In the
Missouri Court of Appeals
Western District

TIM BEVERLY,	)	
	)	
Appellant,	)	**WD80092**
	)	
v.	)	**OPINION FILED: February 6, 2018**
	)	
MICHAEL C. HUDAK, D.C., ET AL.,	)	
	)	
Respondents.	)	

Appeal from the Circuit Court of Clay County, Missouri
The Honorable Janet L. Sutton, Judge

Before Special Division: Zel M. Fischer, Special Judge, Presiding, Cynthia L. Martin, Judge, and Gary D. Witt, Judge

Tim Beverly ("Beverly") appeals from the trial court's judgment in favor of Michael C. Hudak, D.C. ("Dr. Hudak") and I Got Your Back Chiropractic, LLC ("I Got Your Back") (collectively "Defendants") following a jury trial on Beverly's claim of chiropractic malpractice. Beverly asserts that the trial court erred in denying his motion for new trial because the trial court made errors involving evidentiary rulings and because the verdict in favor of the Defendants was against the weight of the evidence. Finding no error, we affirm.

Factual and Procedural Background[1]

On December 22, 2007, Beverly fell while playing basketball. It is uncontested that as a result of the fall, Beverly suffered a vertebral artery dissection, which is a tear to the internal layers of the wall of the vertebral artery. Following a vertebral artery dissection, blood flows around the tear, and a blood clot forms to close off the artery, creating a risk that the clot will dislodge and occlude blood vessels in the brain, causing a stroke.

Immediately after his fall, Beverly experienced neck pain. Throughout the evening, Beverly's symptoms worsened. Beverly's neck pain progressed in intensity, and he developed neck stiffness. Beverly's head began to hurt. His left eye started to throb and became watery, and he had difficulty keeping his left eye open. Beverly developed blurry vision. Beverly vomited several times and started feeling lightheaded and dizzy. Beverly had no appetite.

Beverly's symptoms continued through December 28, 2007, when he sought medical treatment at Truman Medical Center's emergency room. Beverly complained of nausea, vomiting, photophobia, decreased appetite, and a severe, constant headache on his left side that was made worse with movement. Truman Medical Center ordered a CT scan and a lumbar puncture. The results of both tests were normal. Truman Medical Center discharged Beverly with medications to treat his symptoms, with instructions to return if his headache persisted or worsened, and with instructions to follow up with his primary care provider.

[1]We view the facts in the light most favorable to the jury's verdict. *Host v. BNSF Ry. Co.*, 460 S.W.3d 87, 94 n.2 (Mo. App. W.D. 2015).

On December 31, 2007, Beverly went to the emergency room at St. Luke's North Hospital, complaining of the same symptoms, though they were more localized to the left-side of his body. St. Luke's North Hospital reviewed the records from Truman Medical Center and examined Beverly. St. Luke's North Hospital gave Beverly medications for his symptoms and allowed him to rest in the emergency room before discharging him with the same instructions Beverly received from Truman Medical Center.

Beverly's symptoms continued, so he went to I Got Your Back on January 2, 2008, to receive chiropractic care from Dr. Hudak. Beverly reported a left-sided headache made worse by movement. Beverly reported that Truman Medical Center performed a CT scan and a lumbar puncture and that the results of both tests were normal. Dr. Hudak took x-rays of Beverly's cervical spine and requested radiology interpretation. Dr. Hudak's notes reported that Beverly's "[l]eft side eye is protruding and waters a lot," and noted nystagmus in Beverly's left eye. Dr. Hudak examined Beverly and found a subluxation at C5, the fifth cervical vertebra located in the lower-middle portion of the neck. Dr. Hudak performed a chiropractic adjustment to Beverly's neck. After the adjustment, Beverly returned home and took a nap. When Beverly woke up, he felt much better and had regained his appetite.

The next day, Beverly's symptoms returned. Beverly's roommate drove him to I Got Your Back on January 4, 2008, for another chiropractic adjustment. Immediately after Dr. Hudak performed the adjustment on Beverly's cervical spine, Beverly's eyes rolled back into his head, his right arm and left leg shook, and his speech became slurred. Dr. Hudak's assistant called 911. An ambulance transported Beverly to North Kansas City Hospital,

where doctors diagnosed Beverly's vertebral artery dissection for the first time and determined that Beverly had suffered four strokes.

Beverly filed suit against the Defendants. Though it was uncontested that Beverly sustained his vertebral artery dissection while playing basketball on December 22, 2007, the jury was asked to determine whether Dr. Hudak's chiropractic adjustment on January 4, 2008, caused a blood clot to dislodge and occlude blood vessels in the brain, causing Beverly's strokes. The jury returned a verdict in favor of the Defendants, and the trial court entered a judgment ("Judgment") accepting the jury's verdict. Beverly filed a motion for new trial, which was overruled.

Beverly filed this timely appeal. Additional facts will be discussed where relevant to Beverly's points on appeal.

Standard of Review

Beverly presents five points on appeal, each of which argue that the trial court erred in denying Beverly's motion for new trial. "[T]o succeed on a motion for new trial, the moving party must establish 'that trial error or misconduct of the prevailing party incited prejudice in the jury.'" *Sherar v. Zipper*, 98 S.W.3d 628, 632 (Mo. App. W.D. 2003) (quoting *Kansas City v. Keene Corp*., 855 S.W.2d 360, 372 (Mo. banc 1993)). We review the denial of a motion for new trial for abuse of discretion. *Westerman v. Shogren*, 392 S.W.3d 465, 469 (Mo. App. W.D. 2012). An abuse of discretion occurs when the trial court's ruling is clearly against the logic of the circumstances before the court at the time and is so unreasonable and arbitrary that it shocks one's sense of justice and indicates a lack of careful consideration. *Id.* at 469-70. We will reverse the trial court's denial of a

motion for new trial only if we find a "substantial or glaring injustice." *Sterbenz v. Kansas City Power & Light Co.*, 333 S.W.3d 1, 7 (Mo. App. W.D. 2010).

Analysis

Point One: Allowing the Defendants' Expert Witness to Testify to New Opinions

In his first point on appeal, Beverly argues that the trial court erred in denying his motion for new trial because the Defendants' expert, Dr. Harold Pikus ("Dr. Pikus"), was improperly allowed to testify "in that several of his opinions were new opinions offered for the first time at trial." [Appellant's Brief p. 22] Beverly asserts that Dr. Pikus's new opinions resulted in unfair surprise that had a consequential influence on the jury's verdict.

Rule 56.01(b)(4) allows a party to obtain discovery by interrogatories or by deposition of facts known and opinions held by any persons the other party expects to call as an expert witness at trial. "'Discovery rules and case law establish the principle that when an expert witness has been deposed and ***later changes his opinion*** before trial ***or bases that opinion on new or different facts*** from those disclosed in the deposition, it is the duty of the party intending to use the expert witness to disclose that new information to his adversary, thereby updating the responses made in the deposition.'" *Snellen ex rel. Snellen v. Capital Region Med. Ctr.*, 422 S.W.3d 343, 353 (Mo. App. W.D. 2013) (quoting *Redel v. Capital Region Med. Ctr.*, 165 S.W.3d 168, 175 (Mo. App. E.D. 2005) (emphasis added)). The purpose of the principle is "to protect a party from the failure of an expert to disclose his opinion or the facts he bases that opinion on during the discovery process." *Sherar*, 98 S.W.3d at 633. If an expert provides different testimony from that disclosed in discovery, then the trial court is vested with discretion to determine how to remedy the

situation. *Beaty v. St. Luke's Hosp.*, 298 S.W.3d 554, 560 (Mo. App. W.D. 2009). Surprise exists when "an expert witness suddenly has an opinion where he had none before, renders a substantially different opinion than the opinion disclosed in discovery, uses new facts to support an opinion, or newly bases that opinion on data or information not disclosed during the discovery deposition." *Sherar*, 98 S.W.3d at 634. Surprise cannot be manufactured, however. "The attorney deposing the witness must ask for the expert's opinion and/or the underlying facts or data." *Id*. A party cannot claim surprise based on "new opinions" as to matters about which the expert witness has not been asked during discovery. As we explained in *Sherar*, to conclude otherwise:

> would open the door to serious concerns. Specifically, a fundamental hazard arising from the position advocated by . . . counsel is the promotion of a form of sandbagging by counsel. Under his arguments, deposition counsel could ask general questions regarding the nature of an expert's opinion, yet refrain from asking "ultimate issue" questions of the expert. . . . Then, when the time comes for trial . . . , counsel could claim "surprise" and seek to have the testimony excluded.

98 S.W.3d at 634.

Beverly's first point on appeal identifies eight "new" opinions Dr. Pikus gave at trial: (i) that Beverly did not have nystagmus when he was treated by Dr. Hudak; (ii) that it takes twenty seconds for a blood clot to travel to the brain; (iii) that Beverly had suffered a stroke more than forty-eight hours before Dr. Hudak adjusted his neck; (iv) that Beverly made a remarkable recovery with rehabilitation; (v) that Beverly did not comply with treatment recommendations; (vi) that Beverly's cognitive dysfunction was not caused by his stroke; (vii) that Beverly reached maximum medical improvement; and (viii) that Beverly's insomnia and memory issues were not caused by his stroke. Beverly argues that these

opinions were "new," and subject to exclusion from evidence, because Dr. Pikus was asked in his deposition if he had given all of the opinions he intended to offer at trial.[2] Beverly began his cross-examination of Dr. Pikus by asking him to admit that he had offered "new opinions" during his direct examination--that is opinions he had not given during his deposition. Dr. Pikus responded that any "new opinions" given at trial involved matters he had not been asked about during his deposition.[3]

First, Beverly complains that Dr. Pikus testified at trial that even though Dr. Hudak made a notation that Beverly had "nystagmus present left eye," Dr. Pikus did not believe that Beverly had nystagmus because nystagmus symptoms would have been present in both eyes. Beverly complains that this opinion was not provided during Dr. Pikus's deposition. Beverly's argument fails to account for the fact that Dr. Pikus's trial testimony on this subject was provided in response to Beverly's cross-examination of Dr. Pikus. [Tr. 1236] Beverly did not object to the trial testimony at the time it was given, or otherwise seek relief from the trial court regarding the testimony, leaving his objection on appeal unpreserved for our review. *Host*, 460 S.W.3d at 106. Moreover, during his deposition, Dr. Pikus was generally asked about the causes of nystagmus. Dr. Pikus testified during

[2]During his deposition Dr. Pikus was generally asked "what opinions [he] intend[ed] to testify to at trial." [L.F. 266] After describing general opinions he intended to provide at trial, Dr. Pikus testified: "And then, you know, there's certainly a lot of other specific questions that you may ask that I might have an opinion on." [L.F. 266] The attorney who conducted Dr. Pikus's deposition withdrew from representing Beverly prior to trial. Counsel representing Beverly on appeal also represented Beverly at trial but was not present during Dr. Pikus's deposition.

[3]The Defendants' written expert witness designation identified Dr. Pikus as a licensed and practicing neurosurgeon who, based on his experience and review of materials, "will testify that [the Defendants] met the standard of care during their care and treatment of [Beverly]." The Defendants also indicated that Dr. Pikus "will testify to the nature and cause of [Beverly's] condition and that any alleged acts of negligence by [the Defendants] did not cause or contribute to cause the injuries or damages alleged by [Beverly]." Dr. Pikus did not prepare a written report in advance of his deposition. Thus, the only measure against which Dr. Pikus's trial testimony can be gauged to determine surprise is his deposition transcript.

his deposition that a dissection will not cause nystagmus, though the sequelae of dissection (such as a stroke or ischemia) might cause nystagmus. He was not asked about Beverly's reported nystagmus. In order for an expert's testimony to constitute a surprise, "the attorney deposing the witness must ask for the expert's opinion and/or the underlying facts or data." *Sherar*, 98 S.W.3d at 634.

Second, Beverly challenges Dr. Pikus's testimony that it takes approximately 20 seconds for a blood clot to travel to the brain once it dislodges. Dr. Pikus offered this trial testimony to explain why he believed that even though Beverly suffered a stroke while he was at Dr. Hudak's office, the stroke was not caused by Dr. Hudak's manipulation. During his deposition, Dr. Pikus consistently testified that "any little movement" will free a clot, and that although there was a temporal relationship between when Beverly had a stroke and his presence in Dr. Hudak's office, he could not say that Dr. Hudak's manipulation caused the clot to let lose. Dr. Pikus's trial testimony about the time it takes a blood clot to travel to the brain constituted an explanation for the causation opinion Dr. Pikus provided both at trial and during his deposition. However, Beverly's counsel did not ask Dr. Pikus to explain the basis for his causation opinion during his deposition. "[T]he attorney deposing the witness must ask for the expert's opinion ***and/or the underlying facts or data***." *Sherar*, 98 S.W.3d at 634 (emphasis added). Dr. Pikus's trial testimony was not surprise testimony.

Third, Beverly claims that Dr. Pikus's trial testimony that Beverly suffered a stroke at least forty-eight hours before his January 4, 2008 visit to Dr. Hudak was a surprise. We disagree. Dr. Pikus testified at trial that, in addition to the stroke that Beverly suffered on

January 4, 2008 at Dr. Hudak's office, Beverly suffered other strokes, including one that occurred at least forty-eight hours before the CT scan taken after his admission to North Kansas City Hospital. During his deposition, Dr. Pikus similarly testified that Beverly had a stroke before his neck was manipulated by Dr. Hudak on January 4, 2008. He explained that this prior stroke occurred "at least a day" before the CT scan on January 4, 2008. Though Dr. Pikus's trial testimony, which suggested that the time frame of the earlier stroke was forty-eight hours before January 4, 2008, was more specific than the "at least a day" time frame testified to in his deposition, the discrepancy is not so material as to constitute surprise testimony. The principle requiring a party to disclose when an expert witness changes an opinion "is not intended as a mechanism for contesting every variance between discovery and trial testimony. Impeachment of the witness will accomplish that goal." *Sherar*, 98 S.W.3d at 634.

Beverly's fourth objection involves Dr. Pikus's testimony at trial that Beverly's rehabilitation at North Kansas Hospital "went really well" and that Beverly "made a remarkable recovery." This was not surprise testimony. Dr. Pikus similarly testified during his deposition that Beverly "recovered awfully well" from his January 4, 2008 stroke.

Beverly's fifth objection involves Dr. Pikus's testimony at trial that based on a review of Beverly's medical records: (i) Beverly had been referred to complete a sleep study at least two times though no sleep study appeared in Beverly's medical records; (2) Beverly's doctors had requested that Beverly keep a headache diary but there was no indication that Beverly had ever done so; and (3) despite being referred to physical therapy, Beverly did not attend all of his physical therapy appointments. Dr. Pikus's factual

impressions were drawn from medical records admitted into evidence. The records identified by Dr. Pikus at trial were the same records Dr. Pikus identified as having been reviewed in advance of his deposition. Beverly's attorney did not ask Dr. Pikus whether he had drawn any impressions from Beverly's medical records regarding Beverly's compliance with treatment recommendations, even though Dr. Pikus was identified as an expert on the subject of the "nature and cause of [Beverly's] condition." *Sherar*, 98 S.W.3d at 634.

The sixth opinion Beverly challenges is Dr. Pikus's trial testimony that Beverly's cognitive dysfunction was not caused by his stroke. This was not surprise testimony. At trial, Dr. Pikus explained that Beverly's strokes occurred in the cerebellum, brain stem, and right thalamus, and that none of those areas of the brain are associated with cognitive function. During Dr. Pikus's deposition, Beverly's attorney asked, "Do you know [if] there's damage to any of the cerebellum or to the brain stem or to the thalmus, whether it'll impair any of the patient's cognitive abilities?" Dr. Pikus answered, "None of those areas should affect his cognitive function at all."

The seventh opinion Beverly challenges is Dr. Pikus's trial testimony that he believed Beverly had reached maximum medical improvement within a year of the strokes. Beverly's point on appeal complains about Dr. Pikus's cross-examination testimony. [L.F. 1265-66] However, it was Beverly's question of Dr. Pikus that used the phrase "maximum medical improvement," not Dr. Pikus's response. Dr. Pikus did explain on direct-examination that he had reviewed Beverly's medical records from January 2008 to January 2009 because "this is the critical period [in which] you can expect that somebody is going

to be at their maximum medical improvement." One of these records indicated that Beverly was "neurologically normal" in August 2008. However, Beverly did not object to this direct examination testimony at trial, and has not cited to this testimony as the basis for his claim of error on appeal, preserving nothing for our review. *Host*, 460 S.W.3d at 106.

The eighth opinion Beverly challenges is Dr. Pikus's trial testimony that Beverly's insomnia and memory problems were due to stress. At trial, Dr. Pikus testified that insomnia and memory problems "are characteristic of stress reaction" and that he believed that stress is "responsible for [Beverly's] tension headaches and his insomnia and his perception of cognitive trouble." During his deposition, Dr. Pikus was specifically asked for his "opinion as to why [Beverly is] having the trouble he's having now." Dr. Pikus similarly responded:

> Well, it sounds to me that [Beverly is] enduring the sort of stress that a lot of adults endure. I mean, the stress of finding the right job and working and raising a family, and I understand that he's lost a child. You know, it seems like he has a fairly stressful life. And my understanding also is that he -- his cognitive function really didn't start out too much differently than it is now . . . it sounds like the description of things now is pretty similar to the description of his earlier life, and he's just responding to the stresses of his life the way most adults would.

Dr. Pikus's trial testimony was not a surprise.

The trial court did not err in denying Beverly's motion for new trial based on Beverly's claims that Dr. Pikus provided surprise expert opinion testimony. Point One is denied.

Point Two: Permitting Dr. Hudak's Expert Testimony

Beverly's second point on appeal argues that the trial court erred in denying his motion for new trial because Dr. Hudak should not have been allowed to give surprise expert witness testimony on the subject of whether his treatment of Beverly fell below the chiropractic standard of care. Beverly asserts that Dr. Hudak should not have been permitted to give this opinion because he had not been disclosed or identified as an expert witness on the issue of the standard of care.

Beverly's claim of error fails to differentiate between the discovery rules applicable to retained versus non-retained experts. "Discovery rules distinguish between facts and opinions held by non-retained experts from those held by experts who acquired facts and developed opinions in anticipation of litigation." *St. Louis Cty. v. River Bend Estates Homeowners' Ass'n,* 408 S.W.3d 116, 133 (Mo. banc 2013). Rule 56.01(b)(4) "applies only to experts retained by parties in anticipation of litigation." *State ex rel. Mo. Highway & Transp. Comm'n v. McDonald's Corp.*, 872 S.W.2d 108, 113 (Mo. App. E.D. 1994). "To give advance notice to the opposing party and avoid unfair surprise, Rule 56.01(b)(4) requires a party to disclose more information with respect to expert witnesses who acquired facts and have formed opinions in preparation for litigation." *St. Louis Cty.*, 408 S.W.3d at 133. Parties may discover what witnesses their opponents expect to call as expert witnesses at trial through the use of interrogatories:

> A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial by providing such expert's name, address, occupation, place of employment and qualifications to give an opinion, or if such information is available on the expert's curriculum vitae, such curriculum vitae may be attached to the

> interrogatory answers as a full response to such interrogatory, and to state the general nature of the subject matter on which the expert is expected to testify, and the expert's hourly deposition fee.

Rule 56.01(b)(4)(a). Then "[a] party may discover by deposition the facts and opinions to which the expert is expected to testify." Rule 56.01(b)(4)(b). Rule 56.01(b)(4) does not apply to parties. The Defendants were not required to comply with Rule 56.01(b)(4) in order to introduce standard of care evidence through Dr. Hudak's testimony. *See State ex rel. Mo. Highway & Transp. Comm'n*, 872 S.W.2d at 113.

Though the argument is not made by Beverly, the Defendants were required to comply with Rule 56.01(b)(5), which sets forth the disclosure rules for non-retained experts, including parties. "A party, through interrogatories, may require any other party to identify each non-retained expert witness, including a party, whom the other party expects to call at trial who may provide expert witness opinion testimony ***by providing the expert's name, address, and field of expertise***." Rule 56.01(b)(5) (emphasis added). "Discovery of the facts known and opinions held by such an expert shall be discoverable in the same manner as for lay witnesses." *Id.*

Here, the Defendants' designation of expert witnesses included the following statement: "Defendants further reserve the right to call, as non-retained expert witness, any and all of plaintiff's treating healthcare providers, to testify about their personal knowledge of plaintiff's conditions including standard of care, causation and damages issues." Although the Defendant's disclosure plainly indicated that treating physicians might testify as non-retained experts regarding the standard of care, the disclosure did not provide the

name, address, or field of any non-retained expert witness, including a party, though required by Rule 56.01(b)(5) to do so.

The trial court overruled Beverly's objection that Dr. Hudak should not be allowed to testify regarding the standard of care because the Defendants had not identified him as an expert for this purpose. Though the Defendants violated Rule 56.01(b)(5) by failing to specifically identify Dr. Hudak as a non-retained expert on the subject of the standard of care, we review the trial court's decision to permit Dr. Hudak's testimony for an abuse of discretion. *Travelers Commercial Cas. Co. v. Vac-It-All Servs., Inc.*, 451 S.W.3d 301, 306 (Mo. App. E.D. 2014) (holding that the trial court has broad discretion to resolve discovery violations). In reviewing the trial court's decision, "we consider whether the challenged act by the trial court, under the totality of the circumstances, has resulted in prejudice or unfair surprise." *Id.*

The trial court did not abuse its discretion in permitting Dr. Hudak's testimony about whether his treatment of Beverly was within the standard of care. Dr. Hudak was the defendant whose actions Beverly asserted were in violation of the chiropractic standard of care. Beverly cannot sincerely claim that he was surprised by Dr. Hudak's contrary testimony, offered in his own defense.

This case is thus distinguishable from *Wilkerson v. Prelutsky*, 943 S.W.2d 643 (Mo. banc 1997). There, the plaintiff disclosed that it might "call as expert witnesses on damages any and all of Plaintiff's treating physicians. Said experts may testify to various aspects of the damage issues including fairness and reasonableness of the medical charges and causal relationship of the treatment provided to the carbon monoxide poisoning." *Id.* at 649. The

trial court excluded the testimony of a ***non-party*** treating physician as a sanction for the plaintiff's failure to specifically identify the treating physicians who would testify as non-retained experts. *Id.* at 648. The Supreme Court noted that "[d]efendants were entitled to rely on plaintiff's answers to interrogatories in determining who they should depose and who to select as their experts," and the "[p]laintiff's failure to identify [the treating physician] in her interrogatory responses could very well have led defendants to believe that plaintiff did not consider [the treating physician] to be a potential witness in the case." *Id.* Our Supreme Court thus concluded the trial court did not abuse its discretion in excluding the testimony of one of the treating physician as a sanction for failing to comply with Rule 56.01(b)(4). *Id*.

Beverly does not similarly contend that the Defendants' failure to identify Dr. Hudak, the party defendant, as a non-retained expert who would testify regarding his own standard of care, impacted Beverly's decision about who to depose. Nor has Beverly argued that he was prejudiced in the selection of his own experts on the issue of the standard of care. Moreover, Dr. Donald Knudson ("Dr. Knudson"), the Defendants' retained chiropractic expert, testified that Dr. Hudak's treatment of Beverly did not fall below the applicable standard of care, rendering Dr. Hudak's self-serving testimony to the same effect merely cumulative. The trial court did not abuse its discretion in denying Beverly's motion for new trial based on Dr. Hudak's testimony regarding the chiropractic standard of care.

Point Two is denied.

Point Three: Denying Motion in Limine to Exclude Evidence of Beverly's Prior Drug Use

Beverly's third point on appeal argues that the trial court abused its discretion in denying his motion for new trial because the trial court erroneously denied Beverly's motion in limine involving the admission of evidence of Beverly's prior drug use.

A ruling on a motion in limine is interlocutory and subject to change during the course of a trial. *Peters v. Gen. Motors Corp.*, 200 S.W.3d 1, 15 (Mo. App. W.D. 2006). Thus, a motion in limine preserves nothing for appeal. *Id.* Instead, a party is required to object at trial to the introduction of evidence and restate the objection in a motion for new trial in order to preserve the issue for appeal. *Id.*

In August 2014, over a year and a half before the trial began, Beverly filed a motion in limine to exclude testimony or evidence of any prior drug use by Beverly. In a pretrial conference on April 21, 2016, the trial court denied the motion in limine, explaining that if there was trial testimony that recent drug use could have affected Beverly's injuries, then it would allow the evidence. The trial court added that it would not allow the Defendants to "ask about prior use in general, but only through an expert if -- if there is expert testimony somewhere in that testimony that says the use of it could have affected" Beverly's injuries.

On each occasion during trial when the prospect of admitting evidence of Beverly's drug use was broached by the Defendants, Beverly successfully objected, resulting in the exclusion of the evidence. Beverly nonetheless asserts on appeal that the trial court's denial of his motion in limine set in motion a series of procedural events that were ultimately grounds for a mistrial. During voir dire, Beverly's attorney asked the venire the following

question: "Now, this next issue, the defendants and their witnesses may talk about drugs and whether or not Mr. Beverly, my client, has experimented with them when he was younger. Is there anyone here who believes it would be difficult for them to enter a verdict for a person who may have experimented with drugs when they were younger?" No venirepersons raised their hands. The Defendants' attorney then asked the venire if anyone had an experience when working in health care when a patient did not fully disclose all relevant information. A juror answered, referencing patients' tendency to hide drug use, particularly cocaine or meth. The Defendants' attorney then stated, "[Beverly's attorney] indicated that there may be an issue in this case about drug use. And since you're involved with caring for patients -- you mentioned cocaine -- is that something that can have adverse consequences to patients?" The venireperson responded affirmatively, and stated that if the patient is currently on cocaine or meth and discloses that information, the treatment plan will be different. Beverly moved for a mistrial the next morning before opening statements. Beverly argued that a mistrial was necessary because "the jury has been voir dired on the drug issue, and I can't unring that bell." The trial court denied the request for mistrial.

We express no opinion as to whether Beverly's request for a mistrial should have been granted. Neither Beverly's motion for new trial nor his point on appeal claim error in the denial of his request for a mistrial. Instead, Beverly's point on appeal challenges only the trial court's preliminary ruling denying Beverly's motion in limine, a ruling which preserves nothing for our review. Beverly argues that the motion in limine ruling left him no choice but to question the venire about prejudice or bias regarding drug use. Beverly

cites no authority, however, for the proposition that his decision to voir dire on the subject of drug use converted the trial court's interlocutory pre-trial ruling into an appealable ruling.[4] "Rule 84.04(d) requires that an Appellant provide appropriate citation to authority in support of his contentions. If no authority exists on the issue, an explanation for the absence of authority is required. If no explanation is given, we may consider the point to be abandoned." *White v. Emmanuel Baptist Church*, 519 S.W.3d 917, 927 (Mo. App. W.D. 2017).

The trial court did not abuse its discretion in denying Beverly's motion for new trial based a claimed error in ruling on a motion in limine. Point Three is denied.

Point Four: Allowing the Defendants to Blame the "Empty Chair"

Beverly's fourth point on appeal argues that the trial court abused its discretion in denying his motion for new trial because the Defendants were permitted to elicit testimony to support an "empty chair" defense.

"In Missouri, fault is only to be apportioned among those at trial." *Kansas City Power & Light Co. v. Bibb & Assocs., Inc.*, 197 S.W.3d 147, 159 (Mo. App. W.D. 2006) (citing *Jensen v. ARA Servs., Inc.*, 736 S.W.2d 374, 377 (Mo. banc 1987)). However, the "[d]efendant may introduce any evidence that tends to establish that she is not guilty of the negligence charged." *Oldaker v. Peters*, 817 S.W.2d 245, 252 (Mo. banc 1991). "'[B]oth

[4]Beverly's reliance on *State ex rel. State Highway Commission v. Blobeck Investment Co.*, 110 S.W.2d 860 (Mo. App. 1937), is unavailing. There, the court held that a party who is subject to an adverse ruling regarding the admission of evidence ***during trial*** may "adduce[] countervailing evidence upon such issue" without being precluded "from thereafter insisting on his appeal that the original ruling of the court was wrong." *Id.* at 863. *Blobeck Investment Co.* addressed how a party complaining about the admission of the evidence may respond, without waiving his complaint, ***after*** the evidence is actually admitted. The case does not address preliminary, interlocutory, pre-trial in limine motions.

as a matter of law and as a matter of logic, evidence that a third party caused the injury may be relevant and necessary to the jury's determination of the negligence and causation issues.'" *Mengwasser v. Anthony Kempker Trucking, Inc.*, 312 S.W.3d 368, 373 (Mo. App. W.D. 2010) (quoting *Whisenand v. McCord*, 996 S.W.2d 528, 531 (Mo. App. W.D.1999)). Thus, a defendant may argue that a third party, including a non-party, was the ***sole*** cause of the plaintiff's injuries. *Id.*

Beverly complains that the trial court erred in allowing the Defendants to elicit testimony that blamed the emergency rooms at Truman Medical Center and St. Luke's North for failing to discover Beverly's vertebral artery dissection. However, the premise of Beverly's argument is not borne out by the record. The Defendants asked Dr. Robert Allen Bailey ("Dr. Bailey"), Beverly's chiropractic expert witness, whether he believed "it was fine for Mr. Beverly to be sent home from both of those emergency rooms." The trial court overruled Beverly's objection that the question sought improper "empty chair" testimony, after which Dr. Bailey testified that he saw no fault in either emergency rooms' discharge decision. The Defendants also asked Dr. Pikus about Truman Medical Center's failure to diagnose Beverly's vertebral artery dissection. Dr. Pikus answered:

> Well, you know, vertebral artery dissection is a difficult diagnosis to make. This is -- because it's so infrequent, we don't have a lot of experience with it. It's not something that every medical student or every physician even sees during his or her career. It's just a very small group of people have knowledge of this. And so it -- it's a very difficult diagnosis to make because it is so unusual.
>
> And so, when he went to the emergency room, the ER doctor, I think, handled things appropriately . . . and actually went above and beyond in terms of the work-up because he had a CT scan and then a lumbar puncture. And all of that was because of Mr. Beverly's symptoms and family history.

> And I think they did a great job. It would have been nice -- and knowing what we know now, it would have been nice if they had picked up on the vertebral artery dissection then. But it's a very difficult diagnosis to make.

Dr. Pikus testified that he similarly believed St. Luke's North "did a very good job" in its care of Beverly. The trial court again overruled Beverly's objection that this testimony blamed an "empty chair."

Contrary to Beverly's argument, the Defendants did not address the care provided by Truman Medical Center and St. Luke's North in an effort to blame an empty chair. Rather, the Defendants referenced the care provided by Truman Medical Center and St. Luke's North to support the argument that Dr. Hudak's failure to recognize Beverly's vertebral artery dissection was not outside the standard of care because such dissections are difficult to diagnose.

The trial court did not abuse its discretion in denying Beverly's motion for new trial based on the alleged admission of "empty chair" evidence. Point Four is denied.

Point Five: Whether the Verdict Was Against the Weight of the Evidence

In his fifth point on appeal, Beverly argues that the trial court erred in denying his motion for a new trial because "the jury's verdict for [the Defendants] was clearly against the weight of the evidence, as the undisputed evidence presented at trial conclusively showed [Dr. Hudak's] culpability." [Appellant's Brief, p. 58] In particular, Beverly argues that the evidence at trial fully supported a finding that Dr. Hudak was negligent in his failure to warn Beverly of the potential consequences of cervical spine adjustments; a finding that Dr. Hudak performed a cervical spine adjustment on Beverly despite the presence of symptoms indicating a vertebral artery dissection, thereby breaching the

chiropractic standard of care; a finding that Dr. Hudak failed either to contact Truman Medical Center or St. Luke's North or to obtain Beverly's medical records from Truman Medical Center or St. Luke's North prior to performing a cervical spine adjustment on Beverly, thereby breaching the chiropractic standard of care; and a finding that Dr. Hudak failed to complete an adequate history or an adequate physical examination of Beverly prior to performing a cervical spine adjustment on Beverly, thereby breaching the chiropractic standard of care. Beverly argues that the undisputed facts establish that the weight of the evidence should have resulted in a verdict for Beverly on all claims and issues.

Beverly, as the plaintiff, bore the burden of proof at trial. *Rouse v. Cuvelier*, 363 S.W.3d 406, 415 (Mo. App. W.D. 2012). "Because [Beverly] bore the burden of proof, a verdict in [the Defendants'] favor need not be supported by any evidence." *Id.* "Where a party bears the burden of proof, it is within the jury's prerogative to find against that party, even if that party's evidence is uncontradicted and unimpeached." *Id.* The jury has that prerogative because the jury determines credibility. *Warren v. Thompson*, 862 S.W.2d 513, 514 (Mo. App. W.D. 1993). Following the jury's verdict, "[t]he trial court alone has discretion to grant or deny a motion for new trial on the ground that the verdict [in favor of the defendant] was against the weight of the evidence." *Id.* "The trial court's overruling a motion for new trial on that ground constitutes a conclusive determination that cannot be overturned on appeal." *Id.*; *see also Wilson v. Union Pac. R.R. Co.*, 509 S.W.3d 862, 878 (Mo. App. E.D. 2017) ("In a negligence case, when the jury enters a verdict in favor of the

defendant, the appellate court will not overturn the verdict and remand for a new trial on the ground the verdict was against the weight of the evidence.").

Even presuming, *arguendo*, that Beverly's evidence was undisputed, the jury was entitled to disbelieve Beverly's evidence that Dr. Hudak breached the chiropractic standard of care, causing Beverly's injuries. The trial court overruled Beverly's motion for new trial on the ground that the jury's verdict in favor of the Defendants was against the weight of the evidence. We will not disturb that ruling on appeal.

Point Five is denied.

Conclusion

The trial court's Judgment is affirmed.

Cynthia L. Martin, Judge

All concur