IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

ROY DALBEY,	)	
Appellant,	)	
	)	
v.	)	**WD83602**
	)	
HEARTLAND REGIONAL MEDICAL CENTER and ASHOK GOKHALE, M.D.,	)	**FILED: April 6, 2021**
Respondents.	)	

Appeal from the Circuit Court of Buchanan County
The Honorable Daniel F. Kellogg, Judge

Before Division One: Alok Ahuja, P.J., and
Thomas H. Newton and Thomas N. Chapman, JJ.

Roy Dalbey sued Dr. Ashok Gokhale and Heartland Regional Medical Center in the Circuit Court of Buchanan County. Dalbey claimed that he suffered personal injuries as a result of medical negligence by Dr. Gokhale, and that Heartland was vicariously liable for Dr. Gokhale's actions. Following a nine-day trial, a jury returned a verdict in favor of Dr. Gokhale and Heartland. Dalbey appeals. We affirm.

Background[1]

In the early morning on November 6, 2011, Roy Dalbey arrived at Heartland's Emergency Department in St. Joseph, accompanied by his roommate, David Rosenbaum, and a neighbor, Kathy Hoffman. Rosenbaum had found Dalbey

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[1] On appeal "[w]e view the facts in the light most favorable to the jury's verdict." *Snellen ex rel. Snellen v. Capital Region Med. Ctr.*, 422 S.W.3d 343, 346 n.1 (Mo. App. W.D. 2013) (citations omitted).

unconscious and unresponsive in the bathroom of their apartment. Dalbey regained some level of consciousness five to twenty minutes after Rosenbaum found him. Hoffman and Rosenbaum drove Dalbey to the hospital.

A critical question – and perhaps *the* critical question – in this case is what Heartland staff were told about Dalbey's condition during his November 6, 2011 hospital visit. Dalbey's medical records indicate that he told the emergency room triage nurse that he had passed out after vomiting up blood approximately half-an-hour earlier (around 2:30 a.m.). Dalbey stated that he had drank some alcohol earlier that night. One of his friends told the nurse that when they found him, Dalbey had "fixed pupils" and had been briefly unresponsive. The triage nurse did not note any abnormalities based on her initial physical examination. The medical records indicate that Dalbey was alert and oriented with no signs of acute distress. Dalbey reported to the nurse that he was not in any pain, and in fact reported a pain level of zero out of ten.

Dr. Gokhale was working in Heartland's Emergency Department when Dalbey arrived. Dr. Gokhale examined Dalbey. According to Dr. Gokhale's notes, Dalbey complained of nausea and a decreased appetite, and stated that he had vomited blood. Dr. Gokhale found Dalbey to be neurologically normal – he was alert, fully oriented, and lucid, was able to carry on a normal conversation, and did not slur his speech. Dr. Gokhale concluded that Dalbey had "almost certainly" fainted as the result of a vasovagal episode, triggered when he saw his own blood after vomiting. Dr. Gokhale ordered numerous tests related to gastrointestinal bleeds, as well as an electrocardiogram (or "EKG") that would look for potential cardiac issues. Dr. Gokhale diagnosed Dalbey with gastritis versus peptic ulcer disease. He prescribed Prilosec, a medication used to decrease gastric acid secretion. Dalbey was discharged with literature relating to gastrointestinal bleeds, and with the recommendation that he obtain a follow-up endoscopy.

When he was discharged, the medical record indicates that Dalbey was ambulatory and was discharged walking (rather than assisted in a wheelchair) to a private vehicle, accompanied by his friends.

Although we view the evidence in the light most favorable to the jury's verdict in favor of Dr. Gokhale and Heartland, we note that Dalbey's companions, Rosenbaum and Hoffman, provided radically different testimony concerning how Dalbey presented at the hospital, and what they and Dalbey told Heartland personnel on the morning of November 6, 2011. While we presume under our standard of review that the jury disbelieved this testimony, it provides important background to the issues Dalbey raises on appeal.

According to Rosenbaum and Hoffman, Dalbey needed their physical assistance both to enter and to leave the Heartland Emergency Department. They testified that Dalbey could not remember what had happened earlier that night, his speech was slurred, and he had difficulty communicating with Heartland staff. Rosenbaum and Hoffman claimed that they told the triage nurse that Dalbey had lost bowel and bladder control during his syncopal episode. They testified that they told both the triage nurse and Dr. Gokhale that Dalbey had complained of severe headaches, and that Dalbey stated that his headache was so severe that he "felt like his head was going to blow off," and that it was a ten out of ten on a pain scale. Hoffman testified that she told a nurse that Dalbey needed to have his head X-rayed. In addition, Hoffman and Rosenbaum claimed that they, and Dalbey, all asked Dr. Gokhale to order an X-ray or computerized tomography (or "CT") of Dalbey's head. They testified that their requests were "blown off," and that Dr. Gokhale concluded that an X-ray or CT scan was unnecessary. None of the circumstances and events which Rosenbaum and Hoffman described were documented in Dalbey's medical records, or corroborated by the testimony of Heartland personnel.

In the early morning hours of December 2, 2011, less than one month later, Dalbey again arrived at Heartland's Emergency Department, this time by ambulance. Rosenbaum testified that he had noticed Dalbey acting strangely in the bathroom of their apartment, scrubbing the sink with no running water, and that Dalbey had said he had a "tremendous horrible headache." Rosenbaum called 9-1-1 when he observed that Dalbey could not move his left side.

Dalbey presented at Heartland's Emergency Department with an "altered mental status," was confused and had decreased responsiveness. Emergency medical personnel reported to Heartland staff that Dalbey's family had found him on the floor in the bathroom confused and disoriented about one hour prior to arriving at the hospital, and that when emergency personnel arrived at his home, Dalbey was unresponsive. While the Emergency Department nurse was conducting her initial examination, Dalbey began experiencing an active seizure.

Dr. Gokhale was again on duty in the emergency room. He ordered a non-contrast CT scan. The CT scan indicated an intracerebral hemorrhage with acute subarachnoid hemorrhage as well as intraventricular hemorrhage, possibly from a ruptured intracranial aneurysm. At approximately 3:13 a.m., Dr. Gokhale consulted with the on-call neurosurgeon at Heartland. The neurosurgeon recommended that Dalbey be transferred to another hospital because Heartland could not treat the massive brain hemorrhage which the CT scan indicated Dalbey had suffered. At approximately 3:33 a.m., Dr. Gokhale contacted the on-call neurosurgeon at the University of Kansas Medical Center, and established plans to transfer Dalbey there for further treatment. Dalbey was life-flighted to the University of Kansas Medical Center at approximately 3:45 a.m.

Dalbey's medical treatment revealed that he had an aneurysm in his right pericollosal artery, which had ruptured on the night of December 1-2, 2011. Dalbey suffered intraparenchymal hemorrhage (bleeding in the brain), as well as

subarachnoid bleeding (blood leaking into the fluid surrounding the brain). As a result, Dalbey suffered substantial and permanent brain damage leading to lasting disability, and requires substantial on-going care and treatment.

Dalbey originally filed suit against Heartland and Dr. Gokhale in the circuit court on November 5, 2013. That case was voluntarily dismissed in April 2015, and Dalbey then filed the present lawsuit on August 19, 2015. Dr. Gokhale passed away in 2016, and his widow Rhonda Gokhale was substituted as defendant *ad litem*. Dr. Gokhale's testimony was presented to the jury in the form of his videotaped deposition, which was taken in October 2015.

A nine-day jury trial began on September 30, 2019. Although Dalbey had alleged in his pleadings that Dr. Gokhale was negligent in multiple respects, he submitted only a single claim to the jury: that Dr. Gokhale was negligent for failing to order a CT scan of Dalbey's head when Dalbey first visited Heartland's emergency room on November 6, 2011. Dalbey contended that, if a CT scan had been ordered at that time, it would have revealed his brain aneurysm, and/or a small "sentinel bleed" from the aneurysm which was a harbinger of its later rupture. Dalbey claimed that the findings of a CT scan would have led to further medical treatment before the aneurysm ruptured, and would have prevented him from suffering massive hemorrhaging and brain damage on December 1-2, 2011. Dalbey submitted a claim of liability against Heartland based solely on its vicarious liability for Dr. Gokhale's negligence.

The defense presented expert testimony indicating that the aneurysm rupture on December 2 was an acute event, which was not preceded by a sentinel leak or bleed. Defense expert Dr. Franz Wippold emphasized that the most common presentation for aneurysm or sentinel leak is an intense or "thunderclap" headache, which was not documented in the records of Dalbey's November 6, 2011 hospital visit. Dr. Fernando Goldenberg, a neurocritical care specialist, testified for the

defense that Dalbey's presentation on November 6 (with a history of syncope and vomiting blood, a normal neurological examination, and no report of pain) was not consistent with a subarachnoid hemorrhage.

The jury returned a verdict in favor of Dr. Gokhale and Heartland. The circuit court entered judgment for defendants on October 23, 2019, and overruled Dalbey's motion for a new trial on February 18, 2020.

Dalbey appeals.

Discussion

Dalbey raises four Points on appeal. In Points I and II, he argues that the circuit court erred in quashing a trial subpoena *duces tecum* which he had served on Heartland, and by "preemptively denying" Dalbey's effort to serve a trial subpoena on Heartland's Risk Manager and corporate representative. In Point III, Dalbey argues that the trial court erred in excluding testimony by Dalbey's mother and brother regarding conversations they had with Dr. Gokhale and two other persons at Heartland on December 2, 2011, during which all three spontaneously denied that there was any connection between Dalbey's symptoms on November 6 and the rupture of his brain aneurysm. In Point IV, Dalbey argues that the circuit court erred when it prohibited Dalbey from cross-examining Dr. Goldenberg, a defense expert, to elicit standard-of-care opinions.

I.

In his first Point, Dalbey argues that the circuit court erred in quashing a subpoena *duces tecum* directed to Heartland.

Dalbey requested a subpoena *duces tecum* for trial testimony by Heartland on September 25, 2019, five days before trial was scheduled to begin. The subpoena sought to obtain a corporate representative's testimony on twenty-five separate topics, and production of documents and tangible items related to eleven of those topics. The subpoena *duces tecum* was served on Heartland on September 26, 2019.

On September 27, Heartland filed a motion to quash the subpoena *duces tecum*, which was taken up at a pre-trial conference held on the morning of September 30, before trial began. At the pre-trial conference, Dalbey abandoned many of the topics designated in the original subpoena. The remaining topics were related to "certain nurse protocols in effect in November 2011 concerning Roy's symptoms" and Heartland's "control and right of control over Gokhale." The remaining document requests concerned "the nurse protocols and documents reflecting whether Gokhale was required to comply with [Heartland]'s medical staff by-laws, rules and regulations in November 2011." The circuit court sustained Heartland's motion to quash the subpoena.

We need not decide whether the circuit court abused its discretion in quashing the Heartland subpoena, because Dalbey could not establish that he was prejudiced by the circuit court's ruling, even if it was incorrect. The two issues ultimately submitted to the jury in this case were (1) whether Dr. Gokhale was negligent in failing to order a CT scan of Dalbey's head on November 6; and (2) whether Heartland was vicariously liable for Dr. Gokhale's negligence under the doctrine of *respondeat superior*.

The request for testimony and documents concerning nursing protocols appears to be related to a claim Dalbey had previously asserted against Heartland, alleging that it was liable based on the negligent conduct of its nurse-employees. Dalbey abandoned that claim at trial, and the quashing of a subpoena related to that abandoned issue cannot justify reversal.

The other requests for testimony and documents concern Heartland's right to control Dr. Gokhale, and relate solely to Heartland's vicarious liability for Dr. Gokhale's negligence. The jury found in favor of Dr. Gokhale on Dalbey's claim of medical negligence, however, and the issue of Heartland's vicarious liability thereby became moot. "It is established in this state that where the right to recover is

dependent entirely on the doctrine of respondeat superior and there is a finding of no negligence by the servant there should be no judgment against the master." *Moran v. N. Cnty. Neurosurgery, Inc.*, 714 S.W.2d 231, 232-33 (Mo. App. E.D. 1986) (citation omitted); *accord Stanton v. Hart*, 356 S.W.3d 330, 338 (Mo. App. W.D. 2011) ("'If an employee is exonerated from liability because the employee has not committed a tort,' the employer is also exonerated." (citation omitted)); *Howard v. Youngman*, 81 S.W.3d 101, 117 (Mo. App. E.D. 2002); *Arnold v. Erkmann*, 934 S.W.2d 621, 631 (Mo. App. E.D. 1996).

Because the jury found that Dr. Gokhale was not negligent, it was unnecessary for the jury to separately consider whether Heartland could be vicariously liable for his actions. Because it was unnecessary for the jury to decide whether Heartland was vicariously liable for Dr. Gokhale's negligence, the quashing of a subpoena seeking information related only to the vicarious liability issue could not have prejudiced Dalbey. An appellant cannot establish prejudicial error justifying reversal, where the claimed error relates to an issue the jury was not required to resolve. *See, e.g.*, *Ziolkowski v. Heartland Reg'l Med. Ctr.*, 317 S.W.3d 212, 219-20 (Mo. App. W.D. 2010) (no prejudice from exclusion of evidence relevant to punitive damages, where jury found no underlying liability; "When the jury's verdict demonstrates that it never reached the issue which is claimed to be the source of prejudice then no prejudice has been demonstrated." (citation omitted)); *Koenke v. Eldenburg*, 803 S.W.2d 68, 71 (Mo. App. W.D. 1990) ("[s]ince the jury found against plaintiff on the issue of liability," any error by trial court in excluding evidence relevant only to damages could not have prejudiced the plaintiff); *Mahan v. Mo. Pac. R.R. Co.*, 760 S.W.2d 510, 515-16 (Mo. App. E.D. 1988) (same).

Point I is denied.

II.

In his second Point, Dalbey argues that the circuit court erred "in preemptively denying plaintiff the opportunity to subpoena [Heartland]'s Risk Manager and Corporate Representative."

On September 30, 2019, the first day of trial, Dalbey obtained – but did not serve – a subpoena directed to Sara Juarez, Heartland's Risk Manager and corporate representative at trial. Dalbey contends that he "delayed service [of the Juarez subpoena] while awaiting the court's ruling" on Heartland's motion to quash the subpoena *duces tecum* directed to Heartland itself, because of the "overlapping" arguments Heartland made in opposition to both subpoenas. The record reflects that at a pre-trial hearing on Heartland's motions to quash, Dalbey's counsel declined to serve the Juarez subpoena, even though she was present at the court. Moreover, the record indicates that the circuit court never actually ruled on Heartland's motion to quash the Juarez subpoena.

Our review of Heartland's motions to quash the Heartland subpoena, and to quash the Juarez subpoena, indicates that the motions raised different arguments. Both motions complained that Dalbey's subpoenas were served too close to the commencement of trial. But that is the extent of the similarity. The motion to quash the Heartland subpoena argued that Missouri's rules of civil procedure do not authorize a trial subpoena for testimony of a corporate representative on designated topics, and that it would be unduly burdensome for Heartland to designate a corporate representative to testify to all of the topics identified in the Heartland subpoena on such short notice. On the other hand, the motion to quash the Juarez subpoena contended that, because she is an attorney, any relevant information Juarez possessed concerning the case would be protected by the attorney-client privilege, and that she was a top-level corporate executive whose compelled testimony was unnecessary and unwarranted. The circuit court's quashing of the

Heartland subpoena did not necessarily indicate that the court would have also quashed the Juarez subpoena. It would not have been futile for Dalbey to serve the Juarez subpoena, and obtain a ruling from the court on the propriety of that subpoena.

It is well settled that "there can be no review of a matter which has not been presented to or expressly decided by the trial court." *BMJ Partners v. King's Beauty Distrib. Co.*, 508 S.W.3d 175, 179 (Mo. App. E.D. 2016) (citation and internal quotation marks omitted). Dalbey cites no caselaw that would entitle him to challenge the "preemptive" quashing of the Juarez subpoena when the subpoena was never actually served, and the circuit court never actually ruled on the subpoena's propriety. Dalbey's reliance on *Grimes v. Bagwell*, 809 S.W.2d 441 (Mo. App. S.D. 1991), for the proposition that "the law does not require the doing of a useless thing," is misplaced. *Grimes* held only that a defendant need not *further* object to the holding of a bench trial after an earlier, timely demand for a jury trial had been denied by the circuit court. *Id.* at 444. In this case, by contrast, the circuit court never ruled on the issue Dalbey raises on appeal.

Point II is denied.

III.

In his third Point, Dalbey argues that the circuit court erred in excluding testimony of two members of Dalbey's family concerning conversations they claimed to have had with Dr. Gokhale and two other unidentified persons at Heartland on December 2, while Dalbey was receiving treatment after the aneurysm ruptured.

Prior to trial, Heartland moved *in limine* to exclude evidence relating to conversations Dalbey's mother, Virgie Dalbey, claimed to have had with three people associated with Heartland on December 2, 2011, in which she contended that the Heartland representatives spontaneously denied any relationship between

Dalbey's November 6, 2011 emergency room visit, and his visit on December 2. The circuit court sustained the motion *in limine*.

At trial, Dalbey moved to reconsider the court's *limine* ruling. In support of the motion to reconsider, Dalbey made an offer of proof through the testimony of Virgie Dalbey, and Dalbey's brother Kelly Dalbey.

Virgie Dalbey testified that while she was in the Emergency Department waiting room at Heartland in the early morning hours of December 2, 2011, "a man in scrubs came out and said that [Dalbey had suffered] a bad brain bleed," and that Dalbey would be life-flighted to the University of Kansas Medical Center for further treatment. She testified that the man told her the brain bleed "was in no way related for what [Dalbey] had been seen for prior," referring to his November 6, 2011 visit to the emergency room. Virgie Dalbey testified that, after the man in scrubs went back into the emergency room, "[a]nother guy came out in scrubs," and told her, "[t]his is in no way related to what [Dalbey] had been seen for prior." Finally, she testified that after the second unidentified man left, a third man dressed in a "suit, hankie and tie that matched and shiny shoes," came out and told her "exactly the same thing" as the prior two persons: that Dalbey's condition on December 2, 2011, "wasn't related to what [Dalbey] had been seen for prior." Virgie Dalbey testified that she did not know the identities of any of the three persons who spoke to her.

Kelly Dalbey testified in his offer of proof that while he was at Heartland on December 2, 2011, "Doctor Guglio" (whom Kelly identified with a picture of Dr. Gokhale) "come out and told us that Roy was in critical condition. He was going to get life flighted to KU. Then he proceeded to tell us that this incident had nothing to do with the prior incident." Kelly Dalbey testified that "I told him that I didn't see how it didn't [have a relationship to the earlier emergency room visit]. It had to have because he came in here with headaches. And you told him that he had a

stomach ulcer, pretty much." Kelly Dalbey testified that Dr. Gokhale did not respond further. Kelly Dalbey testified that later a "guy in a suit" came out and "basically said the same thing" – "[t]hat the two incidents were not related." Kelly Dalbey testified that he argued with this second individual also.

The trial court overruled Dalbey's motion to reconsider its ruling sustaining Heartland's motion *in limine*, and excluded the testimony.

"A trial court enjoys considerable discretion in the admission or exclusion of evidence, and, absent clear abuse of discretion, its action will not be grounds for reversal." *Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 114 (Mo. 2015) (citation and internal quotation marks omitted). "A ruling constitutes an abuse of discretion when it is 'clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration.'" *Id.* (citation omitted).

> To be admissible, evidence must be both logically relevant and legally relevant. Evidence is logically relevant if it makes the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Legal relevance . . . refers to the balance between the probative value and the prejudicial effect of the evidence. That balancing requires the trial court to weigh the probative value, or usefulness, of the evidence against its costs, specifically the dangers of unfair prejudice, confusion of the issues, undue delay, misleading the jury, waste of time, or needless presentation of cumulative evidence. If the prejudicial effect of the evidence outweighs its probative value, then the evidence is not relevant and should be excluded.

Brummett v. Burberry Ltd., 597 S.W.3d 295, 303-04 (Mo. App. W.D. 2019) (citing *Kerr v. Mo. Veterans Comm'n*, 537 S.W.3d 865, 876 (Mo. App. W.D. 2017); internal quotation marks omitted). "For evidentiary error to cause reversal, prejudice must be demonstrated[, that is] there is a reasonable probability that the trial court's

error affected the outcome of the trial." *S.F.M.D. v. F.D.*, 477 S.W.3d 626, 636 (Mo. App. W.D. 2015) (citations and internal quotation marks omitted).

Dalbey argued in the circuit court, and argues on appeal, that the statements to which Virgie and Kelly Dalbey testified were admissible because they constituted admissions of a party opponent. As the Missouri Supreme Court has only recently explained, however,

> [a]n admission of a party opponent is a statement by a party that consciously or voluntarily acknowledges the existence of certain facts unfavorable to, or inconsistent with, the position taken by the party at trial and relevant and favorable to the cause of the opposing party who offers the statement.

Sherrer v. Boston Scientific Corp., 609 S.W.3d 697, 710 (Mo. 2020) (citing *Thomas v. Harley-Davidson Motor Co. Grp., LLC*, 571 S.W.3d 126, 138-39 (Mo. App. W.D. 2019)); *see also*, *e.g.*, *Hemphill v. Pollina*, 400 S.W.3d 409, 414 (Mo. App. W.D. 2013). There is nothing about the statements Virgie and Kelly Dalbey attributed to the three Heartland representatives which was "unfavorable to, or inconsistent with," the position taken by Dr. Gokhale or Heartland at trial. To the contrary, Virgie and Kelly Dalbey contended that, on December 2, 2011, Dr. Gokhale and two other unknown Heartland representatives took exactly the same position which the defendants took almost eight years later at trial: that the massive intracranial hemorrhage which Dalbey experienced on December 2, 2011, was unrelated to the circumstances which had brought him to the emergency room on November 6. The Supreme Court has observed that the "requirement that the admission be inconsistent with what the declarant is claiming at trial" is "a type of relevancy requirement, which recognizes that it would be a waste of time to offer a statement to prove something that a party has already conceded at trial." *Egelhoff v. Holt*, 875 S.W.2d 543, 551 n.4 (Mo. 1994). Given that the purported "admissions" made by Dr. Gokhale and other Heartland representatives were fully consistent with the

defendants' position at trial, the circuit court did not err in excluding the statements to which Virgie and Kelly Dalbey offered to testify.

Separate from the fact that these statements did not constitute "admissions," the circuit court did not abuse its discretion in concluding that the statements were not relevant. Dalbey first argues that the December 2, 2011 statements would contradict Dr. Gokhale's testimony in two respects: (1) the statements would contradict his denial (in his deposition taken on October 10, 2015) of any recollection of treating Dalbey in November-December 2011; and (2) the statements would contradict Dr. Gokhale's claim that he was not aware of anyone conducting any investigation of his treatment of Dalbey on November 6, 2011.

As the Missouri Supreme Court has explained: "Evidence contradicting a witness's testimony not only supplies direct factual evidence but also may be used to undermine the confidence in the reliability of the witness's testimony." *State v. Taylor*, 466 S.W.3d 521, 530 (Mo. 2015) (citation omitted). Contradiction evidence is "evidence that the witness 'made a factual error' in his or her testimony," which serves to "undermine the confidence in the reliability of the witness's testimony." *Sherrer*, 609 S.W.3d at 707 (citations and internal quotation marks omitted); *see also Menschik v. Heartland Reg'l Med. Ctr.*, 531 S.W.3d 551, 561 & n.7 (Mo. App. W.D. 2017) (citations omitted).

The circuit court did not abuse its discretion in concluding that the proffered testimony from Virgie and Kelly Dalbey would not contradict Dr. Gokhale's testimony. First, this testimony does not contradict Dr. Gokhale's testimony that, at the time of his deposition in October 2015, he did not have "[a]ny independent recollection of any conversation [he] may have had with anybody about the case . . . that night at the hospital." It is not clear from Dr. Gokhale's testimony whether "that night" to which he was referring was December 2 rather than November 6. But even if he was referring to December 2, Dr. Gokhale did not testify that he did

not speak with anyone that night. He testified only that he had no "independent recollection" of doing so. The testimony of Virgie and Kelly Dalbey that such a conversation occurred does not contradict Dr. Gokhale's testimony that he did not independently recall that conversation almost four years later. We also note that, in his deposition testimony, Dr. Gokhale stated that Heartland's medical records accurately recorded his actions on the two nights in question. Those medical records specifically stated that Dr. Gokhale had discussed Dalbey's condition, prognosis, and future course of treatment with members of Dalbey's family on December 2, before Dalbey was transferred to the University of Kansas Medical Center. Dr. Gokhale did not deny that he had a conversation with members of Dalbey's family on the night of December 2, 2011.

Nor does this proffered testimony contradict Dr. Gokhale's testimony that, "[a]s far as [he] know[s], no investigation was done" into Dalbey's case. Even if the three persons who purportedly spoke with Virgie and Kelly Dalbey on December 2, 2011, had coordinated their remarks, this does nothing to indicate that an "investigation" of Dalbey's treatment had been conducted.

Dalbey also argues that the proffered testimony is relevant to show a "consciousness of guilt" on the defendants' part, since it purportedly shows "a conscious, deliberate and deceitful attempt by [Dr.] Gokhale and [Heartland] to cover up [Dr. Gokhale's] medical malpractice on November 6." Dalbey cites no authority supporting the admission in a civil case of a defendant's *denial* of culpability, fully consistent with the defendant's position at trial, to establish *the opposite proposition*, and we are aware of none. The circuit court did not abuse its broad discretion by rejecting this theory of relevance.

Finally, Dalbey argues that the circuit court erred in excluding his proffered testimony because it "would have helped lay a foundation to establish [Heartland]'s duty to preserve the video recordings of Roy both inside the ER and outside as he

approached the entrance," and thus could have supported an argument that the jury could have drawn an "adverse inference" against Heartland based on its spoliation of evidence.

> To constitute spoliation, the destructive act must be intentional, indicating fraud, deceit, or bad faith. The failure to adequately explain the evidence's destruction may give rise to an adverse inference. . . . Simple negligence is not sufficient to satisfy the mental-state element of spoliation. Thus, the burden is on the party seeking the application and the benefit of the spoliation doctrine to make a prima facie showing that the opponent destroyed the missing evidence under circumstances manifesting fraud, deceit, or bad faith.

Marmaduke v. CBL & Assocs. Mgmt., Inc., 521 S.W.3d 257, 269 (Mo. App. E.D. 2017) (citations and internal quotation marks omitted).

The circuit court was entitled to find, in its discretion, that there was at best a very tenuous connection between the defendants' denial of a relationship between Dalbey's November 6 and December 2 emergency room visits, and a recognition that they should preserve video recordings of Dalbey entering or exiting the emergency room on November 6. The record indicates that such video recordings were routinely erased or overwritten after thirty days. The circuit court could reasonably conclude that it would not have been reasonably apparent to the defendants that video recordings of Dalbey's entry and exit from the emergency room on November 6, 2011, would have any relevance to a claim that Dr. Gokhale should have recognized on November 6 that Dalbey was experiencing a neurological emergency, and that he should have ordered a CT scan. The video recordings are not medical records, and were not created or maintained by medical personnel. It is noteworthy that even in Kelly Dalbey's offer of proof testimony, in which he contends that he argued with Dr. Gokhale about the relationship between the November 6 and December 2 incidents, Kelly Dalbey merely referenced the fact that Dalbey had complained of headaches on November 6 – not that Dalbey had difficulty entering or exiting the hospital. Nothing in the offer of proof testimony would have alerted the

defendants that a video recording of Dalbey entering or leaving the emergency room on November 6 constituted relevant evidence for a potential malpractice claim.

Point III is denied.

IV.

In Point IV, Dalbey argues that the circuit court erred by limiting his cross-examination of a defense expert witness, Dr. Fernando Goldenberg. Specifically, Dalbey argues that the trial court erroneously prohibited him from eliciting testimony from Dr. Goldenberg whether Dr. Gokhale breached the applicable standard of care by not ordering a CT scan of Dalbey's head on November 6, 2011.

Generally speaking, we review a circuit court's decision whether to admit or exclude an expert's testimony for an abuse of discretion. *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 760 (Mo. 2010). "A trial court will be found to have abused its discretion when a ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id.* (citation and internal quotation marks omitted).

The defense called Dr. Goldenberg, a neurocritical care specialist, to testify as an expert witness. On direct examination, Dr. Goldenberg testified that in his medical practice, he treats patients for brain or spinal cord problems or injuries, including brain aneurysms and subarachnoid hemorrhage. Dr. Goldenberg testified that he consults "[a]lmost daily" with emergency physicians. Dr. Goldenberg testified that his role in this case was to "look at the presentation from November 6th and December 2nd and decide whether [he] thought there was any relationship between those two presentations."

On direct examination, Dr. Goldenberg opined that Dalbey's presentation at Heartland on November 6 (with a history of having vomited blood with transient loss of consciousness, but neurologically normal) was not consistent with a

subarachnoid hemorrhage and did not suggest a "neurological emergency." Dr. Goldenberg also testified that, based on Dalbey's presentation and the medical records, his brain aneurysm ruptured on December 2, 2011, without a preceding "sentinel bleed."

On cross-examination, Dalbey's counsel sought to elicit testimony from Dr. Goldenberg as to whether the standard of care required Dr. Gokhale to conduct further neurological investigations on November 6, 2011. Defense counsel objected, contending that Dr. Goldenberg was not a "standard of care" expert, that he practiced a different specialty than Dr. Gokhale, and that Dalbey's counsel's questioning was outside the scope of direct examination. The circuit court observed that testimony from Dr. Goldenberg would "not [be] relevant if he's not able to talk about the standard of care of an emergency room physician, because that's what this case is about, standard of care for the emergency room physician in this situation." The court permitted Dalbey's counsel to conduct a voir dire examination of Dr. Goldenberg, outside the presence of the jury, to seek to lay a foundation for admission of standard-of-care opinions.

During his voir dire examination, Dr. Goldenberg maintained that he was "not here to offer standard of care" testimony. Dr. Goldenberg stated that as a physician brought into the emergency room to consult on patients exhibiting neurological symptoms, he was required to conform to the standard of care "of [his] specialty." Dalbey's counsel asked what steps a neurocritical care specialist, an emergency room physician, and an internist would take if presented with a patient exhibiting confusion, disorientation, abnormal eye movement, decreased responsiveness, seizure activity, and shaking. (Dr. Gokhale was board certified in both internal medicine and emergency medicine.) The following exchange followed:

> A. I do not know what the standard of care for an emergency physician is. So I would not answer that because I do not really know.

> Q. I'm asking with regard to any doctor, any of those three doctors, are there steps that you must take with these symptoms?
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> A. There are basic steps that probably, yes, are common, but there are more sophisticated steps that probably are completely different depending on your specialty, even when facing the same clinical circumstances.
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> Q. So you have no idea whether an internal medicine doctor would have – what steps they would have to take?
>
> A. What I said is that depending on the specialty, the standard of care is probably different. And if you ask me as a neurocritical care doctor, I would say that I know exactly what to do. If you ask me as an emergency physician, I do not know.
>
> Q. What about an internal medicine?
>
> A. Internal medicine, I don't practice internal medicine as a part of my routine life. I practice neurocritical care.

Following the voir dire examination, the circuit court sustained defense counsel's objection, ruling that it would not allow Dr. Goldenberg to testify as to standard of care.

Although the court did not permit Dalbey to elicit an opinion from Dr. Goldenberg concerning the standard of care for an emergency physician or internist, Dalbey's counsel was able to obtain testimony from Dr. Goldenberg that he would have ordered a CT scan of Dalbey's head, *if* Hoffman's and Rosenbaum's testimony concerning the incident on November 6, 2011, were true:

> Q. . . . Doctor, if he had vomited, passed out, was unconscious for a period of time, eyes wide open, eyes rolled back in his head, unable to walk by himself and a horrible headache, you as a neurocritical care doctor, you would be concerned about a problem, an intracranial problem, wouldn't you?
>
> A. With the things that you just described, yes.
>
> Q. And if you were concerned, you'd have to investigate it, wouldn't you?
>
> A. Yes.
>
> Q. A 10 out of 10 headache is a very concerning situation, a 10 out of a 10 headache?

A. Yes.

Q. And with just passing out and a 10 out of 10 headache, that is enough there to require a CT scan, isn't it?

A. Yes.

Q. No question about it.

A. Yes, sorry.

Dr. Goldenberg also agreed that he would be "concerned" "if a person's mentation doesn't return to normal rapidly" after a syncopal episode, and would investigate further. He also agreed that "loss of bladder control is a neurological concern" if it occurs in connection with syncope. Dr. Goldenberg specifically agreed with the statement that, "if [Rosenbaum] and [Hoffman] are telling the truth [as to what they told medical staff on November 6], you would be suspicious, if you were the doctor, for a subarachnoid hemorrhage."

On appeal, Dalbey argues that the circuit court erred in preventing him from cross-examining Dr. Goldenberg about the standard of care applicable to Dr. Gokhale, because Dr. Goldenberg was qualified to give standard-of-care opinions.

Dalbey's argument ignores, however, that Dr. Goldenberg repeatedly stated during his voir dire examination that he was not familiar with the standard of care applicable to emergency physicians or internists, and that he therefore had no relevant opinion to offer concerning whether Dr. Gokhale had complied with the relevant standard of care. Under Missouri law, "a physician is required to use and exercise that degree of care, skill and proficiency which is commonly exercised by the ordinarily skillful, careful, and prudent physician *engaged in a similar practice* under the same and similar conditions." *Piel v. Galbol*, 559 S.W.2d 38, 39-40 (Mo. App. 1977) (emphasis added; citing *Fisher v. Wilkinson*, 382 S.W.2d 627, 630 (Mo. 1964)); *see also, e.g.*, *Gridley v. Johnson*, 476 S.W.2d 475, 482-83 (Mo. 1972); *Yoos v. Jewish Hosp. of St. Louis*, 645 S.W.2d 177, 183 (Mo. App. E.D. 1982); *Swope v. Razzaq*, 428 F.3d 1152, 1155-56 (8th Cir. 2005) (Missouri law). As Dalbey points

out, the Missouri Supreme Court has held that a physician practicing one specialty may be qualified to offer a standard-of-care opinion concerning the actions of a physician having different specialty training. *Klotz*, 311 S.W.3d at 761 (holding that a physician who "completed an internal medicine residency and did specialty training in infectious disease and pulmonary disease" was qualified "to testify about issues related to the cardiology or electrophysiology standard of care"). But the fact that a physician who specializes in one area of medical practice *may* be qualified to testify concerning the standard of care applicable to another area of specialization, does not mean that the circuit court is required to admit testimony from a physician who *denies knowledge* of the standard of care applicable to another practice area.

In this case, Dr. Goldenberg repeatedly stated that he did not have an opinion concerning the standard of care applicable to Dr. Gokhale, or concerning whether Dr. Gokhale had complied with that standard of care, because he was insufficiently familiar with the standards of practice applicable to emergency medicine and internal medicine. While Dalbey may believe this testimony lacked credibility, the circuit court did not abuse its discretion in limiting Dalbey's cross-examination given Dr. Goldenberg's voir dire testimony. The circuit court did not abuse its discretion when it refused to force Dr. Goldenberg to give opinions on matters on which he asserted that he ***had no*** opinions because of a lack of relevant knowledge.

Even if the circuit court erred in limiting Dalbey's cross-examination of Dr. Goldenberg, this would not justify reversal. We will reverse for evidentiary error only if the erroneous evidentiary ruling was prejudicial. *Campbell v. Union Pac. R.R. Co.*, 616 S.W.3d 451, 474 (Mo. App. W.D. 2020); *Revis v. Bassman*, 604 S.W.3d 644, 654 (Mo. App. E.D. 2020). To establish prejudice sufficient to justify reversal, the appellant must show that the erroneous exclusion of evidence "materially affected the merits of the action." *Will v. Pepose Vision Inst., P.C.*, 528 S.W.3d 433,

436, 438 (Mo. App. E.D. 2017); *see also Secrist v. Treadstone, LLC*, 356 S.W.3d 276, 284 (Mo. App. W.D. 2011) (to obtain reversal based on evidentiary error, appellant must demonstrate that the "trial court's error affected the outcome of the trial"; citation and internal quotation marks omitted).

As we have described above, Dr. Goldenberg specifically and repeatedly stated during his voir dire examination that he was unable to offer an opinion concerning the standard of care applicable to an emergency room physician or internist like Dr. Gokhale. There is nothing in the record to suggest that Dr. Goldenberg would have testified *differently* if he had been asked the same questions in front of the jury. We fail to see how Dalbey was prejudiced by the fact that the jury did not hear Dr. Goldenberg's expressions of agnosticism.

Moreover, despite the limitations the circuit court placed on Dalbey's cross-examination, he was permitted to elicit testimony from Dr. Goldenberg that the symptoms to which Rosenbaum and Hoffman testified would cause him to "be concerned about . . . an intracranial problem" and to "be suspicious . . . for a subarachnoid hemorrhage," and that these concerns and suspicions would require further neurological investigation. Dr. Goldenberg testified that the loss of bladder control, and persistent confusion following syncope, were symptoms of concern. Moreover, he testified that a report of a ten-point headache "is a very concerning situation" which would be "enough . . . to require a CT scan" when combined with an episode of syncope. This testimony provided substantial support for Dalbey's claim that Dr. Gokhale had violated the standard of care – assuming that the jury believed the testimony of Rosenbaum and Hoffman (which it evidently did not). In these circumstances, we cannot find that the limitations the circuit court placed on Dalbey's cross-examination of Dr. Goldenberg "materially affected the merits of the action," even if those limitations were themselves erroneous.

Point IV is denied.

Conclusion

The judgment of the circuit court is affirmed.

Alok Ahuja, Judge

All concur.