandon v. Combs*, 666 S.W.2d 755, 759 (Ky. App. 1983)(emphasis added). The objectives of CR 17.01 are to assure that recovery is sought only by proper plaintiffs, prevent piecemeal litigation, and ensure that a defendant will not be subject to repeated claims. See *Bryan v. Henderson Electric Co.*, 566 S.W.2d 823, 825 (Ky. App. 1978) (“the purpose” of CR. 17.01 is ‘to prevent the persons liable from paying the debt more than once.’”) In urging that CR 17.01 be applied to *invoke* liability against an immune governmental defendant, Branham overlooks the rule’s central purpose.

Branham relies on two inapplicable cases, *Williamson v. Schneider*, 205 S.W.3d 224 (Ky. App. 2006), and *Earle v. Cobb*, 156 S.W.3d 257 (Ky. 2004). These cases merely hold that the identity of actual *parties to a case* at the time of trial cannot be

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<sup>24</sup> CR 17.01 states: “Every action shall be prosecuted in the name of the real party in interest, but a personal representative, guardian, curator, committee of a person of unsound mind, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, a county, municipal corporation, public board or other such body, a receiver appointed by a court, the assignee or trustee of a bankrupt, an assignee for the benefit of creditors, or a person expressly authorized by statute to do so, may bring an action without joining the party or parties for whose benefit it is prosecuted. Nothing herein, however, shall abrogate or take away an individual's right to sue.”

withheld from the jury. *Williamson*, 205 S.W.3d at 227-229 (overruling trial court's withholding of the identity of a non-immune medical clinic at trial where the clinic was still a defendant at time of trial); *Earle*, 156 S.W.3d at 258 (holding that a non-immune underinsured motorist carrier must be identified at trial when it chooses to preserve subrogation rights and remains in case as defendant and cross-plaintiff at time of trial). The cases are obviously distinguishable on the basis that neither one involved a state agency that had been dismissed on governmental immunity grounds and was therefore *not a party* at the time of trial. There is simply no merit to Branham's argument that UKMC and the Hospital Corporation are the "real parties in interest" and thereby lose their immunity.

#### **CONCLUSION**

For the above reasons, this Court should affirm the well-reasoned opinion of the Court of Appeals affirming the judgment entered in favor of the UK physicians.

Respectfully submitted,



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## APPENDIX

Appendix 1	<i>Laughridge v. Moss</i> , 163 Ga. App. 427, 294 S.E.2d 672 (Ga. App. 1982)
Appendix 2	<i>Bair v. Callahan</i> , 664 F.3d 1225 (8th Cir. 2012)
Appendix 3	<i>Cerniglia v. French</i> , 816 So. 2d 319, 322-25 (La. App. 2002)
Appendix 4	<i>Jones v. Tranisi</i> , 212 Neb. 843, 326 N.W.2d 190, 192 (Neb. 1982)
Appendix 5	<i>Persichini v. William Beaumont Hosp.</i> , 238 Mich. App. 626, 607 N.W.2d 100 (Mich. App. 1999)
Appendix 6	<i>Gipson v. Younes</i> , 724 So. 2d 530 (Ala. App. 1998)
Appendix 7	<i>Lai v. Sagle</i> , 373 Md. 306, 321-322 (Md. 2003)
Appendix 8	<i>Campbell v. Vinjamuri</i> , 19 F.3d 1274 (8th Cir. 1994)
Appendix 9	<i>Marsingill v. O'Malley</i> , 58 P.3d 495 (Ala. 2002)
Appendix 10	<i>Douglas v. University Hosp.</i> , 150 F.R.D. 165, 171 (E.D. Mo. 1993)
Appendix 11	<i>Jackson v. Buchman</i> , 338 Ark. 467, 996 S.W.2d 30 (Ark. 1999)
Appendix 12	<i>Williams v. Memorial Medical Center</i> , 218 Ga. App. 107, 460 S.E.2d 558 (Ga. Ct. App. 1995)
Appendix 13	<i>Beis v. Dias</i> , 859 S.W.2d 835, 838-39 (Mo. Ct. App. 1993)
Appendix 14	2-23 Palmore & Cetrulo, <i>Kentucky Jury Instructions</i> , § 23.01
Appendix 15	2-23 Palmore & Cetrulo, <i>Kentucky Jury Instructions</i> , § 23.07
Appendix 16	<i>Adams v. Cooper Indus.</i> , 2006 U.S. Dist. LEXIS 75565, (E.D. Ky. Oct. 17, 2006)

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