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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002599-MR

GENEVA HAGER — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 98-CI-02482

ALLSTATE INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, MOORE AND THOMPSON, JUDGES.

MOORE, JUDGE: Geneva Hager[1] appeals from a jury verdict rendered after a two-week trial in Fayette Circuit Court deciding that Allstate Insurance Company did not violate Kentucky Revised Statute (KRS) 304.12-230, Kentucky's Unfair Claims Settlement Practices Act. Hager brings numerous issues on appeal.

[1] Generally, we will refer to the Appellant as Hager.

Having heard oral arguments and after a thorough review, we find no error at the trial court level sufficient for the relief sought by Hager.

FACTUAL AND PROCEDURAL BACKGROUND

Hager raises approximately twenty claims of error and numerous sub-issues as to the trial court proceedings and rulings in this case. Given the size of the record, which contains over 9,300 pages, countless exhibits, numerous depositions, a multitude of hearings, seemingly limitless sidebar hearings, two weeks of trial testimony, and a history spanning nearly ten years, it is fortunate for our review that Hager has not challenged the jury verdict as being against the weight of the evidence. Consequently, despite the fact that both parties have set out in great detail the underlying facts of this matter, the Court need not recite page-upon-page of the convoluted facts of the underlying case for resolution of the appeal.

We appreciate the parties' respective briefs because their efforts were very helpful to the Court to grasp what at first appears to be a complex case. But when fully digested, the matter as litigated on appeal is not nearly as complex as the facts at first make it appear. Accordingly, despite the numerous claims before this Court, only one issue concerns a directed verdict, and that issue can be easily resolved by our analysis. Thus, our review is limited to those rulings and procedural claims of errors brought by Hager, which are preserved on the record, correctly cited thereto and for which proper authority has been given.

For the reasons stated above, Hager's appellate posture only requires that the Court set forth the most basic facts of this matter for its resolution. As additional facts are required for review on the claims, they will be presented later in the analysis.

The action is based on a bad faith claim, upon which Allstate prevailed at trial. Its genesis is an accident that occurred on July 10, 1997. Thomas LaPointe, who was insured by Allstate, rear-ended the Hagers' vehicle. Mr. Hager, Geneva's husband, was driving, and Geneva Hager was a passenger. According to LaPointe's recorded statement of the accident, his brakes failed as he approached the Hagers' truck. In response, he shifted his vehicle from second gear to first gear and turned off the motor. While in second gear, LaPointe estimated that he was going approximately fifteen miles per hour. After gearing down, he thought he was going around five miles per hour when he rear-ended the Hager vehicle. LaPointe described the impact like unexpectedly hitting a speed bump.

At first, Mr. Hager corresponded with Allstate regarding both the Hagers' claims, but later the Hagers retained attorney Paul S. Kaplan to represent them in their claim against LaPointe. In a letter dated December 5, 1997, Kaplan wrote to Allstate that all further communications regarding the accident should be sent to his office.

Within a short time after the accident, Allstate determined that it was reasonably clear its insured was liable. Thus, liability was not at issue. The issue

became at what point in the underlying claim procedures Allstate had the necessary documentation and information regarding Geneva Hager's claim to make a timely and reasonable determination of how and under what procedures her claim should be evaluated.

Hager argues in her brief that her case was handled in Allstate's Minor Impact Soft Tissue ("MIST") unit. MIST claims involve accidents with little or no damage to the vehicles, occurring at a low rate of speed, with no discernable physical injury. According to the Allstate documents, "MIST files are, by definition, suspected of consisting of no, or minor injury based on impact." Early recognition of MIST claims include: damages of $1,000 or less; no sheet metal or frame damage; no visible damage indicated by the insured or the police report; soft tissue injuries; no pre-existing conditions to the same bodily area as the complaints arising from the accident; and no objective findings such as confirmed herniation, confirmed bulges, lacerations, scarring, fractures, etc.

Regardless of how convoluted the parties may try to make the issue, at the time of receiving Kaplan's letter, the record supports that Allstate knew only that Hager had been taken to the emergency room by ambulance and, based on LaPointe's earlier referenced statement, that it was a minor accident. At that time, because the accident appeared to be minor, the claim initially fell into the MIST category. It was given to Allstate claim handler, Sarah Howard, who handled attorney-represented claims in the MIST unit.

A series of correspondence was exchanged between Hager's attorney and Allstate's claim adjusters. The record is replete with requests from Allstate for information from Kaplan regarding Hager's medical records, history, treatment, prior conditions, etc. While Kaplan supplied some documentation to Allstate, he responded that it was his policy not to have his clients sign medical releases in cases such as this.

The record is undisputed that Allstate made a number of attempts to get documentation regarding Hager's damages. For example, in Howard's claims diary, dated January 5, 1998, she wrote that she and Kaplan had discussed the Hagers' loss. Kaplan would talk to his clients but said "our [Allstate's] reputation proceed[ed] us, so [they] may wait until we are in suit." (Capitalization changed.). Howard continued to request documentation from Kaplan to evaluate Geneva Hager's claims. While Kaplan supplied some of the documents, Howard wrote, in a letter dated May 13, 1998, that she had reviewed the documentation provided thus far. However, to properly review the claim, Howard still needed the emergency room records, where Hager was treated after the accident; the family physician's records (both before and after the accident); a number of medical billing records; the complete PIP file; and all wage and disability verification. Thereafter, Howard took an extended medical leave. In the interim, however, it is undisputed that Kaplan did not provide the documentation Howard requested.

While Howard was on leave, another adjuster, Debbie Niemer, reviewed the file. In an entry in the claims diary, dated June 20, 1998, she noted

that she received a telephone call from Kaplan requesting policy limits because (1) Geneva Hager had an objective injury; (2) she had an assessed 11 percent impairment; and (3) the PIP carrier's IME agreed with the diagnosis. Kaplan relayed to Niemer that he would "not go into detail and indicated that if we were unable to evaluate this claim at policy limits before the statute [of limitations ran,] he would file suit[.] I advised that we would continue to investigate this matter[;] we would require prior medical history and perhaps our own IME on the case[.] He indicated that he would still file suit[.] I advised we would handle accordingly." (Capitalization changed).

In an entry dated July 6, 1998, Niemer wrote that Kaplan had contacted her again regarding evaluation of the claim. Niemer also wrote that the claim was not ready for an evaluation because medical records and loss information were still missing. At that time, given additional information and photographs of the automobiles that Allstate received, Niemer did agree with Kaplan that it was not a minor impact case, as damage was shown to the rear cab panels, the tailgate, and the front of the Hagers' vehicle. The type of damage shown on the Hager vehicle took the claim outside of the qualifiers for the MIST unit. Thus, the claim was transferred out of the MIST unit.

In July of 1998, Ben Urso, a senior adjuster who had been with Allstate for thirty years, was assigned to Hager's claim. Urso was not an adjuster in the MIST unit. According to Urso's testimony, due to the lack of the requested

documentation while Howard and Niemer had the claim and prior to it being transferred to him, Hager's claim was never evaluated in the MIST unit.

Kaplan filed suit on behalf of the Hagers against LaPointe in July of 1998. Allstate provided counsel for LaPointe, its insured. Thereafter, discovery commenced in the case. Both Hager and LaPointe sought through discovery requests information they had not received during the claims process.

Ultimately, according to Allstate, once it received the documentation it requested relevant to Hager's claim for proper evaluation, it offered policy limits prior to the trial in this matter. Shortly thereafter, Kaplan amended the complaint to add a bad faith claim against Allstate. The Hagers and LaPointe settled their suit, but the circuit court ordered that Allstate shall remain as a defendant in the action. Later Hager filed a motion for leave to file a second amended complaint, which included a reference to a class action against Allstate. The court granted this motion on June 16, 2000. Thereafter, Hager filed two additional amended complaints regarding more specific allegations against Allstate to form a foundation for the class action suit. The last amended complaint was the fourth one, which was granted on November 30, 2004.

Regarding the class action, it was comprised of individuals whose claims were subject to the MIST claims-handling process. After a motion to certify the class was filed, the trial court timely denied the motion for lack of commonality and typicality on October 31, 2006. Hager was the only named plaintiff in the action. Shortly after the motion for class certification was denied,

Hager filed a motion to notify the putative class members of the denial of class certification. The trial court timely ruled that notice was not required under the facts of this case. After this ruling, Hager has not cited to this Court any additional proceedings relevant to the class action.

Hager's individual bad faith claim proceeded to trial in October of 2007. After a two-week trial, the jury returned a verdict in favor of Allstate. Hager now appeals a number of rulings by the trial court, but does not attack the jury's verdict as being against the weight of the evidence. Accordingly, we will review each claim presented by Hager where properly preserved, as supported by a preservation statement and proper citation to the record, and where supported by authority in accordance to Kentucky Rules of Civil Procedure (CR) 76.12. *See Cherry v. Augustus*, 245 S.W.3d 766, 781 (Ky. App. 2006).

ANALYSIS

1. Hager's claim regarding her entitlement to a directed verdict on judicial estoppel regarding the "McKinsey documents" is not properly before the Court.

Hager's first claim of error is not properly before this Court. In her statement of preservation, she claims to have preserved the issue of judicial estoppel regarding documents referenced as the "McKinsey documents"[2] when her

[2] We are highly cognizant of Hager's claims regarding the importance of the McKinsey documents and her belief that they form the foundation for the practices of which she maintains form the basis of her bad faith claim. Nonetheless, this issue is not properly before the Court. Accordingly, we need not recite the facts or allegations surrounding the McKinsey documents other than to note that they were documents generated after McKinsey & Company was retained

counsel moved for a directed verdict. This Court has reviewed both parties' motions for directed verdict near the end of Hager's case in their entirety.[3] During these arguments, Hager's counsel did not argue in any manner whatsoever that Hager was entitled to a directed verdict based on judicial estoppel.

> CR 50.01 states that 'A motion for a directed verdict shall state the specific grounds therefor.' The primary purpose of the Rule is to fairly apprise the trial judge as to the movant's position; and also to afford opposing counsel an opportunity of arguing each ground before the judge makes his ruling. The attention of the trial judge can thus be focused on possible reversible errors, which might otherwise be obscure with only a general motion for a directed verdict. In the absence of a statement of the specific grounds for a motion for a directed verdict, this Court normally will not consider the question of the *denial* of the motion. Clay, CR 50.01; 5 Moore's Federal Practice, Par. 50.04 (2nd Ed. 1951).

Carr v. Kentucky Utilities Co., 301 S.W.2d 894, 897 (Ky. 1957) (emphasis added in *Carr*); *see also Whitesides v. Reed*, 306 S.W.2d 249, 250 (Ky. 1957). Hager has not cited this Court to anywhere else in the record where she preserved this issue. We are not obligated, nor will we, search this vast record to try to otherwise locate where this issue may have been preserved. *See Phelps v. Louisville Water Co*., 103 S.W.3d 46, 53 (Ky. 2003); *Robbins v. Robbins*, 849 S.W.2d 571, 572 (Ky. App. 1993). Accordingly, despite Hager's claims that she was entitled to a directed verdict regarding judicial estoppel, she failed to state this as a basis for a directed

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by Allstate to conduct a review of Allstate's claim handling procedures and practices.

[3] There were two more depositions for Hager's case to be played for the jury at the time both parties moved for a directed verdict. Hager's counsel informed the circuit court that these depositions were not dispositive and would not have an impact on the court's decision on directed verdict. Accordingly, the court heard the motions.

verdict before the trial court. Thus, she has waived this issue.

2. The trial court did not abuse its discretion in denying class certification.

Before discussion of the merits of Hager's arguments under class certification, we address Allstate's arguments that Hager does not have standing to appeal this issue due to losing at trial on her individual claim. While at the outset this argument may appear to have validity, persuasive case law holds otherwise.

A seminal case on this issue is *United States Parole Commission v. Geraghty*, 445 U.S. 388, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980), wherein the Court held that

> an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied. The proposed representative retains a "personal stake" in obtaining class certification sufficient to assure that Art. III values are not undermined. If the appeal results in reversal of the class certification denial, and a class subsequently is properly certified, the merits of the class claim then may be adjudicated. . . .

445 U.S. at 404, 100 S. Ct. at 1212-13.

In its decision, the Supreme Court relied on several principles, including the fact that the issue of denial of class certification is simply one issue to be litigated, so it stands to reason that it should be appealable. *Id*., 445 U.S. at 399-400, 100 S. Ct. at 1205. The Court also relied on the fact that, at that time under Federal Rule of Civil Procedure (F.R.C.P.) 23, the denial of class action

certification was interlocutory and not appealable.[4] *Id.*, 445 U.S. at 399, 100 S. Ct. at 1210. The Court noted that there remained "'the prospect of prevailing on the merits and reversing an order denying class certification.'" *Id.* (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469, 479, 98 S. Ct. 2453, 2459, 57 L. Ed. 2d 351 (1978)). Thus, while the merits of a plaintiff's claim may be extinguished at the trial court level, "'it does not follow that this circumstance would terminate the named plaintiff's right to take an appeal on the issue of class certification.'" *Id.*, 445 U.S. at 402, 100 S. Ct. at 1211 (quoting *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 333, 100 S. Ct. 1166, 1117, 63 L. Ed. 2d 427 (1980)).

There remains the issue of whether Hager has a personal stake in the outcome of the litigation sufficient that there exists a case or controversy for the Court to resolve. In *Geraghty*, the Court determined a review of the personal stake must be undertaken, requiring consideration of "the purpose of the case-or-controversy requirement." 445 U.S. at 402, 100 S. Ct. at 1212. In the context of a class action, the considerations are different from traditional cases.

> Although the named representative receives certain benefits from the class nature of the action, some of which are regarded as desirable and others as less so, these benefits generally are the byproducts of the class-action device. In order to achieve the primary benefits of class suits, the Federal Rules of Civil Procedure give the proposed class representative the right to have a class certified if the requirements of the Rules are met. This "right" is more analogous to the private attorney general concept than to the type of interest traditionally thought

[4] F.R.C.P. 23 has since been amended to allow for an interlocutory appeal in federal courts of the grant or denial of class certification.

> to satisfy the "personal stake" requirement. *See Roper*, 445 U.S. at 338, 100 S.Ct at 1173-1174.

Geraghty, 445 U.S. at 403, 100 S.Ct. at 1212 (note omitted).

Numerous courts have held in accord with *Geraghty*. For example, the United States Court of Appeals for the Third Circuit has decided that, pursuant to *Geraghty*, "a named plaintiff who has lost her individual claims on the merits has standing to appeal the denial of class certification." *Alexander v. Gino's, Inc.,* 621 F.2d 71, 73 (3d Cir. 1980).

The Tenth Circuit Court of Appeals held that where a named plaintiff's "individual claim was decided against her at the trial level and is not moot on appeal," she had "standing to appeal the individual adverse determination and in so doing" was permitted to "appeal interlocutory orders [such as an order denying class certification] decided against her below." *Anderson v. City of Albuquerque*, 690 F.2d 796, 798-99 (10th Cir. 1982). The Court noted that "(A)n order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff. . . ." *Id*. (internal quotation marks omitted).

Therefore we are persuaded that Hager has standing to appeal the circuit court's denial of class certification, despite having lost on the merits at the trial court. However, we review a circuit court's denial of class certification for an abuse of discretion. *See Sowders v. Atkins*, 646 S.W.2d 344, 346 (Ky. 1983).

The class Hager sought to certify involved individuals whose claims were evaluated by Allstate's MIST unit. The trial court in this case found that

Hager lacked the typicality and commonality required for her to qualify as the class representative, and we do not find an abuse of discretion in that decision.

> To satisfy the typicality requirement, the representative plaintiff's interests must be aligned with those of the class. . . . [A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.

Powers v. Hamilton County Public Defender Comm'n, 501 F.3d 592, 618 (6th Cir. 2007) (internal quotation marks omitted). "The commonality requirement is satisfied if there is a single factual or legal question common to the entire class." *Powers*, 501 F.3d at 619. "To have standing to sue as a class representative it is essential that a plaintiff must be a part of that class, that is, he must possess the same interest and suffer the same injury shared by all members of the class he represents." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216, 94 S.Ct. 2925, 2930, 14 L. Ed. 2d 706 (1974).

The trial court noted that Hager's claim was not denied by Allstate and that although it was "initially valued at far less than the ultimate settlement[,] Plaintiff's claim was settled by Defendant tendering policy limits." Based on the record, we agree with the trial court that a "basic flaw[] in satisfying the commonality and typicality requirements is the undisputed evidence that Plaintiff's claim, though initially classified as a MIST claim upon initial notification to Defendant, was eventually removed from the MIST classification and resolved in a non-MIST procedure."

Hager's claim initiated in the MIST unit was based on the only information Allstate had: LaPointe's statements regarding the accident and limited information regarding Hager's medical condition, treatment, history, etc. Once Allstate received information that the damage to the vehicle was more severe than what the MIST unit was intended to cover, it was transferred out of the MIST unit. Nothing cited in the record illustrates that once this documentation was received, it was not properly transferred out of the MIST unit. Further, we agree with the trial court that nothing in the record disputes that when Hager's claim was in the MIST unit, Hager's claim was not evaluated. The period the claim spent in MIST was during an extended document-gathering phase, and as the record bears out, Hager did not turn over a number of documents during that time for an evaluation of her claim. Thus, we cannot say that the trial court abused its discretion in concluding that Hager's claim was not typical or common of MIST claims, resulting in a denial of class certification.

3. The trial court did not abuse its discretion when it ruled that notice of its decision denying class certification was not required to be given to putative class members.

Hager contends that, pursuant to the Sixth Circuit Court of Appeals's decision in *Doe v. Lexington-Fayette Urban County Government*, 407 F.3d 755 (6th Cir. 2005), notice is required to be provided to putative class members even when class certification is denied by the trial court. Hager argues that the trial court erred in failing to order this notice.

To rebut Hager's reliance on *Doe,* Allstate attacks *Doe* on three fronts. First, Allstate argues that the events and the law applied in *Doe* were prior to the 2003 revisions to F.R.C.P. 23(e), and it is, therefore, inapplicable. Allstate explains that prior to 2003, the notice provision of F.R.C.P. 23(e) was identical to the Kentucky Rule of Civil Procedure (CR) 23.05,[5] and "a majority of courts and the great weight of authority interpreted 'dismissal' in the rule as 'voluntary dismissal,' and 'held that the rule's provisions did not apply when the dismissal was not voluntary.'" (Allstate's Br. at p. 19 (quoting 7B Charles Alan Wright et al., *Federal Practice and Procedure* § 1797, at 72 (3d ed. 2005))). Allstate quotes Wright and Miller as providing that "those courts concluded, appropriately, that because an involuntary dismissal presumably could not involve collusion or benefit the representative plaintiffs at the expense of the remaining class members, the protection afforded by giving notice to the absentees was not required." Allstate notes that "[i]n 2003, [Federal Rule of Civil Procedure] 23(e) was amended to clarify that it only applies to 'voluntary dismissals' and only to a 'certified class,'" and Allstate argues that this "clarification similarly illuminates the meaning of [Kentucky Rule of Civil Procedure] 23.05."

In *Doe*, the Sixth Circuit Court of Appeals quoted the former version of F.R.C.P. 23(e)(1)(B), *i.e.*, the version of the Rule before it was amended in 2003, as having "provided that a class action shall not be dismissed or

[5] Kentucky Rule of Civil Procedure 23.05 provides: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." *Doe*, 407 F.3d at 761 (internal quotation marks omitted). Comparing the former version of Federal Rule of Civil Procedure 23(e) with the current Kentucky Rule of Civil Procedure 23.05 reveals that Allstate's argument is correct to the extent that it states that Kentucky's current rule mirrors the former version of the federal rule. This leads to the second argument advanced by Allstate.

The second attack Allstate launches against *Doe* is that it is inapplicable because it was resolved under the prior version of F.R.C.P. 23(e). We disagree because the notice provision in the prior version of the federal rule is identical to Kentucky's current CR 23.05. Thus, cases interpreting and applying the prior version of the federal rule, including *Doe* as persuasive authority, will aid in our interpretations and understanding of CR 23.05.

Allstate asserts as its third point that *Doe* is inapplicable because it involved a voluntary dismissal, unlike the facts in this appeal. Courts interpreting the prior version of F.R.C.P. 23(e) have typically held that prejudice to the putative class must be considered when evaluating whether a court should exercise its discretion to order notice.

Certainly there is a logical argument that in the absence of an order certifying a class, no class exists to notify. We find persuasive *See Salantino v. Chase*, 939 A.2d 482, 489 (Vt. 2007) that this reading is "unduly restrictive and

contrary to the court's role as protector of absent class members' interests." (Citation omitted). The Court in *Salantino* cited the Advisory Committee Notes to F.R.C.P. 23 stating that "'[w]hether the court should require notice to be given to members of the class of its intention to make a determination [of class certification], or of the order embodying it, is left to the court's discretion under subdivision (d)(2).'" 939 A.2d at 490-91 (quoting F.R.C.P. 23, Advisory Committee Notes).

"Case law addressing pre-certification notice generally takes a flexible approach framed by two guiding principles: (1) the lack of collusion or bad faith,[6] and (2) the existence of any reasonable reliance interest by the absent class members." *Griffith v. Javitch, Block & Rathbone, LLP*, 241 F.R.D. 600, 602 (S.D. Ohio 2007) (citing *Doe*, 407 F.3d at 762-64). Consequently, "Rule 23(e) applies in a precertification context where putative class members are likely to be prejudiced." *Doe*, 407 F.3d at 764; *see also*, *Salantino*, 939 A.2d at 490 (stating that the bulk of cases which have reviewed this issue have allowed discretionary application of the notice requirement to an uncertified class under Rule 23 where prejudice is shown to a putative class).

In *Shelton v. Pargo, Inc.*, 582 F.2d 1298 (4th Cir. 1978), the issue was whether notice was required to be provided to absentee putative class members before the trial court was permitted to approve a proposed settlement. On appeal in that case, the Fourth Circuit Court of Appeals held as follows:

[6] Given that this case was resolved by jury trial, the issue of collusion or bad faith (in the context of the disposition of a case filed as a class action) is not relevant to our analysis.

> [N]o notice to purported class members is required upon the filing of a class action. Therefore, any reliance produced by such a filing arises as a consequence of such persons learning of the action through the news media or some other secondary source. The danger of reliance is thus generally limited to actions that would be considered of sufficient public interest to warrant news coverage of either the public or trade-oriented variety. Also, reliance can occur only on the part of those persons learning of the action who are sophisticated enough in the ways of the law to understand the significance of the class action allegation. Because this reliance interest is often thought to be so speculative as to warrant little or no consideration, a court should consider the relevant facts and circumstances in order to determine whether the possible reliance interest of the absent putative class members in the particular case is sufficiently realistic to make necessary class notice.

Shelton, 582 F.2d at 1315 (internal quotation marks omitted).

We find the analysis in *Salatino* persuasive regarding (1) the potential hazards in ordering discretionary notice when class certification is denied and (2) factors to consider regarding whether the putative class members are prejudiced. The Court in *Salatino* thoroughly reviewed the issues, therefore its examination is worthy of repeating herein as persuasive authority.

> Ordering notice to putative class members-in addition to precipitating litigation of notice issues-imposes substantial time burdens and costs on the parties and the courts. . . . Notice can "be an exceedingly costly burden, and many times it is not necessary to protect the class." *Glidden v. Chromalloy Am. Corp*., 808 F.2d 621, 627 (7th Cir. 1986). Additionally, many courts have recognized that ordering notice to putative class members absent evidence of reliance would promote barratry and could suggest that the court had made merits-based determinations about the action. *Street* [*v. Diamon Offshore Drilling*, No. 00-1317] 2001 WL 883216, at *1

[(E.D. La. July 30, 2007)]; *Marian Bank v. Elec. Payment Servs., Inc*., No. 95-614-SLR, 1999 WL 151872, at *2 (D. Del.1999); *Rineheart* [*v. Ciba-Geigy Corp*.] , 190 F.R.D. [197] at 201 [(M.D. La 1999)]; *Maddox & Starbuck, Ltd. v. British Airways*, 97 F.R.D. 395, 397 (S.D.N.Y. 1983); *Cherner v. Transitron Elec. Corp*., 201 F.Supp. 934, 936 (D. Mass. 1962). The Advisory Committee warned that notice "should not be used merely as a device for the undesirable solicitation of claims." F.R.C.P. 23, Advisory Committee Notes. Given these countervailing interests, notice of class-certification denial is only appropriate when the denial may "affect adversely the rights of individuals not before the court." *Pearson* [v. *Ecological Science Corp*.], 522 F.2d [171] at 177 [5th Cir. 1975)].

The main reason to order notice after denial of class certification is to ensure that putative members are not unfairly prevented from having their claims heard. While a pending class action does not bar individuals from filing separate claims, they may refrain from doing so and rely on the class action to protect their interests. To promote this practice, which furthers efficiency of litigation and helps avoid unnecessary filings, the filing of a class action tolls the statutes of limitation for the class claims of all putative class members. *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. [538] at 551, 553-54, 94 S.Ct. 756 [(1974)]. But once a court denies class certification, the statutes of limitation run again. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983). The concern expressed by the . . . plaintiffs here is that if these individuals do not learn that class certification has been denied[,] they will not know that the limitation period is again running, and they may miss the opportunity to have their claims adjudicated.

While some potential plaintiffs may lose their chance to litigate by letting the statutes of limitation expire on their claims . . ., absent a showing of reliance on the pending action, there is no risk that putative class members will be prejudiced if the court does not approve of notice that it has denied class certification. The [lower] court

suggests that merely restarting the running of the statutes of limitation prejudices class members. But rather than being prejudiced, putative class members benefitted from the *American Pipe* rule, which tolled the statutes of limitation while the class action was pending. *Bantolina v. Aloha Motors, Inc*., 75 F.R.D. 26, 32 (D. Haw. 1977). Restarting the limitation period does not prejudice the putative class members; they are free now, as they have been the entire time that the class action was pending, to initiate an action against defendants. And unlike dismissals or settlements of certified class actions, the denial of class certification has no effect on any putative class member's legal interests. Putative class members will only be prejudiced by not receiving notice that class certification is denied when they are reasonably relying on the pending class action to protect their interests. The court's discretion to provide notice of class certification denial to putative class members must be exercised only in that situation. Otherwise, the burdens, costs, and barratry concerns surrounding notice weigh more heavily than the need to protect an uncertified class. *See, e.g., Maddox & Starbuck*, 97 F.R.D. at 397; *Elias v. Nat'l Car Rental Sys., Inc.*, 59 F.R.D. 276, 276 (D. Minn. 1973); *see also Simer v. Rios*, 661 F.2d 655, 665 (7th Cir. 1981) (rejecting the "absolute application" of Rule 23(e) to provide notice in the precertification context because the high costs and time delay of notice "may be injurious to the interests of the putative class members").

In this case, there were no actions by the court that could have caused reasonable reliance by putative class members on plaintiffs' suit, and there is no evidence that any class members were in fact relying on the suit. There was never a decision in favor of class certification; the court twice denied class certification, under two different provisions of Rule 23. Neither the court nor the attorneys provided notice to putative class members of plaintiffs' class claim. Likewise, neither the court nor the attorneys provided putative class members with notice that plaintiffs had moved for class certification. . . . Additionally, plaintiffs have not submitted any evidence that the court or any of the attorneys had been contacted about the litigation by putative class members, or that

> there are putative class members who actually relied on the litigation. The only evidence of reliance might be inferred from the media coverage of [the defendant], but no actual evidence was introduced.

Salatino, 939 A.2d at 491-92.

From the foregoing analysis, we agree that whether to issue notice when class certification is denied is discretionary with the court. In exercising its discretion, the court must consider what *evidence* exists to illustrate a reliance on the pending action and prejudice to the putative class members, as well as the cost and judicial economy of the notice. Factors comprising evidence of whether there is prejudice include actual knowledge by the putative class members that a class action has been filed and reasonable reliance by the putative class members on the class action to protect their interests.

Hager argues why she believes notice was required. Two points in her brief are used to support this claim:

> [1] Unless these class members are notified that the suit has been dismissed, and that class certification has been denied, they will be deprived of the opportunity to file their own individual lawsuit.
>
> [2] The trial court in the case *sub judice* distinguished the *Doe* decision, finding that in *Doe*, there was a substantial amount of publicity. However, the *Doe* court stated that the "amount of publicity is simply one factor among others that a district court should take into account when considering whether putative class members are likely to be prejudiced by a settlement. Although publicity is not the sole deciding factor, the undersigned counsel has never participated in any case that has garnered more publicity than Hager's. This case achieved national publicity from media outlets across the nation, including

> PBS' NOW, a TV news magazine, BusinessWeek, the Chicago Tribune, the Kansas City Star, The Times-Picayune of New Orleans, Bloomberg Markets magazine and an email circulated by KATA to all members regarding this case.

Regarding the first point, Hager has not cited the Court to any evidence in the record that any putative class members knew that the amended complaints filed included class action allegations. She furthermore has not shown any putative class members actually relied on her case. If the case had received widespread publicity, a court may be within its discretion to presume reliance and possibly prejudice.

In the second point urged on us by Hager, her counsel states that he "has never participated in any case that has garnered more publicity than Hager's." He thereafter, as quoted *supra*, sets out to illustrate this by citing to a string of media outlets. Upon review, there are various obstacles to these comments.

To support these statements, Hager first cites to the record at Vol. 61, R. 9115-9116, Exhibit B and R. 9117, Exhibit A to Hager's "Motion to Alter, Amend or Vacate."[7] Before addressing whether these exhibits suffice to illustrate evidence of publicity of Hager's case in such a degree that we must presume putative class members were reasonably aware that it was filed as a class action and were relying on it to such a degree that a failure to provide notice to them of the denial of class certification prejudiced them, we must first address whether

[7] This motion was actually styled as "PLAINTIFF'S MOTION TO ALTER, AMEND OR VACATE; PLAINTIFF'S MOTION FOR A NEW TRIAL; PLAINTIFF'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT; AND ALL OTHER MOTIONS" and was filed after the judgment on November 2, 2007.

these exhibits were even properly before the trial court, and hence this Court. The timing of the exhibits must also be evaluated.

Regarding timing of the publicity (which will illustrate in part whether there was a reasonable basis for reliance), Hager's motion for leave to file a second amended complaint, which included only a vague reference to a class action was granted on June 16, 2000. Thereafter, on November 30, 2001, the trial court granted Hager's motion to file a third amended complaint, which included more specific allegations regarding the class action. And, on November 30, 2004, the court again granted leave for Hager to file a fourth amended complaint, further specifying the allegations regarding the class action. Notably, from June 16, 2000 until the trial court denied Hager's motion to certify the case as a class action on October 31, 2006, no one moved to intervene in the action, no additional plaintiffs were added, and Hager has not cited this Court to even one individual in the putative class who contacted her regarding the litigation.

Within a few days after Hager's motion to certify the class was denied, she filed a motion to alter, amend or vacate the order denying class certification and moved the court to amend the order to provide language requiring notice to all putative class members of dismissal of the class certification at Allstate's expense. A hearing was held on the motion on November 17, 2006. During the hearing, the court orally mentioned the publicity in the case, noting the KATA reference and two or three small articles over a two or three year period in

the *Lexington Herald Leader*.[8] The court specifically questioned Hager's counsel if there was other publicity in the case beyond what it had cited. One of Hager's attorneys replied "None that I'm aware of." And, another referenced the website of www.allstateinsurancesucks.com. No other publicity was cited to the trial court at that time.

In its written order following the hearing, the trial court made the following factual findings:

> Plaintiff in her brief and reply brief suggests the language utilized by the Sixth Circuit in *Doe* that due to substantial publicity there is a danger of prejudice to putative class member[s] if there is not notification to them of the denial of class certification. The Court finds this unpersuasive. It is the Court's observation that there has been little publicity generated by this case as compared to *Doe*. The fact that some media outlets have contacted Plaintiff's counsel and KATA (Kentucky Academy of Trial Attorneys) has taken an interest in this case through conferences and its publication does not rise to the level of substantial publicity. Plaintiff's reference to the web site www.allstatesucks.com is misplaced. It was argued to the Court in 1998 or 1999, is [sic] a discovery dispute over documents, that this web site was essentially a plaintiff's web site utilized for the purposes of sharing information and documents obtained through discovery in various lawsuits, including ones similar herein, across the country. The Court does not believe the creation of such a web site rises to the level of substantial publicity as the Sixth Circuit made reference in its decision in *Doe*. Further, the taint of collusion does not exist in as much as the underlying case is not being settled out from under them as was the concern in *Doe*.
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> ***

[8] If these articles exist in the record, Hager has not given the Court a citation to the record where they can be located. In reviewing the motions and orders regarding this issue, the Court did not locate these articles for its own review.

> The Court cannot find, based upon the record before the Court any taint or prejudice adversely affecting the rights of the putative class members.

Consequently, the trial court found that the record at the time of its ruling did not support a finding of publicity sufficient that putative class members would be prejudiced in the absence of notice. Thus, the trial court, in exercising its discretion, ruled that notification was not warranted in the case at hand due to the lack of publicity. After this ruling, Hager did not move the Court again for certification of the class and did not file any further exhibits regarding publicity before judgment was entered in this case.

Having set forth what *evidence* was before the trial court when it made its ruling on notice and what *evidence* existed on the issue prior to judgment, we now focus on the exhibits offered to this Court as proof of publicity and prejudice to the putative class members. These exhibits cited in Hager's appellate brief were attached to her post-judgment motion styled as "PLAINTIFF'S MOTION TO ALTER, AMEND OR VACATE; PLAINTIFF'S MOTION FOR A NEW TRIAL; PLAINTIFF'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT; AND ALL OTHER MOTIONS." Consequently, they appeared in the record for the first time on November 2, 2007, which was over a year after the court denied Hager's motion for class certification and her motion seeking notice of the denial of class certification to the putative class members. Hager placed these exhibits in the record after judgment was

rendered, despite the fact that the exhibits were not relevant to the issues presented at trial or to any issue that could serve as the basis for the relief from the judgment. Moreover, in her post-judgment motion, Hager sought to bring in virtually every grievance she had with the trial court's rulings throughout the litigation.

Hager has not presented any arguments to this Court regarding how these exhibits could be properly introduced after judgment was rendered, nor has she met any of the foundations for which evidence can be introduced under the post-judgment civil rules, e.g., CR 59(e), CR 60.02. *See Hopkins v. Ratliff*, 957 S.W.2d 300, 301-302 (Ky. App. 1997). Further, "[a] party cannot invoke CR 59.05 to raise arguments and to introduce evidence that should have been presented during the proceedings before the entry of judgment." *Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005) (note omitted). The two exhibits referencing publicity in the case at hand do not meet any of the criteria for introducing evidence after judgment has been rendered. Consequently, they were not properly before the trial court and therefore are not properly before this Court.

This Court has reviewed each of the exhibits and even if they could properly be considered, they are not the type of evidence necessary to prove the trial court abused its discretion on this issue. Accordingly, there was no error.

Regarding the reference in Hager's brief to the email to the Kentucky Academy of Trial Attorneys (KATA) members, we agree with the trial court's ruling that this is not evidence of substantial publicity. Hager does not inform this Court of any putative class members who were KATA members. She also does

not present any evidence that after the email was sent, it reached any putative class members. The trial court found that the KATA contact was insufficient as publicity requiring notice, and this Court cannot find error or an abuse of discretion in that decision.

Turning back now to Hager's reliance on *Doe*, we find that Hager's fact situation has little in common with *Doe*. We do note that in *Doe*, the Court decided that "[r]ather than adopt a per se rule, most courts considering the issue have found the level of publicity to be one of several factors appropriately considered when examining whether putative class members are likely to be prejudiced if the class-action case is dismissed without notice." *Doe*, 407 F.3d at 763-64 (citations omitted). The Sixth Circuit thereafter "adopt[ed] the general principle that the amount of publicity is simply one factor among others that a [trial] court should take into account when considering whether putative class members are likely to be prejudiced by a settlement." *Id.* at 764. Consequently, in reviewing the issue, the Court noted that in the *Doe* case "the local media devoted substantial coverage of the . . . lawsuits." *Id.* at 764. Given this, "[w]ithout notice that these actions had been dismissed, the putative class members were likely lulled into believing that their claims continued to be preserved." *Id*.

We note that in *Doe*, the Court referenced several times that publicity was only one factor to consider. However, in the case before us, Hager has given no other basis for prejudice to the putative class members beyond her statements regarding publicity. Her vague and unsupported statements about prejudice are not

evidence and are insufficient to cause this Court to decide that the trial court abused its discretion in ruling that notice was not required. Consequently, without the publicity necessary to support an inference that the putative class may have been aware of the fact that Hager's complaint was amended several times to include a class action, we cannot find error in the trial court's conclusion that the putative class members were not prejudiced and, accordingly, notice of the order denying class certification was not warranted.

4. The trial court did not commit error when it allowed discovery regarding communications between Hager's counsel and her expert witness, Hon. James E. Keller.

Hager contends the trial court erred when it entered an order requiring her to disclose privileged communications between her counsel and her expert witness, Honorable James E. Keller. As Hager does not set forth in her original brief what communications she is referencing, the Court is informed by Allstate's brief that this claim is likely based on two documents,[9] (which are thereafter referenced for the first time in Hager's reply brief): (1) a letter from Hager's counsel to Justice Keller used to refresh Justice Keller's recollection during his deposition upon his request and (2) drafts of Justice Keller's CR 26 disclosures.

[9] Hager's original brief lacked any detail regarding what specific discovery claim this argument was brought under, which in turn understandably left Allstate not knowing precisely how to respond. Allstate actually presented a third category in its brief: work-effort documents, *i.e.*, documents showing how much time Justice Keller spent reviewing the case. Hager's having failed to present an argument on this, this issue is waived.

Hager has not favored the Court with any case law supporting her arguments. As legal authority, she relies on CR 26 and CR 45.04 as to what is discoverable.

Regarding the letter, counsel references it as "the engagement letter." It was a five-page letter of the factual background of the matter authored by Hager's counsel. The letter became an issue at Justice Keller's deposition when he stated that he believed he asked for a letter from Hager's counsel setting forth the facts relating to the case. When asked in more detail regarding the letter by Allstate's counsel, Justice Keller asked for a recess during his deposition to review the letter to refresh his recollection. Thereafter, he did so.

After the recess was over, Allstate's counsel questioned him regarding the letter. When Hager's counsel would not produce a copy of the letter to Allstate's counsel, Allstate thereafter moved the trial court for a copy of the letter pursuant to Kentucky Rule of Evidence (KRE) 612. The trial court ordered the letter to be produced *in camera* and under seal. After reviewing it, the court ordered Hager to produce it, ruling that Allstate was entitled to the communications and documents provided to Justice Keller from Hager's counsel "upon which the expert relied in formulating his opinions, and any revisions thereto. . . ."

KRE 612 expressly recognizes the right to production of documents used to refresh the deponent's recollection. In relevant part, KRE 612 provides that:

> Except as otherwise provided in the Kentucky Rules of Criminal Procedure, if a witness uses a writing during the course of testimony for the purpose of refreshing memory, an adverse party is entitled to have the writing produced at the trial or hearing or at the taking of a deposition, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. . . .

Hager contends that the trial court's rulings on this discovery issue exceeded the allowable discovery pursuant to CR 26.02(4). Under Hager's theory, any communication or document that is not specifically covered under CR 26.02 is precluded from discovery. Following this logic would render meaningless a number of other Civil Rules and render KRE 612 a nullity.

The credibility of expert testimony is subject to attack and cross-examination by the opponent of such testimony. *Sanborn v. Com*., 892 S.W.2d 542 (Ky. 1994). This is precisely how Allstate's counsel used the letter at trial.

While cross-examining Justice Keller at trial, Allstate's counsel attempted to discredit his expert opinion by eroding away the underlying information he used to form his opinions. In part, counsel for Allstate used the letter to elicit testimony from Justice Keller that he may have used portions of it to become familiar with some of the facts of the case leading up to the litigation. Justice Keller referenced the letter as a "preliminary letter that attorneys often send to proposed experts." Acknowledging that Hager's counsel had an economic incentive to win the case, Justice Keller conceded that Hager's counsel would not be unbiased in writing the letter. When asked about confirming the facts stated in

the letter, Justice Keller responded that he did confirm "some of them," but not all of them. For example, the letter set forth Hager's injuries, but Justice Keller did not review any of Hager's medical records to confirm. He further testified that he had no independent knowledge of whether Allstate made an offer prior to litigation other than what was supplied to him by Hager's counsel. When asked about discrepancies in the letter regarding the monetary amount of claims falling under MIST review when compared with the deposition testimony of Debbie Niemer, an Allstate employee, Justice Keller stated he had not read her deposition. He conceded this presented a conflict regarding claims handled in the MIST unit. Justice Keller agreed that an Allstate employee should know more about MIST than Hager's counsel. Further, Justice Keller testified that he had not reviewed all of the background information regarding Allstate's attempts to get Hager's medical records prior to litigation. Consequently, the Court, having reviewed Justice Keller's trial testimony, disagreed with Hager's contention that "there was never testimony that Justice Keller relied upon the correspondence in forming his opinion."

Our standard of review of a trial court's evidentiary rulings is an abuse of discretion, *see Tumey v. Richardson*, 437 S.W.2d 201, 205 (Ky. 1969), we find no such abuse regarding the trial court's allowing discovery of the letter.

The second claim, and again one brought to light by Allstate but then referenced in Hager's reply brief, is that the trial court ordered production of the

drafts of Justice Keller's corrections to CR 26 disclosures to Allstate. In his deposition testimony, Justice Keller noted that after Hager's counsel sent him a draft of the CR 26.02 disclosure, Justice Keller made some corrections to it and sent it back to Hager's counsel. Hager's counsel thereafter made a few changes to the CR 26.02 disclosure. Given that this information was also used to test Justice Keller's credibility and that to do so is patently proper, we find no abuse of discretion.

5. A number of the issues argued by Hager involving her family and insurance with Allstate were not properly preserved. The trial court did not abuse its discretion regarding the issues that were properly preserved.

Hager argues that evidence involving her family and their insurance policies with Allstate were irrelevant and should not have been permitted by the trial court. Hager's list of evidence which she claims is irrelevant includes: (1) her husband's contemporaneous claim and actions taken for policy limits for damages from the accident in which Hager made the present claim against Allstate; (2) Hager's husband's deposition and answers to interrogatories in his claim against Allstate; (3) "medical records, related or unrelated to the accident"; (4) Hager's husband's release and settlement with Allstate; (5) testimony that Mr. Hager had been shot by a former wife; (6) the Hagers' premium payments to Allstate; and (7) Hager's son's insurance with Allstate.

For a variety of reasons regarding compliance with the standards for appellate review, these claims fail. We will again repeat the importance of complying with the rules for appellate procedure.

> Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v) states, in part, that an appellant's brief shall contain "[a]n 'ARGUMENT' conforming to the Statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law...." Because [appellant's] brief lacks any citations of authority pertinent to the issue [at hand], it does not comply with CR 76.12(4)(c)(v). Rather than ordering the brief stricken for this deficiency, a more appropriate penalty in this instance is to refuse to consider [appellant's] contentions. . . .Therefore, we need not address the merits of [this] claim. . . .

Cherry, 245 S.W.3d at 781(footnote omitted).

Before analyzing the merits of the specific claims raised, two points must be emphasized. First, a number of Hager's claims fail because other than a broad statement claiming irrelevance without any supporting legal citation, Hager does not analyze the issues. Thus, she does not provide a foundation as to why the evidence is irrelevant nor argue why the trial court abused its discretion in allowing the evidence. Pursuant to *Cherry,* we need not review the merits of all claims falling under this category.

Second, not only has Hager failed to present legal authority for some of her claims under this category, she has not met her burden of preservation regarding several of the claims she makes. CR 76.12(4)(c)(v) requires that the argument section of a brief contain "ample supportive references to the record and

citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." It is not the burden of the Court to search the record to find proof of Hager's claims or to try to otherwise locate where the issues were preserved. *See Phelps*, 103 S.W.3d at 53; *Robbins*, 849 S.W.2d at 572; *Young v. Newsome*, 462 S.W.2d 908, 910 (Ky. App. 1971). "[W]e choose to give little credence to the arguments of either party that are not supported by a conforming citation to the record." *Smith v. Smith*, 235 S.W.3d 1, 5 (Ky. App. 2006). Thus, claims falling under this category will not be reviewed.

Turning now to the specific issues raised in her brief, the Court has reviewed thoroughly each of Hager's statements of preservation of error and citation to the record to determine which issues are correctly preserved. There was no citation to the record in Hager's preservation statement regarding her claims that the trial court erred by allowing evidence to be introduced of (1) Mr. Hager's deposition in the underlying case against LaPointe; (2) "medical records, related or unrelated to the accident"; (3) testimony that Mr. Hager had been shot by his former wife; and (4) the Hagers' premium payments to Allstate before and while litigation was pending. It was Hager's burden to correctly cite to the record where these objections were preserved. Thus, we give no credence to these claims and will not search out this vast record to locate them, if they exist.

In checking each of the preservation citations provided by Hager, she listed a number of cited objections. For three of these objections she did not, however, make any mention to them in her argument section of her brief nor did she cite any authority for these issues.[10] Thus, we decline to review them on the merits.

Hager properly preserved and cited to objections in the record for three arguments: (1) the objection to testimony regarding Mr. Hager's claim for policy limits, release and settlement;[11] and (2) the objection to the introduction of Defendant's Exhibit 525, *i.e.*, Mr. Hager's answers to interrogatories in the underlying suit against LaPointe and testimony; and (3) the issue regarding Hager's son being insured by Allstate. Regarding the first two issues, Hager only listed them numerically in her argument section, without providing any analysis or legal authority. Thus, they are not properly briefed. Consequently, we need not review the merits of these claims. *Cherry*, 245 S.W.3d at 781.

Regarding her son's insurance policy with Allstate, Hager has presented a short argument, albeit one without any legal authority. Thus, we need

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[10] The three citations in Hager's preservation statement that are not argued in her brief include:
(1) An objection regarding Allstate's mischaracterizing or misconstruing Mr. Hager's testimony as stating that the window to his vehicle was "cracked or broken" during the accident. Mr. Hager's statement had been that the window was "knocked out." Allstate's counsel agreed to restate her question in conformity to Mr. Hager's statement;
(2) an objection regarding questions concerning Mr. Hager's tax returns; and
(3) an objection in reference to Defendant's Exhibit 58, which was Hager's own release of her claims against LaPointe and does not reference her husband's release.

[11] Although not properly argued before this Court, even if the trial court erred in admitting Mr. Hager's underlying release and settlement with Allstate, we cannot conclude that the outcome of the trial would have been any different had this evidence been excluded. Therefore, any alleged error is harmless at best. *See* CR 61.01.

not review the merits of it. We will, nonetheless, briefly address this issue for manifest injustice.[12] *See Elwell v. Stone*, 799 S.W.2d 46 (Ky. App. 1990).

During direct examination, Hager testified that she was seeking punitive damages against Allstate because "if Allstate is punished they won't treat anyone like this--they will stop this process." She then testified that she "would hate to think that one of [her] children or grandchildren would ever have to go through this." On cross-examination, she testified that her "children knew she was having trouble dealing with all of this." Based on the context of the testimony, "this" referenced her claim against Allstate. Hager's counsel objected on the grounds of relevancy to Allstate's counsel's line of questioning regarding Hager's son insuring his vehicle[13] through Allstate.

Given (1) Hager's direct testimony about not wanting her family to go through what she had with Allstate; (2) her direct testimony about wanting to punish Allstate for what it had put her through; (3) her direct testimony about the distress she suffered in dealing with Allstate; and (4) her testimony that her family

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The standard of review for relevancy, "is a determination which rests largely in the discretion of the trial court. . . ." *Green River Electric Corp. v. Nantz*, 894 S.W.2d 643, 645 (Ky. App. 1995) (quoting *Transit Auth. v. Vinson*, 703 S.W.2d 482, 484 (Ky. App. 1985)). "This court will not disturb a lower court's discretionary ruling on appeal absent an abuse of discretion." *Id.* Even if we reviewed this issue under this standard rather than for manifest injustice, we find no error with the trial court's ruling.

[13] This line of questioning began regarding the transfer of the vehicle, which the Hagers were driving when they were in the accident, to the Hagers' son. Thereafter, Hager was questioned on the son's insuring the vehicle with Allstate.

knew she was having trouble dealing with it, we find that the trial court did not commit manifest injustice in overruling the objection.

6. There was no trial error regarding the admissibility of the MCE report, and Hager did not object to testimony regarding the RAND and IRC.[14]

Hager contends the trial court committed error when it allowed Allstate to introduce evidence of the Kentucky Insurance Commissioner's Market Conduct Examination (MCE) of Allstate, a RAND Institute for Civil Justice study, and Insurance Research Council (IRC) studies. We find that these arguments either lack merit or portions of the arguments are not properly before this Court.

We will first review issues surrounding the MCE which appear in Hager's original brief.[15] According to Hager, the trial court erred because under KRE 403, "the jury may have been influenced by the official character of the report to afford it greater weight than it was worth." She cites to *Bright v. Firestone Tire & Rubber Co.*, 756 F.2d 19, 23 (6th Cir. 1984), in support of this statement. Hager contends the trial court erred in admitting the MCE report because (1) the jury may have attached undue weight to it due to its official nature, and (2) the report may have misled the jury to believe that because the MCE addressed Allstate's MIST policy, the Commonwealth condoned MIST. Hager

[14] In her caption on this issue, Hager states that "The MCE, RAND and IRC Studies are Inadmissible Hearsay." Regarding the MCE report, the argument presented in her brief and in her motion in *limine* do not reference hearsay. Regarding the RAND and IRC studies, as examined *infra*, there were no hearsay objections placed on the record at any point where Hager has cited to the Court.

[15] Hager properly preserved her objection to the MCE evidence and properly cited to the Court where this objection, as well as her motion in *limine,* are located in the record.

also points out that the MCE did not address Allstate's treatment of Hager's individual claim.

In her original brief, Hager does not question the trustworthiness of the MCE. Nor does she reference therein KRE 803 as a basis for relief. Hager's citation to legal authority in her original brief is as follows: *Bright*, 756 F.2d at 23, and KRE 403.

In the *Bright* case, the Court's review was based on Federal Rule of Evidence (FRE) 803(8)(C),[16] noting that to be admissible under that rule the report "must first be a set of 'factual findings'" and must be trustworthy. *Id.* at 22 (citations omitted). But, as cited to and relied upon by Hager, the Court in *Bright* did note that under FRE 403 "[t]here was a substantial danger of unfair prejudice because the jury may have been influenced by the official character of the report to afford it greater weight than it was *worth*." *Id.* at 23 (emphasis added). In regard to the report's *worth,* the Court stated that "[i]t would be extremely difficult and time-consuming to evaluate the report's trustworthiness by examining all the data on which it was based." *Id.* The Court was highly critical of the facts underlying the report at issue, noting that it was based on "hearsay regarding lawsuits and customer complaints without any investigation into the ground for those complaints." *Id.* Thus, the report in *Bright* was ruled inadmissible.

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16 This rule provides that: "Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness [are admissible]."

Unlike the report in the *Bright* case, Hager does not present an argument or any factual allegations in her brief before this Court that the MCE was not based on factual findings and lacked trustworthiness. Thus, while Hager's citation to *Bright* on the undue weight may have some relevance, it was the trustworthiness of the report that concerned the Court in *Bright*. Consequently, *Bright* gives little support to Hager's argument.

Turning to the admissibility of the MCE Report under KRE 403, this rule provides that

> [a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

"Rulings upon admissibility of evidence are within the discretion of the trial judge; such rulings should not be reversed on appeal in the absence of a clear abuse of discretion." *Simpson v. Com*., 889 S.W.2d 781, 783 (Ky. 1994).

The Office of the Department of Insurance Commissioner conducted an MCE in accordance with KRS 304.2-210. This statute set forth the purposes for which an MCE is conducted and provides in relevant part that

> [f]or the purpose of determining financial condition, ability to fulfill and manner of fulfillment of its obligations, the nature of its operations, and compliance with law, the executive director shall examine the affairs, transactions, accounts, records, and assets of each authorized insurer as often as reasonably necessary. He shall so examine each domestic insurer not less frequently than every three (3) years. . . .

Allstate argues that the MCE report was properly admitted in this bad faith case to illustrate that it had "a reasonable basis to believe that its claims practices were appropriate and lawful." Given that the statutory purpose of the MCE is to determine whether an insurer is in compliance with the law, the MCE was properly admitted.

Hager's counsel had the opportunity to cross-examine witnesses, including Christine Sullivan, an Assistant Vice President at Allstate in the Property-Claim Service Organization, on the MCE report and did specifically ask whether it was intended as an adjudication on the MIST practices, to which the response was "no." Hager's counsel also had the opportunity to cross-examine other witnesses as to whether the MCE reviewed Hager's case. Given (1) the probative value of the MCE report in light of the bad faith claim made against Allstate; (2) whether Allstate had a reasonable basis to believe its practices were lawful; and (3) Hager's counsel's opportunity to cross-examine witnesses on the value of the MCE report, we cannot find that the trial court abused its discretion in allowing the MCE report to be introduced.

We now turn to Hager's inclusion of an argument first appearing in her reply brief: that the MCE was not admissible under KRE 803(8),[17] which is an

[17] Pursuant to KRE 803(8), the following are not excluded by the hearsay rules, even though the declarant is available as a witness:
8) Public records and reports. Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or other data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The

exception to the hearsay rule. There are at least two fatal problems with this argument.

First, as noted *supra,* in her brief Hager claims the trial court erred in admitting the MCE report because it would be *misleading* to the jury. She cites only to *Bright* under KRE 403. In her brief, Hager does not argue that the MCE lacked trustworthiness or argue KRS 803(8), which would have given Allstate an opportunity to have responded to this claim. "Reply briefs shall be confined to points raised in the briefs to which they are addressed. . . ." CR 76.12(4)(e). ""The reply brief is not a device for raising new issues which are essential to the success of the appeal."" *Best v. West American Inc. Co.*, 270 S.W.3d 398, 405 (Ky. App. 2008), *reh'g denied* (quoting *Catron v. Citizens Union Bank*, 229 S.W.3d 54, 59 (Ky. App. 2006) (quoting *Milby v. Mears*, 580 S.W.2d 724, 728 (Ky. App. 1979))). Raising the KRE 803(8) argument for the first time in her reply brief prevented Allstate from addressing the trustworthiness of the MCE report in its response. Indeed, Allstate only responded to Hager's claims under KRE 403 and did not address KRE 803.

Second, and more fatal to Hager's reply brief argument under KRE 803, is the fact that Hager has the same additional issue as the appellant in *Best*, to wit:

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following are not within this exception to the hearsay rule:
(A) Investigative reports by police and other law enforcement personnel;
(B) Investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; and
(C) Factual findings offered by the government in criminal cases.

> While we could question whether the bad faith claim as adjudicated by the trial court is essential to success of this appeal, a more elementary problem Best has, however, is the fact that he did not include the bad faith claim in his prehearing statement. Pursuant to CR 76.03(8):
>
> A party shall be limited on appeal to issues in the prehearing statement except when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion.

In Hager's prehearing statement regarding the MCE report, she references hearsay issues, juror confusion, prejudice, failure to qualify Sullivan as an expert and "all other objections made by Plaintiffs."[18] She did not reference in any manner the trustworthiness of the MCE or KRE 803. Hager's not having included these as issues on appeal in her prehearing statement and not having moved this Court for good cause to consider her claim under KRE 803, this issue is not properly before the Court. Had Hager properly presented this as an issue in her prehearing statement and then in her original brief, Allstate would have had the opportunity to rebut it. But, it was never an issue throughout the appellate proceedings until Hager's reply brief. Thus, it is not properly before the Court.

Hager also argues that the trial court erred when it prevented her from rebutting "misleading evidence with statements from the Chief Market Conduct Examiner for the Kentucky Office of Insurance, Sharon Burton, who swore that the Kentucky Office of Insurance does not condone the illegal conduct of Allstate." In reviewing the record at the citation provided by Hager, Hager's counsel was cross-

[18] Hager's statement that the issue was preserved by "all other objections made by Plaintiffs" is clearly insufficient to present a claim on appeal. *See, e.g., Elwell*, 799 S.W.2d 46; *Phelps*, 103 S.W.3d at 53.

examining Sullivan and asked whether Sullivan was familiar with Burton's affidavit. Sullivan responded in the negative. Thereafter, it was Allstate's counsel who objected and asked to approach the bench to discuss Burton's affidavit. The court sustained Allstate's objection, and Hager's counsel asked for no additional relief. Thus, this issue is waived.

Turning now to the RAND and IRC studies, Hager states in her brief that "[t]he trial court further erred when it allowed Christine Sullivan to testify as to the findings of the RAND and IRC studies. The court correctly excluded the actual RAND and IRC studies but allowed Sullivan to testify at length about the hearsay content of those studies."[19]

The Court having reviewed in great detail the preservation statement as cited by Hager, we find that this issue was not properly preserved. Hager only objected to the *introduction* into evidence of the documents, which as noted *supra*, she agreed was correct. She did not, however, object to Sullivan's testimony about these studies. In reaching this conclusion, the Court viewed the entirety of the bench conference regarding Hager's objection and reviewed each citation referenced by Hager to the record regarding Sullivan's testimony. Regarding this issue, the Court will herein recite what Hager actually objected to during the bench conference.

During Sullivan's testimony, Allstate asked her to review Defendant's Exhibits 4 and 5. Hager's counsel specifically objected to the "introduction" of

[19] Footnote omitted.

these documents. At a bench conference regarding this objection, the trial court stated: "Isn't the issue . . . being raised the physical introduction of the documents as compared to the witness's ability to testify as to the documents she relied upon in formulating whatever opinion or steps or actions that she may have taken based on her review of those documents?"

One of the attorneys at the bench conference responded in the affirmative to this question, but it is not clear from a review of the video whether it was defense or plaintiff's counsel. In any case, neither counsel stated otherwise.

After more debate by counsel, the court restated its ruling as follows:

> I think she can testify as to not necessarily physically introducing the documents in the record, but if they're documents upon which she relied among other things as far as formulating the implementation of any policies or procedures, I think she can testify as to that.

Counsel for both parties continued thereafter arguing whether the RAND and IRC documents should be introduced under the public records exception under KRE 803. The court ruled that

> I think she can testify as to documents that she may have relied upon through her course of business dealings in formulating whatever opinions or approaches or actions that she undertook without specifically introducing the actual physical documents into evidence.

After more debate among counsel, the court stated its ruling again that the witness could testify as to her conclusions and that the actions taken by Allstate were consistent with the reports. Counsel for both parties then argued regarding

whether or not Sullivan could read the reports out loud. After debate on this, Hager's counsel stated, "Judge, I think you're right. She can say what she relied upon and her conclusions. . . ." Later, Hager's counsel again stated that "Judge, I think your ruling is correct." Again, the only objection stated by Hager's counsel was the *introduction* of the RAND and IRC studies and the only ruling made by the court regarded what Sullivan could testify to concerning the RAND and IRC studies. The studies were not introduced into evidence. Hager's counsel stated on the record that the trial court's ruling was correct. Counsel cannot agree with the trial court and then claim error before this Court. Accordingly, this issue was waived.

Relying on the citations to the record as given to this Court by Hager, Hager did not place any other objections on the record to Sullivan's testimony, including hearsay objections. This Court is not obligated to search the record for any such objections, if they in fact exist. *Phelps*, 103 S.W.3d at 53.

7. The trial court did not commit error in denying Hager's request to call Allstate's expert, Dr. Shaffer, to testify after Allstate closed its case without calling him.

Hager contends it was error when the trial court denied her request to call Allstate's expert, Dr. William Shaffer, as a witness after Allstate closed its case without calling him. Hager cites in her brief regarding the trial court's order sustaining Allstate's motion in *limine* to preclude her from calling Allstate's expert as the court's relying "'*on the representation by counsel for the Defendant that Dr.*

Shaffer will testify live at the trial of this matter.'" In actuality, the order goes on to state that "[i]n the event that Dr. Shaffer is not called to testify, the Court will reconsider permitting the Plaintiff to show the designated portions of Dr. Shaffer's video deposition, subject to objections and counter-designations."

After the defense rested, Hager called Dr. Shaffer for her case in chief, via video deposition. The court convened a bench conference to discuss the issue. The court stated that when it previously ruled on Allstate's motion in *limine*, it had not had the opportunity to fully review the portions of Dr. Shaffer's deposition that Hager wanted to introduce. The court noted that at the time it made its prior ruling, it was not really necessary for it to review the deposition because Allstate intended to call Dr. Shaffer to testify live at the trial. Thereafter, the court reviewed the portions of Dr. Shaffer's deposition that Hager wanted to introduce in anticipation of Hager's calling him at trial if Allstate did not.

Upon the trial court's review of Dr. Shaffer's deposition, the court determined that Dr. Shaffer was to testify only in rebuttal to Dr. Michael Freeman's testimony. The court opined that the portions of Dr. Shaffer's deposition that Hager wanted to present were misleading, could creates issues of completeness and took matters out of context. The court stated that the designated portions of Dr. Shaffer's deposition were replete with questions regarding Hager's medical records, which Dr. Shaffer repeatedly stated he had not reviewed. The court noted that Dr. Shaffer was not retained by Allstate as an expert to review Hager's medical records, treatment, care, etc. Consequently, the court ruled that

the designated portions of the deposition contained questions to Dr. Shaffer for which he was not retained as an expert; hence, they were not relevant.

Allstate maintains that it did not call Dr. Shaffer to testify at trial to rebut Dr. Freeman's testimony because "Dr. Freeman did not testify as to what Dr. Shaffer was prepared to rebut, *i.e.*, that as a general matter, treating physicians' records are the 'gold standard' for determining injury causation." In his deposition testimony, as cited to by Allstate, Dr. Shaffer referenced what he believed were inherent problems with medical records and the issues he saw with Dr. Freeman's statements. In relevant part, Dr. Shaffer testified in his deposition that

> there's always some missing piece of information. . . . The medical records by themselves contain facts, but they also contain untruths and . . . misleading things. . . . That doesn't discount the information given to me. It just isn't something that I look at as . . . Dr. Freeman's statement that this is fact, this is gold, if you will, . . . is just . . . not – not correct.

Allstate's argument is further supported by reviewing the portions of Dr. Shaffer's deposition as cited by Hager's brief. Dr. Shaffer testified that

> [m]y opinion as stated is that medical records are inherently with error and holes as we've discussed over a number of hours now; that it depends on how well all the information is gathered, evaluated, and the conclusions come to. . . .

When Hager's counsel pressed Dr. Shaffer several times during his deposition as to why Allstate did not request that he review Hager's medical

records and why he had in fact not reviewed Hager's medical records, Dr. Shaffer's response was, in relevant part as follows:

> I would – you know, it became clear that they didn't want me to look at the medical care, but look at the opinions of Dr. Freeman about making causation comments about a patient. And that's what was different that what I've done in the past, yes.
>
> ***
>
> No. They asked me to frame my look at this as to what a senior physician would expect to be common practice for coming to causation in a patient's care. . . .
>
> [Allstate wasn't] asking my opinion about her medical care.

Consequently, as the cited portions of Dr. Shaffer's testimony reveal and as relied upon by the trial court, Dr. Shaffer was retained to rebut any statements by Dr. Freeman regarding the *credibility of medical records*, *not to review Hager's medical care*. Having reviewed the cited portions of Dr. Shaffer's deposition, we conclude that the trial court did not abuse its discretion in ruling that the designated portions of Dr. Shaffer's deposition that Hager wanted to introduce were irrelevant and taken out of context. Thus, we find no error.

8. The trial court did not commit error when it excluded evidence concerning the handling of Ariel Nicole Johnson's claim by Allstate at trial.

Hager contends that the trial court erred in sustaining Allstate's motion in *limine* to exclude bad acts relating to the claims handling of a former insured, Ariel Nicole Johnson. Hager provides no authority for this argument and fails to explain under what legal precept this evidence should have been admitted.

Consequently, we need not review the merits of this claim. *Cherry*, 245 S.W.3d at 781.

We briefly pause to note that despite Hager's having failed to cite any authority for her claim, we conclude that the trial court's decision on this matter was not error based upon the rationale set forth in *Kentucky Farm Bureau Mut. v. Rodgers*, 179 S.W.3d 815 (Ky. 2005).

9. Hager cites no authority regarding her arguments that the trial court erred when it excluded evidence of expert Charles Cohen's involvement in another case.

Hager claims the trial court erred in sustaining Allstate's motion to exclude evidence of the involvement in another case of an expert witness, Charles Cohen. Hager's argument before this Court is very conclusory, consisting of three sentences, and does not reference any legal citation or authority. Her argument only gives an overview of the background of this issue, insufficient for proper review by the Court.

"Because [Hager's] brief lacks any citations of authority pertinent to [this] issue. . ., it does not comply with CR 76.12(4)(c)(v). Rather than ordering the brief stricken for this deficiency, a more appropriate penalty in this instance is to refuse to consider [Hager's] contentions regarding [this issue]. Therefore, we need not address the merits of [Hager's] claim that the circuit court erred by [excluding this evidence]." *Cherry*, 245 S.W.3d at 781(note omitted).

10. **The trial court's order of September 26, 2007, denying Hager's Motion in *Limine* to exclude evidence of portions of Dr. Shraberg's IME of Hager was not in error.**

Hager fails to cite any authority in her claim that the trial court erred in denying her motion to exclude portions of Dr. Shraberg's IME of Hager relevant to psychological testing. Pursuant to *Cherry*, 245 S.W.3d at 781 and CR 76.12(4)(c)(v), we are not required to review the merits of this claim or to give it much credence. Given that Hager has supplied the Court with enough record evidence, we will briefly pause, however, to review it for manifest injustice. *See Elwell*, 799 S.W.2d 46.

Hager relies heavily on a ruling made in October of 1999 in regard to Dr. Shraberg's psychological testing of Hager during an IME.[20] At issue was the failure of LaPointe's counsel to receive leave of the trial court for a mental examination of Hager. LaPointe's counsel conceded that Dr. Shraberg's examination went beyond the scope of what the court had previously allowed under CR 35.01. Accordingly, the trial court granted Hager's motion to strike Dr. Shraberg's testimony.

The trial court noted that its ruling did not preclude the defendant from moving the court for permission to introduce Dr. Schraberg's psychological testing at a later time. As stated in its October 6, 1999 order, the court ruled that "Defendant is not precluded from attempting to establish in the future that Plaintiff's mental condition is in controversy and to seek a mental examination including psychological testing." Consequently, the door to Dr. Schraberg's report

[20] At that point in the proceedings, Hager's bad faith against Allstate had not been filed.

was not forever closed, and the trial court's later allowance of it should not be characterized as error by Hager as the trial court "essentially condon[ing] Allstate's violation of a court order limiting the scope of the examination to Hager's physical condition only."

Hager has failed to cite any authority to this Court that a court cannot reserve the opportunity to revisit a prior ruling before judgment is entered. Under the circumstances of this case, we conclude that it was well within the trial court's discretion to revisit the prior ruling. Consequently, the trial court did not commit error, and Hager has not presented us with any foundation to find manifest injustice on this claim.[21]

11. The trial court did not commit error in its September 26, 2007 order denying Hager's Motion in *Limine* to exclude any order of the trial court requiring Hager to provide medical authorizations.

Hager claims the trial court erred in its September 26, 2007 order denying her motion to exclude a prior order requiring Hager to execute medical authorizations. The prior order referenced was entered September 17, 1999, during the underlying litigation between the Hagers and LaPointe. The referenced order provided that:

> Pursuant to Defendant's oral motion, the Plaintiffs will execute a Medical Authorization using the same form of Medical Authorization exchanged in November 1998.

[21] Hager did not attack the substance of Dr. Schraberg's report in her brief before this Court. Her only argument went to the procedural nature underlying the CR 35.01 argument made in October of 1999.

> Said Medical Authorizations shall be provided to Defendant forthwith.

To place this order in context, LaPointe argued at that time that he did not have all of the Hager's medical records. Thus, his insurer Allstate could not properly evaluate the claim and make an offer without reviewing these records.

Although *Geary v. Schroering*, 979 S.W.2d 134 (Ky. App. 1998), was rendered at the time of the September 17, 1999 order, Hager did not argue at that time that she was not required to sign the medical authorizations. She now argues before this Court that the law did not require execution of such authorizations and that the order "act[ed] like an *ex parte* subpoena." Hager is correct in her recitation of the holding of *Geary*, but that does not provide her any relief for a number of reasons.

To begin with, Hager does not cite where in the record she objected when defense counsel orally moved the trial court to order her to execute the medical authorization in September of 1999. Rather, she has conceded that she did not object to the order at issue. In her August 24, 2007 motion to exclude the September 1999 order, Hager represented to the trial court that

> [s]uch orders would mislead the jury into believing that the Plaintiff was uncooperative in producing these documents. In actuality, the Plaintiff was more than willing to provide medical authorizations and in an effort to cooperate during discovery and expedite the discovery process, **Plaintiff did not object to any orders requiring production of medical authorizations**.

(Emphasis added).

By Hager's own admission, she did not object to the prior order. Having failed to do so, the issue is waived. Thus, we can find no error in the trial court's having ordered the authorizations at issue.

Even if the issue is not waived, Hager still is not entitled to relief. The Kentucky Supreme Court has explained the impact on a case where there has been a discovery violation, such as the one falling under *Geary*.

> As a practical matter, whenever a discovery violation occurs that allegedly allows discovery in error, a party will not have an adequate remedy by appeal because "once the information is furnished it cannot be recalled." [*Bender v. Eaton*, 343 S.W.2d 799, 800 (Ky. 1961)]. The information may or may not be used at trial and, generally, the admissibility of the information is not affected by the discovery violation. *See, e.g., Transit Authority of River City v. Vinson*, Ky.App., 703 S.W.2d 482, 486 (1985) ("[W]ork product immunity protects only the documents themselves and not the underlying facts.") Thus, when information that is obtained from a party in violation of the discovery rules is admitted as evidence at trial, this fact alone does not provide grounds for objecting to the introduction of the evidence and, hence, an aggrieved party has no means of preserving the issue for appeal.

Wal-Mart Stores, Inc. v. Dickinson, 29 S.W.3d 796, 800 (Ky. 2000) (note omitted). Consequently, Hager's reliance on *Geary* and on the trial court's error in ordering the execution of the medical authorization cannot alone support her objection to introducing the order at trial.

Assuming that the issue was not waived by Hager's admission that she did not object to the court's ordered medical authorization, Hager could have

otherwise objected as noted in a footnote in the above quote. The Court in *Dickinson* went on to state that

> [t]his, of course, does not preclude the party from objecting to the introduction of the evidence on some other independent ground, *e.g.*, that the evidence is privileged information under the Kentucky Rules of Evidence.

Id., at n.1.

Hager argues before us that the order made Kaplan, Hager's counsel at the time, appear "uncooperative." We will presume that this statement encompasses her argument before the trial court that introduction of the order would unduly prejudice her.

Even assuming *arguendo* that the issue was not waived and that *Geary* applies, many of the reasons for the holding in *Geary* do not apply to the introduction of the order. The Court in *Geary* was particularly concerned with the client's privacy rights and the protection of those rights through an adversarial process. 979 S.W.2d at 136 (An ordered executed medical authorization "would allow [defendants] to obtain medical information without any notice to [plaintiff] and without any means for [plaintiff] to protect her legitimate privacy interest. To compel execution of this medical authorization would allow [defendants] to circumvent the Rules of Civil Procedure and permit discovery without any adversarial safeguards."). Here, it was not the information contained in Hager's medical records that she sought to exclude; rather, it was the order requiring her to

execute the authorization she sought to exclude. Given that this is a bad faith claim,

> an insured must prove three elements in order to prevail against an insurance company for alleged refusal in bad faith to pay the insured's claim: (1) the insurer must be obligated to pay the claim under the terms of the policy; (2) the insurer must lack a reasonable basis in law or fact for denying the claim; and (3) it must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed. . . .

Wittmer v. Jones, 864 S.W.2d 885, 890 (Ky. 1993).

To prove her case, Hager had to prove that Allstate "either knew there was no reasonable basis for denying the claim or acted in reckless disregard for whether such a basis existed. . . . [A]n insurer is . . . entitled to challenge a claim and litigate it if the claim is debatable on the law or the facts." *Id.* (quoting *Fed. Kemper Ins. Co. v. Hornback*, 711 S.W.2d 844, 846-47 (Ky. 1986) (Leibson J., dissenting)). To defend against Hager's bad faith claim, Allstate did what it was entitled to do: present evidence before the jury that the claim was debatable on the facts. Allstate's defense was that Hager would not timely provide it with relevant medical records so that it could make an informed decision on her claim. Consequently, we cannot say that the trial court abused its discretion in determining that the order of September 17, 1999, was relevant to this issue.

12. The issue raised regarding authentication of memoranda from Kaplan's file was not preserved; nor did Hager present any authority in support of her argument.

Despite failing to present legal authority in support of this argument in compliance with *Cherry*, 245 S.W.3d at 781 and CR 76.12(4)(c)(v), this argument fails for an additional reason.

A review of the testimony at issue and the objections placed on record illustrates that Hager's counsel did not object to the testimony regarding memoranda in Kaplan's file regarding authentication. Rather, Hager's counsel's objection was termed that "she's just reading from the document, a hearsay document." Hager's counsel did not mention authentication of the records at issue. Hence having failed to object on this basis and the trial court's not having been given an opportunity to rule on this issue, it was not properly preserved. *See Tamme v. Commonwealth.*, 973 S.W.2d 13, 33 (Ky. 1998) (citing *Harrison v. Commonwealth*, 858 S.W.2d 172 (Ky. 1993)) (Error is not preserved if the wrong reason is stated for the objection.).

13. Hager has failed to show palpable error regarding her argument that Allstate misled the jury when it referenced the absence of a non-testifying witness, Kaplan,[22] in closing argument.

Hager failed to object during Allstate's closing when its counsel referenced Kaplan's failure to testify. Hager claims before this Court that nonetheless review is warranted because palpable error occurred.

> [P]ursuant to CR 61.02, our Supreme Court has held that a palpable error affecting the substantial rights of an individual, even if insufficiently raised or preserved is

[22] Although Kaplan initially represented Hager in the case against LaPointe and after the bad faith claim was filed, he later moved to withdraw as counsel. Hager listed him as a witness for her case.

> reviewable, and, reversible upon a conclusion that it has resulted in manifest injustice. *Herndon v. Herndon*, 139 S.W.3d 822, 827 (Ky. 2004). An error is palpable only when it is "easily perceptible, plain, obvious and readily noticeable." *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997). A palpable error must be so serious that it would seriously affect the fairness to a party if left uncorrected. *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). Fundamentally, a palpable error determination turns on whether the court believes there is a "substantial possibility" that the result would have been different without the error. *Id*.

Hibdon v. Hibdon, 247 S.W.3d 915, 918 (Ky.App. 2007).

Hager's claim of palpable error has at least two fatal errors. First, she has failed to justify how the reference to Kaplan's failure to testify in Allstate's closing argument resulted in manifest injustice to her case or how absent this statement, the outcome of her case would have been different.

Second, upon reviewing Hager's counsel's opening statement, Hager's counsel openly praised Kaplan's work on the case several times. Thus, Kaplan's absence was fair comment by Allstate's counsel and certainly did not rise to the level of palpable error.

Beyond opening the door, Kaplan also had material information about the case. Consequently, Allstate's counsel's reference to his failure to testify was proper. *See T. C. Young Const. Co. v. Brown*, 372 S.W.2d 670 (Ky. 1963); *Chappel v. Doepel*, 301 Ky. 622, 192 S.W.2d 809 (1946); *Helton v. Prater's Adm'r*, 272 Ky. 574, 114 S.W.2d 1120 (1938)). Kaplan's material knowledge of the case was aptly illustrated by Hager's counsel's opening statements that Kaplan

did not do anything to delay the case and that the jury did not have to believe anything Allstate had to say about Kaplan. Accordingly, Allstate's counsel's statement did not result in manifest injustice to Hager.

14. A mistrial was not warranted due to Allstate's counsel's opening statements.

Hager cites to no authority for her argument. Thus, we are not required to review the merits under *Cherry*, 245 S.W.3d at 781 and CR 76.12(4)(c)(v).

In any case, we briefly note that the record of the trial reveals that Hager's counsel objected and moved for sanctions only. He did not move for a mistrial. "'[F]ailure to move for a mistrial following an objection and an admonition from the court indicates that satisfactory relief was granted.'" *Howell v. Com.*, 163 S.W.3d 442, 447 (Ky. 2005) (quoting *West v. Commonwealth*, 780 S.W.2d 600, 602 (Ky. 1989)). Accordingly, we find no error.

15. There was no error in regard to Hager's claims of leading questions by Allstate's counsel.

Hager contends that "[t]he trial court committed error when it allowed Allstate to 'cross-examine' Christine Sullivan, Ben Urso, Jenni Ballard, Sandra Wade, and Frank Smith using leading questions." Yet, Hager cites in her preservation statement only two instances where her counsel objected and in footnotes cites to only two witnesses, Urso and Ballard, who Hager contends were lead by Allstate's counsel. Thus, only those objections that were properly placed

on the record and preserved are before this Court. *See Lee v. Butler*, 605 S.W.2d 20, 23 (Ky. App. 1979) ("Appellants speak of a number of leading questions but objected to only one and we are, therefore, limited to that single instance as the others have not been preserved for review.").

Urso and Ballard were called by Hager during her case in chief. Because Urso and Ballard were being cross-examined, "[o]rdinarily leading questions should be permitted. . . ." KRE 611(c). This is so because as a general rule when a witness is being cross-examined, he is usually aligned with the opposing party. Given the atmosphere of an adversary nature during cross-examination, leading questions are commonly deemed permissible. Accordingly, we find no abuse of discretion by the trial court in overruling Hager's objections.

Our decision does not change if we review this issue as Hager urges us to: as if Urso and Ballard were being questioned on direct examination. We recognize Hager's argument that in actuality Urso and Ballard were not necessarily in a conflicting role while being questioned by Allstate's counsel. While called to testify in Hager's case in chief, Urso and Ballard were represented by Allstate's counsel. Consequently, the general rule for allowing leading questions may not have been applicable in regard to these witnesses.

Nonetheless, even if we analyze Hager's claim as if the witnesses at issue were not subject to the rigors that often accompany cross-examination and review the questioning and testimony as if on direct examination, Hager cannot meet the very high standard to show error. When evaluating leading questions,

> [w]e must review the judge's decision here with an understanding that "[w]hile the use of leading questions on direct examination is generally unacceptable . . . judgments will not be reversed because of leading questions unless the trial judge abused his discretion and a shocking miscarriage of justice resulted." *Tamme v. Commonwealth*, 973 S.W.2d 13, 27 (Ky. 1998) (citations omitted).

Embry v. Turner, 185 S.W.3d 209, 217 (Ky. App. 2006).

Given the numerous witnesses, exhibits, depositions and days of testimony, we cannot say that only two instances of leading questions resulted in "a shocking miscarriage of justice." More importantly is the fact that Hager has failed to explain to this Court how her case specifically was harmed, resulting in "a shocking miscarriage of justice," by the two instances of leading questions to which her counsel objected and has cited to this Court. Given this, we conclude the trial court did not abuse its discretion in overruling Hager's objections to leading questions by Allstate's counsel.

While not preserved, we point out that to the degree Hager implies the trial was permeated with leading questions by Allstate, Hager's counsel had an obligation to timely object to the leading questions.

> KRE 103 and RCr 9.22 require that objections to the admission of evidence be both timely and specific. As Professor Lawson notes, the general rule is that an objection is not timely unless it is made "as soon as the basis for objection becomes apparent." Lawson, *The Kentucky Evidence Law Handbook* (Fourth Edition), p. 36 (2003) (citing *Sallee v. Ashlock*, 438 S.W.2d 538 (Ky. 1969) and *Williams v. Commonwealth*, 602 S.W.2d 148 (Ky. 1980)). *See also*, 21 Wright and Graham, *Federal Practice and Procedure: Evidence* 2d, § 5037.1 (2005)

> (noting that under the very similar federal rule, to be timely the objection must be raised as soon as the basis for the objection is, or reasonably could be, known to the objector.).

Winstead v. Com., 283 S.W.3d 678, 688 (Ky. 2009). Having failed to cite to any other timely objections, any objections not otherwise cited to this Court were waived.

16. The trial court did not commit error in overruling Hager's motion to strike Allstate's pleadings for alleged "misconduct" during depositions.

Hager contends error by the trial court when it overruled her motion to strike the pleadings of Allstate due to Allstate's counsel "interject[ing] well over 2,000 'object to form' objections" during the numerous depositions taken in this matter. Hager's claim lacks merit for a variety of reasons. We first note that other than

citing that "[a]busive tactics such as this violate CR 30.02(4)(3) and CR 30.03(3)," Hager does not reference any other authority for her claim and hence, we are not required to review the merits thereof. *Cherry*, 245 S.W.3d at 781; CR 76.12(4)(c)(v).

We next note that in no manner does Hager illustrate how any of the objections prejudiced her during the trial in this case. Because Hager has cited no authority showing that we are to presume prejudice, we decline to do so.

We will note, however, that Hager cites to only two examples of objections during depositions in her brief, one taken on December 14, 2004, and

the other taken on December 15, 2004. Notwithstanding the references to only two depositions in her brief before this Court, Hager also does not direct this Court to any reference in the record where she brought what she calls "abusive tactics" to the attention of the trial court until September 5, 2007, only a few weeks prior to the trial in this matter. By that time, the case had been pending since 1998 and many depositions had been taken several years earlier.

Despite Hager's allegations that "[t]his tactic is used to chop up videotape depositions to preclude using the video clips for impeachment, to create skips in the video, [and] to divert the jury's attention. . .," Hager also fails to list any video depositions that she used at trial that were affected, as she alleges, to her prejudice.

Next, assuming *arguendo* that even if we accepted Hager's contentions of abusive tactics in the number of objections to form during the depositions (which we do not based on the record citations before us), the Civil Rules provided remedies to her, which she did not pursue. *See, e.g.,* CR 30.03(4) and CR 30.04. The trial court indicated during the hearing on the motion to strike that, during the many years of litigation in this action, it was available to settle any disputes regarding the depositions taken in this case.

We review the trial court's decision to overrule the motion to strike based on an abuse of discretion. *Greathouse v. American Nat'l Bank & Trust Co*., 796 S.W.2d 868, 870 (Ky. App.1990). Based on the foregoing, we cannot

conclude that the trial court abused its discretion in denying Hager's motion to strike.

17. The trial court did not commit error by dismissing a juror after opening statements.

Hager claims that the trial court erred by dismissing juror 208 after opening statements. The juror made the trial court aware of the fact that she knew about the circumstances surrounding the death of Sarah Howard, who initially handled Hager's claim. The trial court had previously ruled that this matter would be excluded from the trial.

Hager fails to cite any authority in support of her argument. Thus, it fails to meet the requirements of CR 76.12(4)(c)(v). Pursuant to *Cherry,* 245 S.W.3d at 781, we can decline to review the merits of this argument.

We will briefly note, however, that the trial court's decision to strike a juror will not be overturned absent an abuse of discretion. *Lester v. Com*., 132 S.W.3d 857, 863 (Ky. 2004). Contrary to Hager's claims of error, prior appellate decisions have upheld striking a juror after *voir dire*. *See id*.; *see also, Hubbard v. Com*., 932 S.W.2d 381, 382-83 (Ky. App. 1996). Relying on prior authority and the facts under which the juror was dismissed, we cannot say that the trial court abused its discretion.

18. There was no error in the trial court's order of September 27, 2007, as it related to discovery regarding Kaplan.

Hager claims that the trial court's order of September 26, 2007, regarding the attorney-client privilege between her and Kaplan "*prevented her from calling Kaplan as witness and is grounds for reversal*." (Appellant's brief at p. 40) (emphasis added). To fully grasp this claim, it is necessary to set forth Hager's brief argument in its entirety:

> On September 26, 2007, the trial court erred when it granted that portion of Allstate's Motion which sought a ruling that there had been a subject matter waiver of the privilege which extended to Kaplan's communications with Hager and others concerning the bad faith claim, both before and after the Complaint was amended to include such claim. Allstate relied on *United States v. Jones*, and *In re Grand Jury Proceedings*, to argue that, when part of a privileged communication is revealed, all other communications relating to the same subject matter must also be revealed. Allstate failed to bring to the attention of the trial court, however, that neither of these cases involved two separate actions as in the case where there is an underlying tort and a subsequent bad faith claim. **This ruling by the court prevented Hager from calling Kaplan as a witness and thus is grounds in and of itself for reversal**. This ruling by the court is contrary to *Riggs v. Schroering* and **prevented Hager from calling Kaplan as a witness and thus is grounds in and of itself for reversal**.

(Bold emphasis added; footnotes omitted).

The Court quotes this argument in full to illustrate that Hager contends that based on the trial court's ruling she was *prevented* from calling Kaplan as a witness and according to her, this alone is grounds for reversal. Hager does not, however, reveal fully what transpired at the trial court with regard to her calling Kaplan as a witness.

At a hearing held on September 14, 2007, Hager's counsel recounted that Allstate had previously moved to strike Kaplan as plaintiff's witness or to take his discovery deposition. The court had previously ruled on the matter, overruling the motion to strike and allowing discovery with regard to Kaplan, who was on Hager's witness list. At the September 14th hearing, Hager's counsel at first generally expressed concern that Kaplan's deposition would result in its requesting a continuance (which Allstate denied that it would do). The Court has thoroughly reviewed this hearing and notes that Hager's counsel represented to the trial court that:

> We are willing to withdraw Mr. Kaplan from being a witness so that we may have this matter go forward in a timely manner and so that I can devote my time to trial preparation, which is sorely needed on my behalf . . . I've got plenty to do between now and the trial date. So, I'd like to withdraw him and **render the issue moot**. . . If you'll [the court] recall two and half years ago, I prompted Ms. Barfield to please go ahead and take Kaplan's deposition. I showed you [the court] the letter where I said I'm not going to let you [Ms. Barfield] use this as a delay later on. I'm going to call you [Ms. Barfield] on it in front of the judge. Then the witness list was tendered, and I had Paul[] [Kaplan's] name on it. Then, they are like we had no idea even though they had noticed his deposition two times prior that he was going was going to be a witness. We provided several dates. . . . He was timely disclosed on our witness list. They did not name him. So us [sic] withdrawing him removes all the need for the rest of that stuff that we shouldn't have to go through. . . . We ask the court to alleviate us of the obligation we currently have; allow us to withdraw him as a witness; take off several days of discovery; and perhaps a motion for a continuance and also cut down on trial days.

(Emphasis added).

In deciding on Hager's request to withdraw Kaplan as a witness, the trial court noted that Kaplan was only listed as a witness for Hager and that Allstate had not named Kaplan as a witness. Consequently, the trial court allowed Hager to withdraw Kaplan as a witness.

In the September 26, 2007 order, which is the order cited as error by Hager, the trial court memorialized its oral ruling of September 14, 2007, as follows:

> The Court originally ruled on Allstate's Motion in Limine to Exclude Paul Kaplan as a Witness, or in the Alternative for a Ruling that that [sic] Kaplan's Decision to Testify in this Matter is a Complete Subject Matter Waiver of Attorney-Client and Work Product Privileges on September 12, 2007. The Court denied that portion of the Motion seeking to exclude Kaplan as a witness. It granted that portion of Allstate's Motion which sought a ruling that there had been a subject matter waiver of the privilege which extended to Kaplan's communications with Hager and others concerning the bad faith claim, both before and after the Complaint was amended to include such claim, and those portions which sought a ruling that the documents identified in Allstate's subpoena duces tecum upon Kaplan must be produced. The Court ordered production of all such documents by September 21, 2007.
>
> On September 14, 2007, this matter came before the Court again when Plaintiff moved to withdraw Paul Kaplan as a witness. The Court orders that the Plaintiff is permitted to withdraw Kaplan as a witness and that he will not be a witness in Plaintiff or Defendant's case-in-chief, and that the Plaintiff is thus relieved of the discovery obligations previously ordered by the Court.
>
> **The Court also orders that, in light of the fact that Kaplan will not be witness for Plaintiff, the scope of the subject matter waiver is once again limited**

> **from the time of Kaplan's involvement in the underlying action in December 1997 until the settlement of Hager's underlying claim in December 1999.**
>
> The Court also orders that the Plaintiff may reserve its right to call Kaplan as a rebuttal witness, but only to rebut any testimony or other evidence introduced by Allstate at trial if the Plaintiff can establish that the testimony or evidence that Kaplan would rebut could not currently be reasonably foreseen by the Plaintiff prior to trial. . . .

(Emphasis added).

As the record illustrates, Hager was not *prevented* by the trial court's ruling from calling Kaplan to testify. Rather, Hager withdrew Kaplan to *render the issue moot*. Hager will not now be heard to complain before this Court when she received exactly what she asked for from the trial court. A party cannot present one argument before the trial court and another to this Court. *See Kennedy v. Com*. 544 S.W.2d 219, 222 (Ky. 1976).

While the foregoing is sufficient to deny this claim, it is pertinent to delve further into this issue. In its citation of preservation on this issue, Hager directs the Court to her January 18, 2005 Motion for Clarification Regarding the Scope of Paul Kaplan's Testimony at Vol. 32, R. 4760. Relevant to the issue at hand is the following statement in Hager's motion:

> **The Plaintiff contends that Mr. Kaplan's testimony should be limited to the time period of December 1997 when he [Kaplan] first started working on Geneva Hager's case, until the day that he [Kaplan] filed an Amended Complaint asserting bad faith allegations against Allstate.** In support of this limitation, Plaintiff states that attorney Kaplan has worked on the bad faith

> claim and that the Defendants are not entitled to make inquiries that are applicable to the time period after the first claim for bad faith was made.

(Emphasis added).

In reference to when the bad faith claim was first brought, the trial court granted Hager's motion to amend her complaint to add the bad faith claim on February 19, 2000. Consequently, the September 26, 2007 order of which Hager presently claims error limited the discovery regarding Kaplan to the time period Hager had earlier requested from the court. Again, Hager received what she requested from the trial court and will not now be heard to complain of it.

Finally, even if somehow this Court could agree that the trial court's ruling "prevented" her from calling Kaplan, Hager has also not shown this Court how she was prejudiced by this or whatever evidence or testimony she was precluded from introducing by not calling Kaplan. And, having voluntarily withdrawn Kaplan as a witness without reference to what evidence or testimony Hager wanted to introduce through him, the trial court was never given the opportunity to rule on this issue. "It is well-settled that a trial court must be given the opportunity to rule in order for an issue to be considered on appeal, and the failure of a litigant to bring an alleged error to the trial court's attention is fatal to that argument on appeal." *Baker v. Weinberg,* 266 S.W.3d 827, 835 (Ky. App. 2008) (citing *Hines v. Carr*, 296 Ky. 78, 176 S.W.2d 99 (1943)). Consequently, having failed to illustrate how her case was prejudiced by the ruling and having

failed to give the trial court the opportunity to rule on the issue as presented on appeal, we find no error.

19. The trial court did not commit error in excluding evidence of Sarah Howard's death.

Hager contends the trial court erred by granting Allstate's motion in *limine* to exclude evidence of Howard's death. Specifically, Hager contends that during the testimony of a witness regarding the work environment at Allstate, the door was opened into the evidence regarding Howard's death. Having failed to present any authority on this issue, Hager does not meet the requirements under CR 76.12(4)(c)(v), and we are not required to review the merits of this claim. *See Cherry,* 245 S.W.3d at 781.

We will briefly address that this was an evidentiary ruling by the trial court which is subject to an abuse of discretion standard of review. Given the highly inflammatory and prejudicial nature of Howard's death when weighed against its probative value, we cannot say the trial court abused its discretion in its ruling.

Accordingly, the judgment of the Fayette Circuit Court is affirmed.

THOMPON, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

KELLER, JUDGE, CONCURRING: I concur in result only and write separately to address specifically three areas of concern with the majority's

opinion. First, the majority states that Hager's failure to object during the underlying case to the court's order requiring her to execute an authorization releasing medical records amounted to a waiver of any objection to the admission of that order in the bad faith case. I respectfully disagree.

As occurred in this case, an underlying tort claim is tried first and separately from a bad faith claim. Proof in both claims, while it may be the same, is offered for different reasons. In other words, what may be relevant in the tort claim may very well not be relevant in the bad faith claim.

In Hager's tort claim, the fact that the court ordered her to execute an authorization releasing medical records would have no relevance. Therefore, Hager had no evidentiary reason to object to the court's order. However, in the bad faith claim, Hager did have an evidentiary reason to object to admission of the order – its potential to mislead the jury. Because the order was being used by Allstate for a different purpose in the bad faith claim, Hager's failure to object to the order in the tort claim did not act as a waiver of any objection in the bad faith claim.

Second, I note that the majority states in numerical paragraph 16 that, "other than citing that 'abusive tactics such as this violate CR 30.02(4)(3)[23] and CR 30.03(3),' Hager does not reference any authority for her claim and hence, we are not required to review the merits thereof." I agree that, in the absence of any

[23] I recognize that there is no CR 30.02(4)(3); however, CR 30.02(4)(c0 does exist and addresses video recording of depositions. I believe that what appears to be a typographical error is not grounds to set aside an issue on appeal.

citation to authority, this Court is not required to address an issue raised on appeal. However, as noted by the majority, Hager cited to the Kentucky Rules of Civil of Procedure, those rules are authority sufficient to meet the requirements of CR 76.12(4)(c)(v).

Third, with regard to Hager's argument that Allstate's tactics during depositions were abusive, the majority states that Hager "did not pursue" any of the remedies available to her under the Civil Rules. While I agree with the majority that Hager may not have timely pursued available remedies, she did pursue a remedy. CR 30.03(4) states that, if a court finds that counsel's tactics during a deposition "frustrated the fair examination of the deponent," the court may impose "an appropriate sanction." Hager asked the court to strike the depositions, which could be "an appropriate sanction." Therefore, I believe that the majority's statement that Hager did not pursue any remedies is incorrect.

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