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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2013-CA-000909-MR

WILLIAM T. DOSS, IN HIS
CAPACITY AS ADMINISTRATOR
OF THE ESTATE OF YVONNE DOSS — APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 04-CI-00225 & 05-CI-00966

PHILIP C. TROVER, M.D. AND
BAPTIST HEALTH MADISONVILLE,
INC., F/K/A THE TROVER CLINIC
FOUNDATION, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; KRAMER AND TAYLOR, JUDGES.

ACREE, CHIEF JUDGE: Appellant William T. Doss, as administrator of the Estate of Yvonne Doss,[1] appeals from the May 1, 2013 order of the Hopkins

[1] Yvonne Doss passed away on February 18, 2012, from medical conditions unrelated to her claims in this case. On September 6, 2012, the circuit court entered the agreed order of the parties to substitute as plaintiff William T. Doss, in his capacity as administrator of the Estate of Yvonne Doss and the action was thereby revived. For ease of reading and clarity's sake, we will

Circuit Court granting summary judgment against the Estate in favor of Appellees Dr. Philip Trover and Baptist Health Madisonville f/k/a Trover Clinic Foundation.[2] The circuit court found Yvonne had failed to produce sufficient expert evidence to defeat summary judgment as to her claims of medical negligence, outrage/intentional infliction of emotional distress (IIED), negligent infliction of emotional distress, fraud, and punitive damages. We affirm.

This matter is one of more than four dozen cases appealed to this Court related to Dr. Trover and the Foundation. By means of the Court's prehearing conference procedure, about half of those cases settled prior to briefing. This Court, with the assistance of the parties, divided the remaining twenty-four cases into three main groups, with a few outlying cases.

While similar in most respects to the cases disposed of in *Stanley v. Trover*, No. 2013-CA-000901-MR, ----- WL ----- (Ky. App. Jan. 8, 2016), also rendered this day, the arguments raised by the Estate in this case are sufficiently nuanced to warrant disposing of this appeal by separate opinion. For an in-depth discussion of the common background giving rise to these matters, see *Stanley*, *supra*.

## RELEVANT MEDICAL FACTS

refer to the Appellant throughout this opinion as either Yvonne or the Estate, as appropriate.

[2] The Trover Clinic Foundation, Inc.'s name was changed effective November 1, 2012, and is now known as Baptist Health Madisonville, Inc., f/k/a Trover Clinic Foundation, Inc., d/b/a Baptist Health Madisonville. In their briefs to this Court, the parties continue to refer to what is now Baptist Health Madisonville as the Trover Clinic Foundation. Therefore, for purposes of clarity, throughout this opinion this Court will also refer to appellee Baptist Health Madisonville as the Foundation.

In late 2002, Yvonne began experiencing abdominal pain. Her primary care physician, Dr. Wells, noted a decreased platelet count and ordered a liver/spleen scan. The scan was performed at the Medical Center on December 31, 2002. Dr. Trover interpreted the scan as follows: "The examination shows normal homogenous uptake throughout the liver and the spleen. Both organs appear normal in size and appearance." Yvonne's symptoms eventually resolved.

Some months later, Yvonne "saw it on television . . . [a]nd in the papers" that Trover Clinic was going to re-read many of Dr. Trover's original reads of radiological scans of various types. She "looked back on [her] bills and saw his name on the liver and spleen scan [and] thought well, maybe I need to find out." (Doss Deposition, p. 26).

Sixteen months after Dr. Trover read her liver/spleen scan, Dr. Allen Powell re-read the scan. His conclusion from his re-read of Yvonne's scan was that she had a large liver. Explaining his findings, Dr. Powell stated:

> The liver appears larger measuring almost 20.0 cm in craniocaudal length. On the frontal views, there is diminished activity noted in the upper portion of the liver. I suspect that this is probably due to a breast attenuation artifact as a similar type diminution of activity is noted on the left side. No focal defects of the liver or spleen are identified.

Dr. Powell made no finding as to any clinical significance of the discrepancies between Dr. Trover's read and his re-read. On a supplemental review sheet in the medical records, Dr. Powell commented "enlarged liver."

Yvonne said in her deposition that the letter from the Trover Foundation to Yvonne containing the results of Dr. Powell's re-read "just scared me to death . . . when I saw those words, enlarged liver." (Doss Deposition, pp. 27-28). She went on to say, "But, you know, I – by then I had a scan to show me that it [her liver] was all right." (*Id.* at 28). In fact, she testified that she had two liver scans after receiving the letter from the Trover Foundation. The first was conducted at "Regional Medical Center" and the second by her "doctor in Greenville" because she "wanted a comparison." (*Id.* at 29). Dr. Wells told her that both these scans revealed a normal liver. However, she further said in her deposition:

> When I got this letter [regarding Dr. Powell's re-read] saying . . . my liver was enlarged, I mean, it takes me awhile to adjust to the fact that they [radiologists reading the last two scans told her] hey, I don't have anything to worry about, this is going to be – my liver is okay. I've gotten well over it. But, you know, the months that I went through, I was just so mad that I had to go through that and hurt and – I felt betrayed that all this had happened.

(*Id.* at 31).

Yvonne thus testified that what scared and angered her was the report of the incongruous re-read by Dr. Powell. Nevertheless, the Estate takes the position that Dr. Powell's re-read was proof of an enlarged liver sixteen months earlier and that Dr. Trover misinterpreted the December 31, 2002, nuclear liver/spleen scan that should have revealed that condition. Furthermore, the Estate posits that Dr. Trover's misread resulted in a sixteen-month delay in appropriate

treatment despite Yvonne's testimony that, other than Dr. Powell's report, no physician ever told her that there was anything abnormal about her liver and she has never received any treatment for a liver condition. Dr. Trover's conduct, claims the Estate, caused Yvonne emotional distress.

## PROCEDURAL HISTORY

On March 17, 2004, a proposed class action lawsuit was filed against the Appellees. Yvonne joined the proposed class as a plaintiff in January 2005. The circuit court denied class certification and more than four dozen individual cases were ordered to be tried separately with joint discovery permitted.

Appellees first moved for summary judgment in 2005 citing a lack of lay and expert proof to support the asserted claims. Yvonne, along with most other plaintiffs, objected, claiming inadequate time to prepare and declaring the motions premature because discovery was not yet complete. Appellees renewed their summary-judgment motions in 2007. The circuit court held the motions in abeyance to allow Yvonne, and most other plaintiffs, time to complete discovery on the issue of fraud. On October 4, 2007, Yvonne filed an eighth amended complaint alleging fraud with more specificity.

In the meantime, logistics discussions were had as to the procedure for the selection of cases for trial. The circuit court imposed a lottery system, whereby each party would designate five cases they would like to be tried and, from those cases, the Court would select which case would come to trial first. The circuit court further ordered that, upon selecting the first case to be tried, it would enter a

scheduling order for the disclosure of all information regarding expert witnesses in that case. The Court selected the case of *Estate of Judith Burton v. The Trover Clinic Foundation, et al.*, 05-CI-000932 to be tried first. Yvonne's case was the second one selected for trial, to follow *Burton*.

The *Burton* trial began on July 7, 2009 and concluded on July 20, 2009. The jury returned a defense verdict; on August 13, 2009, the circuit court entered a judgment in favor of the Appellees and dismissed the complaint. It was Yvonne's turn.

The Foundation filed motions to set a trial date and to establish a scheduling order. Yvonne responded with a motion to hold her case in abeyance pending appellate review of *Burton*. The circuit court declined Yvonne's request and, on October 30, 2009, entered a scheduling order giving each party 120 days to disclose expert witnesses. Relevant to medical negligence, Yvonne identified two medical experts: Dr. Ronald Washburn (radiologist) and Dr. Stephen Payne (internal medicine). Their depositions were taken in 2011.

In 2013, the Appellees filed separate but substantively similar motions for summary judgment arguing Yvonne had failed to produce proof, expert or otherwise, of causation or injury. The circuit court agreed and on May 1, 2013, entered summary judgment in favor of Dr. Trover and the Foundation. Yvonne appealed.[3] Further facts will be developed as needed.

[3] The Estate filed a notice of appeal on May 21, 2013, and the appeal was abated until the Kentucky Supreme Court rendered *Trover v. Estate of Burton*, 423 S.W.3d 165, 168 (Ky. 2014) affirming the trial court's judgment and order dismissing based on the jury verdict in that case.

## STANDARD OF REVIEW

"The standard of review on appeal of summary judgment is whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). Under this standard, an action may be terminated "when no questions of material fact exist or when only one reasonable conclusion can be reached[.]" *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901, 916 (Ky. 2013). Summary judgment involves only legal questions and the existence, or non-existence, of material facts are considered. *Stathers v. Garrard County Bd. of Educ.*, 405 S.W.3d 473, 478 (Ky. App. 2012). Our review is *de novo*. *Mitchell v. University of Kentucky*, 366 S.W.3d 895, 898 (Ky. 2012).

Before the trial court, "[t]he moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present" evidence establishing a triable issue of material fact. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). That is, "[t]he party opposing a properly presented summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial." *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001).

## ANALYSIS

Yvonne presents three arguments for our consideration. Those arguments are: (1) the entry of summary judgment on her medical negligence

claims was improper in light of the ample medical evidence in the record creating a genuine issue of material fact; (2) sufficient evidence of outrage/IIED and negligent infliction of emotional distress was presented to warrant a denial of summary judgment; and (3) sufficient evidence of fraud was presented to warrant a denial of summary judgment.[4]

### *A. Medical Negligence Claim Against Dr. Trover*

The Estate contends it produced sufficient medical evidence as to the elements of breach, causation, and injury such that it adequately opposed the motion for summary judgment and created a genuine issue of material fact justifying a trial. We disagree.

A common law negligence claim requires proof of: (1) a duty owed by the defendant to the plaintiff, (2) breach of that duty, (3) injury to the plaintiff, and (4) legal causation between the defendant's breach and the plaintiff's injury. *Wright v. House of Imports, Inc.*, 381 S.W.3d 209, 213 (Ky. 2012). Due to the complexity of medical procedures, proof of these elements, almost always, must take the form of

[4] We considered Dr. Trover's request (not placed in the form of a motion) that we strike the Estate's brief for failing to comply with Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iv). That rule requires an appellant's brief to contain "a statement with reference to the record showing whether the issue was properly preserved for appellate review and, if so, in what manner." CR 76.12(8)(a) permits, but does not require, a brief to be stricken for failure to comply substantially with CR 76.12. *Krugman v. CMI, Inc.*, 437 S.W.3d 167, 171 (Ky. App. 2014) ("We have wide latitude to determine the proper remedy for a litigant's failure to follow the rules of appellate procedure."). Exercising that discretion, we decline Dr. Trover's request. The Estate's brief is deficient; it contains not a single statement of preservation and it fails to adequately cite to the record. However, it is not so deficient as to foreclose us from reviewing the issues raised. Our decision is not incompatible with our Supreme Court's lenient approach to the application of procedural rules in the area of appellate practice and its adherence to the doctrine of substantial compliance. *See Kentucky Farm Bureau Mut. Ins. Co. v. Conley*, 456 S.W.3d 814, 818 (Ky. 2015) (Kentucky follows the rule of substantial compliance).

expert testimony. *Johnson v. Vaughn*, 370 S.W.2d 591, 596 (Ky. 1963) (explaining a physician's negligence must generally be established by expert medical testimony); *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676, 680–81 (Ky. 2005). That is, only expert testimony can establish for the jury "the applicable medical standard of care, any breach of that standard, and the resulting injury." *Blankenship v. Collier*, 302 S.W.3d 665, 675 (Ky. 2010).[5] That quotation embraces each of the four elements of a medical negligence claim. It logically follows, then, that "[t]o survive a motion for summary judgment in a medical malpractice case in which a medical expert is required, the plaintiff must produce expert evidence or summary judgment is proper." *Andrew v. Begley*, 203 S.W.3d 165, 170, 173 (Ky. App. 2006).

Yvonne presented expert testimony of duty and breach. Her radiology expert, Dr. Washburn, offered his opinion, within a reasonable degree of medical probability, that Dr. Trover breached the applicable standard of care when he interpreted Yvonne's December 2002 liver/spleen scan. He stated:

> Q. So as I understand your testimony, at least pertaining to Yvonne Doss's case, Dr. Trover misread a nuclear liver/spleen scan December of 2002 in your opinion, correct?

[5] Of course, "[e]xpert testimony is not required . . . in *res ipsa loquitur* cases, where the jury may reasonably infer both negligence and causation from the mere occurrence of the event and the defendant's relation to it, and in cases where the defendant physician makes certain admissions that make his negligence apparent." *Love v. Walker*, 423 S.W.3d 751, 756 (Ky. 2014) (citations and internal quotation marks omitted). This case is not a *res ipsa loquitur* case. The circuit court found that the interpretation of radiological films and how such interpretations affect the subsequent treatment of a patient is a highly specialized area of medicine that a layperson with general knowledge cannot be presumed to understand. For these reasons, the court ruled that Appellants could not succeed on their medical-negligence claims without expert testimony. Appellants do not take issue with these conclusions by the circuit court.

A. Correct.

Q. And Dr. Chaffin, likewise, misread that scan and the May 2004 image that he had available to him?

A. That is correct.

Q. And both physicians, in your opinion, deviated from the standard of care?

A. That is correct.

While Dr. Washburn criticized Dr. Trover's interpretation of the December 2002 scan, he limited his opinions to duty and breach; he would not and did not comment on causation or injury. That task was left to Dr. Payne. He testified as follows:

Q. [Y]ou can't give an opinion within reasonable medical probability that – that – that it caused any injury – anything that he did or failed to do caused any injury to her, can you, sir?

A. Well, . . . if I am assuming that he – I would have to make an assumption, of course, to do that in this case. I would have to assume that he had incorrectly interpreted the scan. But if I – and I assume that I'm going to be asked that on that basis, you know, Dr. Payne, I want you to assume that Dr. Trover incorrectly interpreted this scan, that it actually showed that the liver was enlarged and he interpreted it as being not enlarged. And, assuming that, did that cause injury? I'll say, yes, it probably caused some type of emotional trauma to the patient when she learned that her scan had been incorrectly interpreted.

Q. Okay.

A. I will say that, within a reasonable medical probability, it did cause that – that emotional trauma to

her at that point in time. Yes, I'll say that. That's what I'm planning on saying when asked.

Q. Uh-huh. Okay. So the only injury that you will – or – or condition you will relate to anything Dr. Trover did or failed to do was to cause this emotional reaction or trauma to her when she was told in 2004 that the – the x-ray might have been misread?

A. Well, I'm going to – I'm not even going to go that far because I haven't read her deposition to say what did or didn't happen to her. I'm going to say that, in that circumstance, it would be typical for a patient to have an emotional reaction, to be upset, distraught, anxious about learning that type of information.

(Payne Deposition, pp. 58-59). Dr. Payne later clarified:

Q. And is it true, within a reasonable degree of medical probability, that if a patient is – is informed differently from – by the doctor as to what the actual test results are, that this could lead to emotional distress?

A. Sure yes. . . . And I think that's reasonable, yes.

. . . .

Q. Are you making the assumption that, if a patient is not told correctly what their results of the test are, that that would lead to – it could lead to emotional issues, within a reasonable degree of medical probability?

A. Yes. I – I am testifying to that, yes.

Q. Okay. And in this instance, if it is a fact that Ms. Doss testified in this case that when she learned that there may have been a misread by Dr. Trover, that it made her sick to her stomach, made her angry, that it scared her, would you agree with me, within a reasonable degree of medical certainty, that Dr. Trover may have, indeed, caused injury to her.

A. Yes, he may have.

> Q. Okay. And that's the type of emotional injury that you've been talking about in this case?
>
> A. Yes, it is. And that's anticipatable. It's common. It would be typical for a patient who had been informed that there had been a misread of a test and that there might have been some kind of significant problem that was not diagnosed because of that.

(*Id.* at 89-90).

Dr. Payne clearly declined to offer any opinions as to the standard of care for a radiologist.[6] It is equally clear that he was of the opinion that Dr. Trover's alleged breach may have caused Yvonne emotional injury. Accordingly, we find Yvonne also presented to the circuit court some expert testimony of causation and injury. But that was not enough.

We must cautiously examine the character of the injury the Estate claims Yvonne suffered. Because Dr. Trover did not cause direct physical harm, and since Kentucky does not recognize lost chance for recovery or a better medical

[6] During Dr. Payne's deposition, the following exchange occurred:

> Q. Dr. Payne you can't state with any degree of reasonable medical probability that Dr. Trover did or failed to do anything that caused any injury to Ms. Doss can you sir?
>
> A. No. Absolutely not.
>
> Q. Okay.
>
> A. I'm certainly not intending to – to do that –
>
> Q. Right
>
> A. – because I'm not going to state whether he interpreted the scan correctly or incorrectly, whether the re-read was correct or incorrect. I'm not going to have any opinion about the correctness of – of the interpretation of any scans.

result as a compensable injury, *Kemper v. Gordon*, 272 S.W.3d 146, 152-53 (Ky. 2008), Yvonne is left only with severe emotional distress as a compensable injury.

Less-than-severe emotional suffering is not grounds to justify recovery under our jurisprudence. A plaintiff must demonstrate that he or she has suffered *more* than some degree of temporary shock, fright, or comparable emotional distress. *See Osborne v. Keeney*, 399 S.W.3d 1, 6 (Ky. 2012); *Benningfield v. Pettit Envt'l Inc.*, 183 S.W.3d 567, 572 (Ky. App. 2005) ("[T]o meet the standard of severe emotional distress the injured party must suffer distress that is 'substantially more than mere sorrow.'" (quoting *Gilbert v. Barkes*, 987 S.W.2d 772, 777 (Ky. 1999)).

> A "serious" or "severe" emotional injury occurs where a reasonable person, normally constituted, would not be expected to endure the mental stress engendered by the circumstances of the case. Distress that does not significantly affect the plaintiffs [sic] everyday life or require significant treatment will not suffice. And a plaintiff claiming emotional distress damages must present expert medical or scientific proof to support the claimed injury or impairment.

*Osborne*, 399 S.W.3d at 17-18 (footnotes omitted). The emotional distress must be severe and debilitating, such as distress that substantially impairs his or her ability to cope with life's daily routines and demands and/or that requires significant treatment. *Id.* "[N]ot every upset plaintiff can recover for emotional distress." *Zurich Ins. Co. v. Mitchell*, 712 S.W.2d 340, 343 (Ky. 1986). This is particularly so in today's modern, razor-sharp society. *Osborne*, 399 S.W.3d at 17 ("emotional

tranquility is rarely attained and . . . some degree of emotional harm is an unfortunate reality of living in a modern society").

When it comes to *proof* of emotional distress, *Osborne* said:

> [A] plaintiff will not be allowed to recover without showing, by expert or scientific proof, that the claimed emotional injury is severe or serious. Put simply, a plaintiff must show that the defendant was negligent and that the plaintiff suffered mental stress or an emotional injury, acknowledged by medical or scientific experts, that is greater than a reasonable person could be expected to endure given the circumstances.

399 S.W.3d at 6.

Yvonne testified at length in her own deposition about the emotional distress she suffered. She stated the Medical Center's re-read letter "scared [her] to death when [she] saw it."

> A. I was scared and mad because I've always taken care of myself and see the doctor when I'm supposed to. It's part of my belief to take care of your body. And then a doctor fouled me up.
>
> Q. Now, how did Dr. Trover foul you up?
>
> A. For not reading it – the scan and telling me that – what was wrong with me. You know, if they'd told me what was wrong with me, I don't even know if there's a treatment for it, but I would known something was wrong. It wasn't just, you know, all this wondering and – and fear as to what it could be, because it's – you know, when you don't know and you're told by a doctor that your scan's all right, you trust them.
>
> . . . .

Q. Okay. When you got that re-read, when you found out the results of that re-read, how did that make you feel at that moment?

A. At that moment, it scared me to death. I did not know what the results of having an enlarged liver was going to be, now or later. I did not know. I mean, you know, I did not know what was going to happen. And I felt – like I said, I felt – I felt betrayed. I felt like, you know, I – I always trusted doctors and here this has happened. After doing all I could to stay in good health and then this has happened. And I didn't have the opportunity to – to receive treatment, if there was a treatment or counsel or anything, because I'm all right. My liver's fine. . . .

Q. But at that moment, what did it make you feel like?

A. It made me angry, and it made me hurt.

Q. Scared?

A. And scared to death and sick to my stomach and everything, because I'm thinking what is the result of having an enlarged liver. I didn't know. So I was terrified. Even though I had one saying that it was going to be – that it was all right, what were going to be the end results. I didn't know. I did not know. I was in the dark. I was lied to. And I'm sick at my stomach and angry. And I feel like --

Q. Would you say you had some emotional distress?

A. Absolutely. The whole time I did. I'm wondering. I'm scared. What is it.

Q. But at that moment you got that film, did you have emotional stress?

A. Oh, yes. I just felt like I just been stabbed in the back.

(Doss Deposition, pp. 27, 51-52). This level of emotional distress is not serious enough to meet the severity threshold of *Osborne*.

*Osborne* cited by way of example of severe emotional distress the Fifth Circuit's opinion in *Smith v. Amedisys Inc.*, 298 F.3d 434 (5th Cir. 2002). *Osborne*, 399 S.W.3d at 18 n.60. In *Smith*, the Fifth Circuit found that a plaintiff who felt angry, belittled, embarrassed, depressed, disgusted, humiliated, horrified, incompetent, mad, very offended, and repulsed did not suffer severe emotional harm. 298 F.3d at 450. The emotional distress in *Smith* is factually analogous to this case. Yvonne's distress manifested in the form of temporary anger, hurt, and nausea; Yvonne felt betrayed, "scared to death," and "stabbed in the back." Yvonne sought no treatment for this emotional distress and it was of limited duration.[7] The distress was not debilitating and did not significantly impede Yvonne's everyday life. *Osborne*, 399 S.W.3d at 18 ("Distress that does not significantly affect the plaintiffs everyday life or require significant treatment will not suffice.").

Significantly, Dr. Payne failed to corroborate or support Yvonne's claims of "severe" emotional distress. *Id.* at 17-18 (a plaintiff claiming emotional distress damages must present *expert medical or scientific proof* to support the claimed injury or impairment). Dr. Payne had not examined Yvonne, nor did he intend to, and had not reviewed her deposition or medical records. He spoke in general terms

[7] Yvonne testified it was only after her receipt of the report of Dr. Powell's re-read that she felt scared, angry and anxious. That was April 2004 and in one month, May 2004, two reports showed Dr. Powell's concern about a large liver were unfounded. Not only does this speak to limited duration, but raises questions about causation.

– Dr. Trover's alleged negligence "probably caused [Yvonne] ***some type*** of emotional trauma" and "it would be typical for a patient to have an emotional reaction, to be upset, distraught, anxious about learning that type of information." (Payne Deposition, p.59) (emphasis added). Dr. Payne offered no testimony that *Yvonne* sustained *severe* emotional trauma. Absent supporting medical or expert testimony that the claimed emotional injury is severe or serious, Yvonne's negligence claim cannot survive. *Osborne*, 399 S.W.3d at 17-18.

In sum, while Yvonne produced two experts: Dr. Washburn (duty and breach) and Dr. Payne (causation and injury), she failed to demonstrate a severe or serious emotional injury, supported by expert evidence, as required by *Osborne*. In light of this failure of evidentiary support, summary judgment was proper. *See Keaton v. G.C. Williams Funeral Home, Inc.*, 436 S.W.3d 538, 544 (Ky. App. 2013) (summary judgment proper where appellant failed to present some affirmative evidence of severe emotional distress to support simple negligence claim). We affirm.[8]

***B. Outrage/IIED and Negligent Infliction of Emotional Distress***

[8] In its order granting summary judgment, the circuit court found Yvonne's negligence claim against the Foundation was derivative in nature, based solely "on [the Foundation's] employment of Dr. Trover." (R. at 1343). "Vicarious liability, sometimes referred to as the doctrine of respondeat superior, is not predicated upon a tortious act of the employer but upon the imputation to the employer of a tortious act of the employee[.]" *Patterson v. Blair*, 172 S.W.3d 361, 369 (Ky. 2005) (citation omitted). Accordingly, "[i]n circumstances under which the liability of the employer is purely derivative, he cannot be held liable while the employee at the same time is found not." *Kiser v. Neumann Co. Contractors, Inc.*, 426 S.W.2d 935, 937 (Ky. 1967). Because our previous analysis convinces us there can be no finding of liability on Dr. Trover's part, the Foundation is also exonerated of any vicarious liability on Yvonne's claim of medical negligence.

Appellees sought and obtained summary judgment as to Yvonne's claims of outrage/IIED and negligent infliction of emotional distress. To a certain degree, the circuit court's summary judgment failed to distinguish between the intentional/reckless tort (outrage/IIED) and the negligence tort (negligent infliction of emotional distress). However, an element common to both causes of action is the type of injury – emotional distress. We will address the circuit court's ruling as to that common element first.

The circuit court ruled that Yvonne:

> failed to produce any affirmative evidence . . . that [her] alleged emotional injury was so severe that: a reasonable person would not be expected to endure it [or that] it affected [her] everyday life [or that] it required significant treatment.

(R. 1342). These measures of emotional injury sufficient to support Yvonne's claims are found in, and the circuit court specifically relied upon, *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990).

In her attempt to reverse the circuit court's ruling on emotional distress, Yvonne erects a straw man that she proceeds to knock down. She asserts that emotional distress is a compensable injury even in the absence of any physical contact. We agree. In *Osborne*, *supra*, our Supreme Court rejected Kentucky's prior "impact rule" which formerly prohibited any claim "for fright, shock [,] or mental anguish which is unaccompanied by physical contact or injury." *Deutsch v. Shein*, 597 S.W.2d 141, 145-46 (Ky. 1980), *abrogated by Osborne*, 399 S.W.3d at 15-17. Noting that the overwhelming majority of jurisdictions had abandoned the

impact rule, the Kentucky Supreme Court expressly followed suit. *Osborne*, 399 S.W.3d at 17.

However, our agreement with this contention does not give cause for reversal. We previously discussed at length the character and degree of proof of emotional distress required by *Osborne*. Our analysis applies equally to Yvonne's claims of outrage/IIED and negligent infliction of emotional distress.

We look to the Estate's brief for direction to the record where it presented expert or scientific proof that Yvonne's claimed emotional injury is severe or serious, but the brief tells us nothing on this point. Rather, the Estate focuses our attention on Dr. Trover's conduct; the Estate claims "[t]his is a case study of outrageous behavior[,]" but fails entirely to tell us what *severe* emotional distress Yvonne experienced as a direct and proximate result of that behavior.

Missing the mark, the Estate lists specific examples of the doctor's conduct such as misreading x-rays, allowing other employees to read x-rays he was required to read, failing to obtain informed consent or medical histories in some cases, or striking an employee. Not only does the Estate claim this conduct is sufficient in and of itself to sustain its outrage/IIED and negligent infliction of emotional distress claims against Dr. Trover, it argues that its proof was also sufficient to sustain its claim against the Foundation because of its corporate knowledge of and acquiescence to such behavior. Contrary to the Estate's belief, none of this is evidence of severe emotional distress.

Severe emotional distress is an essential element of both intentional and negligent infliction of emotional distress. As detailed in our earlier analysis, there is simply no evidence that Yvonne was unable to endure the mental stress of living with Dr. Trover's interpretation of her December 2002 liver/spleen scan, or that it either significantly affected her everyday life or required significant treatment. *Osborne*, 399 S.W.3d at 17-18. And, none of the Estate's evidence of severe emotional distress was in the form of expert medical or scientific proof required to prove the claim. *Id.*

In sum, we find the Estate has failed to put forth affirmative evidence of severe emotional distress, supported by expert medical or scientific proof, caused by Dr. Trover's or the Foundation's "outrageous" behavior. In light of this failure, the circuit court properly entered summary judgment on the outrage/IIED and negligent infliction of emotional distress claims. We again affirm.

***C. Fraud***

Finally, the Estate argues it has effectively pleaded and adequately established by proof the following theories justifying recovery of damages against Dr. Trover and the Foundation: (1) lack of informed consent, (2) direct fraud, and (3) constructive fraud. We disagree.

First, our highest court long ago rejected the idea that failure to obtain informed consent should be treated differently than other failures of medical responsibilities, *i.e.*, as a separate tort in and of itself. *Holton v. Pfingst*, 534 S.W.2d 786 (Ky. 1975). Rather, Kentucky courts "regard the failure to disclose a

mere risk of treatment as involving a collateral matter . . . and so have treated the question as one of negligent malpractice only, which brings into question professional standards of conduct." *Id.* at 788 (quoting W. Prosser, Handbook of the Law of Torts, 106 (4th ed. 1971)). "[T]he action, regardless of its form, is in reality one for negligence in failing to conform to a proper professional standard." *Id.*

Perhaps the most direct explanation of the role played by lack-of-informed-consent issues in our jurisprudence was offered by Justice Leibson.

> "Lack of informed consent" is not, *per se*, a tort. It is only a term useful in analyzing . . . the type of negligence which occurs when a physician has not made a "proper disclosure of the risks inherent in a treatment." Louisell and Williams, Medical Malpractice, Vol. 2, Sec. 22.04. (Emphasis original.).

*Keel v. St. Elizabeth Med. Ctr.*, 842 S.W.2d 860, 862–63 (Ky. 1992) (Leibson, J., concurring); *see also Fraser v. Miller*, 427 S.W.3d 182, 187 (Ky. 2014) (Keller, J., concurring) ("KRS 304.40–320 does not require a physician to obtain informed consent, it simply states when informed consent shall be deemed to have been obtained"). In other words, the claim of medical negligence, and our earlier analysis of that claim and the judgment dismissing it, subsumes the claim that Dr. Trover failed to obtain informed consent.

Next, we consider the claim of direct fraud. It is difficult to tell whether the Estate's claim is one for fraudulent misrepresentation or fraud by omission. We shall analyze both.

Fraud by misrepresentation "requires proof that: (1) the defendant made a material representation to the plaintiff; (2) the representation was false; (3) the defendant knew the representation to be false or made it with reckless disregard for its truth or falsity; (4) the defendant intended to induce the plaintiff to act upon the misrepresentation; (5) the plaintiff reasonably relied upon the misrepresentation; and (6) the misrepresentation caused injury to the plaintiff." *Giddings & Lewis, Inc. v. Industrial Risk Insurers*, 348 S.W.3d 729, 747 (Ky. 2011).

For purposes of our analysis, we will presume Appellees made material false representations; that takes care of the first and second elements of the cause of action. But the circuit court found, and we agree, that the Estate produced no affirmative evidence as to the third or fourth elements – that Dr. Trover or the Foundation made these representations with knowledge of their falsity (the third element), and with the intent to induce Yvonne to act (the fourth element). We have examined the record and can find no evidence to support these elements of the claim of fraud. The Estate's brief directs us to no such proof. Failure to present any proof of these two elements requires that we affirm the summary judgments.

Additionally, the Estate has not identified any injury caused by either Appellee's misrepresentation (the sixth element). "[F]raud is actionable only if it results in damage to the complainant[.]" *Gersh v. Bowman*, 239 S.W.3d 567, 573 (Ky. App. 2007) (citation omitted). As previously noted, the Estate's only claimed and compensable injury is severe emotional distress. Because our previous

analyses convince us that the circuit court correctly found no severe emotional distress in this case, we must conclude that the Estate presented no evidence of injury resulting from any representation by the Appellees.

To the extent the Estate is arguing a claim of fraud by omission, it too must fail.

> [A] fraud by omission claim is grounded in a duty to disclose. To prevail, a plaintiff must prove: (1) the defendant had a duty to disclose the material fact at issue; (2) the defendant failed to disclose the fact; (3) the defendant's failure to disclose the material fact induced the plaintiff to act; and (4) the plaintiff suffered actual damages as a consequence. The existence of a duty to disclose is a matter of law for the court.

*Giddings & Lewis*, *Inc.*, 348 S.W.3d at 747.

The Estate focuses on the first element, duty. It argues Dr. Trover had a duty to disclose that his medical license had been suspended by the Kentucky Board of Medical Licensure. Assuming such a duty was imposed upon Dr. Trover, it would not apply to this case. The emergency order temporarily suspending Dr. Trover's license was entered in 2005, well after Dr. Trover's alleged misreading of Yvonne's December 31, 2002 nuclear liver/spleen scan.

The Estate also claims the Foundation failed in its duty to inform Yvonne that, while she was under treatment, Dr. Trover was in need of supervision or was actually being supervised because of behavioral problems. As a corollary, the Estate claims the Foundation failed to disclose that staff at the Foundation had expressed concerns to the administration regarding Dr. Trover's substandard

medical practices. We do not agree that these facts require our creation of a duty to disclose information. Once again, the timing of these suspicions does not fit the Estate's claim. But there is another reason we agree with the circuit court that there is no duty here.

The existence of a duty is a question of law to be decided by the court. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003). The circuit court found no legal duty on behalf of a doctor or a hospital to disclose behavioral and personal issues of a treating physician to patients. Our review of the law confirms this. Whatever duty the Estate might imagine in this regard would be unworkable. The likely result of recognizing such a duty – *i.e.*, a duty to inform patients of unproven complaints against doctors – is to create more liability than it avoids. We see nothing in our jurisprudence that would encourage or justify requiring the breach of one duty in order to satisfy another. The circuit court was correct in finding no such duty exists.

And, once again, we turn to the absence of an injury in these cases – the fourth element of the cause of action for fraud by omission. Fraud "without damage is, of course, not actionable." *Curd v. Bethell*, 248 Ky. 127, 58 S.W.2d 261, 263 (1932). We will say nothing more than that we are firm in our conclusion, as discussed above, that Yvonne suffered no compensable injury.

There was insufficient evidence in the record to create a genuine issue of material fact as to the various elements of the Estate's claim for direct fraud,

whether by misrepresentation or omission. Therefore, the summary judgment as to such claim must be affirmed.

This leaves constructive fraud. Constructive fraud, unlike direct fraud, "arises through some breach of a legal duty which, irrespective of moral guilt, the law would pronounce fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests." *Coomer v. Phelps*, 172 S.W.3d 389, 393 (Ky. 2005) (quoting *Wood v. Kirby*, 566 S.W.2d 751, 755 (Ky. 1978)). "Constructive fraud may be found merely from the relation of the parties to a transaction or from circumstances and surroundings under which it takes place." *Epstein v. United States*, 174 F.2d 754, 766 (6th Cir. 1949). The doctrine of constructive fraud is rooted in equity. *See Pickrell & Craig Co. v. Bollinger-Babbage Co.*, 204 Ky. 314, 264 S.W. 737, 740 (1924).

The Estate claims Yvonne relied on the Appellees and their expertise in assuring that she would receive the care of a competent physician. It asserts that, had Yvonne known the issues relative to Dr. Trover's practice that were eventually uncovered in the Foundation's investigations, she would not have agreed to be a patient of Dr. Trover or the Foundation.

Again, there is the timing problem for the Estate; however and additionally, the duty analysis undertaken above with regard to fraud by omission applies equally here. We cannot find error in the circuit court's ruling that there is no duty

to disclose unproven[9] allegations of a medical professional's imperfections. And, again, the Estate can point to no evidence of injury. For these reasons, summary judgment on the issue of constructive fraud was proper.

And as a category of claims, all the Estate's fraud causes of action lack evidentiary support sufficient to create a genuine issue of material fact as to at least one element of the claim. Therefore, we cannot find that the circuit court erred as a matter of law in concluding that Dr. Trover and the Foundation were entitled to summary judgment.

## CONCLUSION

We affirm the Hopkins Circuit Court's May 1, 2013 order granting summary judgment in favor of Dr. Trover and Baptist Health Madisonville f/k/a Trover Clinic Foundation.

ALL CONCUR.

[9] Indeed, the Estate's citations to the record indicates that when Dr. Trover read Yvonne's liver/spleen scan, most if not all the allegations challenging Dr. Trover's competence were yet to be made.

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