NOT DESIGNATED FOR PUBLICATION

No. 112,701

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

KEVIN BIGLOW, Individually and on behalf of
the Surviving Heirs of CHARLA E. BIGLOW, Deceased,
Appellants,

v.

MARSHALL E. EIDENBERG, D.O.,
Appellee,

and

VIA CHRISTI HOSPITALS, WICHITA, INC.,
Defendant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; TIMOTHY HENDERSON, judge. Opinion filed April 15, 2016. Affirmed.

Jonathan Sternberg, of Jonathan Sternberg, Attorney, P.C., of Kansas City, Missouri, and *Thomas J. Dickerson* and *Chelsea E. Dickerson*, of Dickerson Oxton, LLC, of Overland Park, for appellant Kevin Biglow.

Steven C. Day and *Chris S. Cole*, of Woodard, Hernandez, Roth & Day, LLC, of Wichita, for appellee.

Before STANDRIDGE, P.J, PIERRON, J., and JOHNSON, S.J.

Per Curiam: Kevin Biglow (plaintiff), the surviving husband of Charla E. Biglow, filed a medical malpractice suit against Dr. Marshall E. Eidenberg (defendant), alleging

that the doctor was negligent in providing emergency medical care to Charla that resulted in her death. After the jury returned a verdict in favor of the defendant, the plaintiff brought this appeal, where he raises two issues. First, he argues the district court erred by issuing two jury instructions: a version of an instruction on the physician's right to elect treatment and an instruction that incorporated definitions of the terms "negligence" and "fault" from a pattern instruction on comparative fault. Second, the plaintiff alleges the district court erred in granting the defendant's pretrial motion in limine, which prevented the plaintiff's witnesses and counsel from using any derivative of the word "safe" or the phrase "needlessly endangering a patient" at trial.

FACTS

In October 2009, Charla developed a nagging cough. Charla's primary care physician diagnosed her with a viral infection and recommended over-the-counter medication. On the evening of October 27, 2009, Charla's cough became so persistent that the plaintiff took her to the emergency room at Via Christi Saint Francis Hospital in Wichita. When Charla arrived at the emergency room sometime after 11 p.m., she complained primarily about her persistent cough. She also complained of body aches and advised that she had a fever earlier that day. At that time, Charla's blood pressure and pulse were normal, her respiratory rate was slightly high, and she had a fever. A later vital assessment at 12:05 a.m. indicated that Charla had an elevated heart rate, but the records did not list a specific heart rate.

At about 12:15 a.m., the defendant conducted a physical examination of Charla, which included listening to her heart and lungs. The defendant found Charla's heart rate to be normal and ordered chest X-rays, blood work, and a urine test. The X-rays showed that Charla's lungs were full of fluid. The blood tests showed that Charla's red and white blood cell counts were low and that she had acidosis, meaning that her body was not using oxygen properly. The defendant diagnosed Charla with pneumonia in multiple

areas of her lungs; and after consulting with Charla's primary care physician, the defendant advised that she would be admitted to the hospital overnight. The defendant prescribed intravenous fluids; a pain reliever; two types of antibiotics; and Xopenex, a breathing treatment to open up airways in the lungs. The breathing treatment was administered in the emergency room at approximately 12:32 a.m. By 12:42 a.m., Charla's respiratory rate had increased, and her heart rate had increased from 90 to 170 beats per minute (BPM). A heart rate of 60 to 100 BPM is considered normal. A heart rate over 100 BPM is referred to as tachycardia. According to the plaintiff, Charla advised the defendant that her heart was beating fast, and he responded that this was a normal side effect of a breathing treatment. Charla began taking antibiotics around 1:35 to 1:45 a.m. while still in the emergency room. Prior to Charla's discharge from the emergency room, her vitals at 2:05 a.m. indicated that her blood pressure was low, her heart and respiratory rates were high, and she continued to have a fever. The defendant marked Charla's condition on her chart as "improved" and "stable."

After Charla arrived in her hospital room, she encouraged the plaintiff to go home and told him that she would call home before she went to sleep. According to the plaintiff, Charla looked "fine" before he left. Nurse Ashley Bishop observed that Charla had no difficulty walking from the transport cart to her bed, did not seem to be in any distress, and seemed "alert and oriented." Around 2:20 a.m., Charla's pulse rate was still high at 162 BPM. Thereafter, Charla complained of nausea, so Bishop left the room to get her some ice chips. Upon Bishop's return, she found other staff performing CPR on Charla, who had no pulse and was unresponsive. Attempts to resuscitate Charla were ultimately unsuccessful. An autopsy listed Charla's cause of death as "cardiac failure and respiratory failure" but expressed no opinion as to the specific mechanism that brought about her death.

In October 2011, the plaintiff filed a wrongful death action against Via Christi's parent corporation, the defendant, Charla's primary care physician, and the respiratory

therapist who administered the Xopenex. The primary care physician and respiratory therapist were later dismissed as parties, and Via Christi entered into a confidential settlement with the plaintiff shortly before trial.

The case against the defendant proceeded to trial. The jury heard evidence regarding Charla's medical history, which included a fairly severe case of lupus, a chronic autoimmune disease. Over the years, she had experienced several complications resulting from the disease and its treatments. These included blood cancer (which was successfully treated), spinal and hip surgery, stroke, removal of her spleen, low blood platelets, inflammation of the lining around her heart and lungs, and arthritis. According to the plaintiff, Charla had not experienced any lupus-related problems in the 9 months prior to October 2009. The plaintiff sought recovery on grounds that the defendant was negligent for failing to properly diagnose and treat Charla's tachycardia. The plaintiff alleged that the defendant's actions fell below the standard of care and caused Charla's death. Conversely, the defendant denied that his actions caused Charla's death, taking the position that her death could not have been reasonably predicted or prevented. The defendant maintained that all medical care provided by him was appropriate and consistent with the applicable standard of care.

Both parties presented expert testimony supporting their respective theories. The plaintiff presented two experts to support his claim that the defendant had violated the standard of care by not using an electrocardiogram machine (EKG) to identify Charla's heart rhythm and the type of tachycardia she was experiencing, without which it was impossible to provide the appropriate care that would have saved Charla's life. The plaintiff's first expert was Dr. Scott Kaiser, a family physician in Denver, Colorado. Dr. Kaiser had practiced emergency medicine for 10 years and had treated "hundreds" of emergency room patients with tachycardia, but he was not residency-trained or board-certified in the field of emergency medicine. Dr. Kaiser testified that because Charla's vital signs showed a dramatic change during her time in the emergency room, the

defendant should not have noted her condition as "improved" upon discharge and instead should have been extremely concerned about her pulse rate. Dr. Kaiser explained that Charla's pulse and heart rate readings could not have shown her heart rhythm. The actual electrical waves of the heart rhythm could only have been detected via an EKG. Dr. Kaiser stated that under the circumstances any reasonable physician would have performed a "differential diagnosis" of the tachycardia, *i.e.*, the process of distinguishing a particular disease or condition from others that present similar symptoms. Dr. Kaiser advised that the basic standard of care for emergency medicine in treating tachycardia required use of a 12-lead EKG machine to determine the heart rhythm and decide what type of treatment should be given and whether any additional testing would be necessary. Dr. Kaiser testified that the defendant's failure to diagnose the tachycardia made it impossible to treat Charla's heart rhythm and provide her with appropriate care. Dr. Kaiser believed that the defendant's failure to identify the cause of Charla's tachycardia or to treat the tachycardia itself violated the applicable standard of care. According to Dr. Kaiser, such treatment could have included medication, fluids, electric shock, neck rubbing maneuvers, and consulting with a cardiologist. Dr. Kaiser stated that the defendant also breached the standard of care by not reassessing Charla's condition after she had been treated with fluids and antibiotics. Dr. Kaiser testified that the defendant's breaches of the standard of care caused or contributed to cause Charla's death.

The plaintiff's second expert, Dr. Michael Sweeney, was a longtime Kansas City, Missouri, cardiologist who also had practiced emergency medicine in Topeka, Kansas. Dr. Sweeney testified that he was familiar with the standard of care required of an emergency room physician treating cardiac issues and that he believed the defendant breached the standard of care in failing to diagnose and treat Charla's tachycardia by using a rhythm strip or a 12-lead EKG to diagnose the specific type of tachycardia present. Dr. Sweeney stated that a 12-lead EKG would have been easy to obtain in an emergency room and would have only taken a minute to read the heart rhythm. Dr. Sweeney identified medications that could have been given to stabilize Charla's heart

rhythm and stated that her heart could have been shocked as a last resort. Dr. Sweeney believed that the defendant breached the applicable standard of care in failing to diagnose and treat Charla's tachycardia, which led directly to her death.

The defendant testified that based on Charla's condition, he believed and continues to believe that she had sinus tachycardia. The defendant explained that sinus tachycardia occurs when the normal pacemaker in the heart is firing faster than usual and results in normal, but faster, sinus rhythm. He testified that tachycardia may be caused by many noncardiac conditions and was seen frequently in patients with fractures, migraines, the flu, and other similar illnesses. The defendant noted that Charla was a young woman with no previous heart disease and a strong pulse. He felt that multiple factors likely combined to cause her elevated heart rate, including the breathing treatment, pneumonia, fever, and other medications she had taken previously. The defendant testified that the standard of care did not require ordering an EKG every time a patient with a noncardiac condition had a high heart rate. He stated that he saw emergency room patients several times a day with tachycardia associated with noncardiac causes. The defendant testified that he did not order an EKG for Charla because her heart rate was consistent with her history of receiving a breathing treatment, having pneumonia and a fever, and having taken cough and cold medicine. The defendant stated that if Charla had a dangerous abnormal heart rhythm, he would have expected to see other signs and symptoms, including changes in mental status, sweating, and a weak pulse. The defendant testified that he never saw anything which caused him to suspect there was a risk of Charla's imminent death and that he was shocked and surprised to hear of her death. The defendant believed that his actions in this case were consistent with and appropriate under the required standard of care.

The defendant's first expert, Dr. Kent Potter, was a board-certified emergency room physician from Wichita. Dr. Potter testified that the defendant exceeded the applicable standard of care as performed by an experienced emergency room physician

under the same or similar circumstances. Dr. Potter believed that the defendant appropriately diagnosed Charla with pneumonia and that it was proper to prescribe Xopenex for her condition. Dr. Potter stated that Charla's tachycardia was likely a result of her fever, pneumonia, and the Xopenex treatment. He testified that any experienced physician would have reasonably concluded "without a doubt" that Charla had sinus tachycardia. Dr. Potter stated that in order to determine whether a patient with tachycardia needs an EKG, a physician looks at whether the patient has a primary cardiac cause. He further stated that patients who have tachycardia combined with an illness such as pneumonia generally have sinus tachycardia. In Dr. Potter's experience, he had never heard of a patient developing anything other than sinus tachycardia after receiving a breathing treatment such as Xopenex. Dr. Potter felt there was nothing in Charla's presentment that would make an experienced emergency room physician order an EKG. Dr. Potter testified that an EKG can be a very valuable tool in certain circumstances, but that the standard of care did not require use of an EKG on all tachycardia patients. He stated that patients with primary cardiac cause need an EKG, but those who have tachycardia in connection with an illness tend to have sinus tachycardia. Dr. Potter did not believe that any experienced emergency room physician would have ordered an EKG for Charla because there was a reason for her tachycardia. If a more serious form of tachycardia had been present, Dr. Potter would have expected to see a very rapid decline in Charla's condition, including decreased blood pressure and a change in her heart rhythm. Dr. Potter did not believe that Charla's heart rate contributed to her death. Dr. Potter stated that the standard of care in this case required the defendant to treat the underlying cause of Charla's tachycardia rather than treating the tachycardia itself.

The defendant's second expert was Dr. Jeffrey Reames, a board-certified emergency room physician from Oklahoma City, Oklahoma. Dr. Reames testified that the defendant had met the applicable standard of care in this case. Dr. Reames agreed with the defendant's pneumonia diagnosis and felt it was consistent with a diagnosis that would have been made by most physicians acting within the standard of care. Dr. Reames

believed that Charla had sinus tachycardia caused by her fever, pneumonia, and the Xopenex. Dr. Reames testified that tachycardia of cardiac origin would involve a completely different presentation than Charla's condition, including significant cardiac history with underlying cardiac problems, shortness of breath, chest pains, and wider fluctuations in vital signs. Dr. Reames believed that an EKG was not required to diagnose Charla's sinus tachycardia because there was an explanation for her condition. Dr. Reames stated that sinus tachycardia typically improves if the underlying cause is treated. Dr. Reames testified that the standard of care did not require the defendant to reassess Charla's condition after the administration of her antibiotics and fluids.

Dr. David McKinsey, an infectious disease physician from Kansas City, Missouri, also testified for the defense. Given Charla's medical history, Dr. McKinsey believed that she died as a result of lupus pneumonitis. Dr. McKinsey testified that lupus pneumonitis presents symptoms very similar to pneumonia but is not a diagnosis that would ever be made in an emergency room because it is a rare condition that takes a long period of time to diagnose. Dr. McKinsey testified that lupus pneumonitis can progress rapidly and cause immediate death.

The jury, after hearing all the expert testimony and other evidence presented, returned a verdict in favor of the defendant by a vote of 10 to 2. The plaintiff timely appeals.

ANALYSIS

On appeal, the plaintiff claims: (1) The district court erred by issuing two improper jury instructions; and (2) the district court erred in granting the defendant's pretrial motion in limine. We address each of these claims in turn.

1. *Jury instructions*

The plaintiff argues that two erroneous jury instructions require reversal and remand for a new trial. He first alleges the district court erred in issuing Instruction No. 15, a modified version of the so-called "best judgment" instruction set forth in PIK Civ. 4th 123.11 (2012 Supp.) (Physician's Right to Elect Treatment to be Used) (See 2014 Comment, such instruction not recommended). The plaintiff also contends the court erred in issuing Instruction No. 8, which incorporated the definitions of the terms "negligence" and "fault" from PIK Civ. 4th 105.01 (Comparative Fault Theory and Effect).

a. *Instruction No. 15*

The standard of review when addressing challenges to jury instructions is based upon the following analysis:

> "(1) First, the appellate court should consider the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review; (2) next, the court should use an unlimited review to determine whether the instruction was legally appropriate; (3) then, the court should determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction; and (4) finally, if the district court erred, the appellate court must determine whether the error was harmless, utilizing the test and degree of certainty set forth in *State v. Ward*, 292 Kan. 541, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012)." *State v. Plummer*, 295 Kan. 156, Syl. ¶ 1, 283 P.3d 202 (2012).

We examine jury instructions as a whole, "'without focusing on any single instruction, in order to determine whether they properly and fairly state the applicable law or whether it is reasonable to conclude that they could have misled the jury.' [Citation omitted.]" *State v. Hilt*, 299 Kan. 176, 184-85, 322 P.3d 367 (2014).

At the time of trial, PIK Civ. 4th 123.11 (2012 Supp.), the "best judgment" jury instruction, was a recommended pattern instruction for medical malpractice lawsuits. This instruction read:

> "Where, under the usual practice of the profession of the defendant, ____ (*name*), different courses of treatment are available which might reasonably be used, the (*physician*) (*specialist*) has a right to use (*his*) (*her*) best judgment in the selection of the choice of treatment.
>
> "However, the selection must be consistent with the skill and care which other (*physicians practicing in the same in the same or similar community*) (*specialists practicing in the same field of expertise*) would use in similar circumstances." PIK Civ. 4th 123.11 (2012 Supp.).

The Notes on Use for PIK Civ. 4th 123.11 (2012 Supp.) stated that "[w]here there is a dispute as to which of two or more courses is to be pursued in administering treatment, this instruction should be used."

PIK Civ. 4th 123.11 originated from a jury instruction approved in dicta by the Kansas Supreme Court in *Natanson v. Kline*, 186 Kan. 393, 399, 350 P.2d 1093, *clarified and reh. denied* 187 Kan. 186, 354 P.2d 670 (1960). Thereafter, our court approved the use of this instruction. See, *e.g.*, *Hibbert v. Ransdell*, 29 Kan. App. 2d 328, 331-34, 26 P.3d 721, *rev. denied* 272 Kan. 1418 (2001); *Wamsley v. Abay*, No. 91,939, 2005 WL 578488, at *2-3 (Kan. App. 2005) (unpublished opinion). But the language in PIK Civ. 4th 123.11 stating that a physician had a "right" to exercise his or her best judgment when picking a course of treatment was later criticized by the Supreme Court in *Foster v. Klaumann*, 296 Kan. 295, 308-13, 294 P.3d 223 (2013). Specifically, the court noted that

> "[t]he instruction approved in *Natanson* instructed the jury that it is not negligence if a physician adopts one recognized and approved method in the profession over another. PIK Civ. 4th 123.11 does not focus the jury on what is (or is not) medical malpractice. Instead, the first paragraph of the PIK Civ. 4th 123.11 instruction informs the jury the

> physician has a 'right' to use his or her best judgment in selecting the choice of treatment. And this language appears to derive from some of this court's other early medical malpractice caselaw defining the physician's contractual duty when the cause of action arose in contract." 296 Kan. at 310.

The *Foster* court ultimately concluded that although the language in PIK Civ. 4th 123.11 was an accurate statement of the law, the instruction at issue in *Natanson* did a better job of focusing the jury on the issue of whether a physician committed malpractice. As a result, the court advised future litigants and the PIK-Civil Advisory Committee to reexamine the instruction. 296 Kan. at 312. The PIK Committee later deleted PIK Civ. 4th 123.11 and replaced it with the following Comment:

> "No separate instruction concerning a physician's standard of treatment is recommended. The Committee believes the applicable standard of care instruction is sufficient to properly instruct the jury when there is a dispute over the course of treatment selected by the physician. The selection among alternative courses of treatment, like other aspects of medical care provided by a physician, must be consistent with the applicable standard of care." PIK Civ. 4th 123.11 (2014 Supp.).

Nevertheless, there is no question that PIK Civ. 4th 123.11 remained a part of the pattern jury instructions at the time of the defendant's trial in August 2014. In light of the Supreme Court's directive in *Foster*, the defendant suggested the following language as an alternative to PIK Civ. 4th 123.11:

> "Where within a physician's field of medicine there exists more than one recognized approach to an issue of diagnosis or treatment, it is not negligence for the physician to adopt any such approach if it was a recognized and approved approach within the profession at the time the medical services in question were provided."

The plaintiff objected to the issuance of any type of "physician judgment" instruction as an inaccurate statement of the law and, thus, legally inappropriate because it used

negative language by instructing the jury what "is not negligence." The plaintiff also objected to the instruction as factually inappropriate because this case did not involve a decision by the defendant between which of two or more courses of treatment to pursue; rather, the defendant simply administered no treatment at all for Charla's tachycardia. Over the plaintiff's objection, the district court issued Instruction No. 15, which adopted the defendant's proposed instruction, as well as the second paragraph of PIK Civ. 4th 123.11:

> "Where within a physician's field of medicine there exists more than one recognized approach to an issue of treatment, it is not negligence for the physician to adopt any such approach if it was a recognized and approved approach within the profession at the time the medical services in question were provided.
>
> "However, the selection must be consistent with the skill and care which other physicians practicing in the same field in the same or similar community would use in similar circumstances."

As it was below, the plaintiff's challenge to Instruction No. 15 is two-fold. First, the plaintiff claims error under the second step of our analytical framework for deciding jury instruction issues by alleging that the instruction is legally infirm because it does not fairly and accurately state the applicable law. The plaintiff also raises a challenge under the third step by alleging the instruction is not supported by the particular facts of this case. See *Plummer*, 295 Kan. at 161-62.

(1) *Legally appropriate*

The plaintiff argues the language in Instruction No. 15 defining what "is not negligence" misstated the law and misled the jury because other instructions defined negligence for the jury. Relying primarily on *LaShure v. Felts*, 40 Kan. App. 2d 1001, 197 P.3d 885 (2008), *rev. denied* 289 Kan. 1279 (2009), the plaintiff contends that the use of negative instructions can cause juror confusion.

In *LaShure*, over the plaintiff's objection, the district court instructed the jury:

> "'The law does not require that the care provided to a patient by a medical care provider be perfect. A provider is not responsible in damages for lack of success or honest mistake or errors of judgment unless it is shown that he [or she] did not exercise the reasonable care, skill and diligence used by providers in the same field of expertise under like circumstances.
>
> "'If there is more than one course of treatment that a physician could reasonably pursue, it is not negligence for the physician to adopt one of the methods even though subsequent events may show that the choice was not the best.'" 40 Kan. App. 2d at 1005-06.

On appeal in *LaShure*, this court focused on the first paragraph of the instruction at issue, noting that "the second paragraph is essentially a repetition of a PIK instruction already given by the court in prior instructions." 40 Kan. App. 2d at 1005. This court then proceeded to examine *Natanson*, the principal authority from which the instruction derived, and questioned the reliance on "50-year-old dicta" as the source of the instruction. *LaShure*, 40 Kan. App. 2d at 1009. We criticized the instruction as "inject[ing] the idea of perfection into the law of professional liability that has no historical foundation" and for omitting other portions of the *Natanson* instruction, which resulted in conflict with another jury instruction and an inaccurate limitation on liability. *LaShure*, 40 Kan. App. 2d at 1009-10. This court further noted that the instruction was drafted in a way that defined what the law was not, specifically referencing the following phrases from the first paragraph of the instruction: "'The law does not require . . . . A provider is not responsible in damages for lack of success . . . .'" 40 Kan. App. 2d at 1010. The *LaShure* court explained that the use of such negative instructions may decrease a jury's understanding of an instruction and determined that the jury in this case was obviously confused, given the jury's request for clarification of the first paragraph of the instruction. This court concluded that the instruction, as written, "in negative terms,

along with the insertion of the idea of perfect care," created confusion among the jurors and constituted reversible error. 40 Kan. App. 2d at 1011.

Given the language of the instruction at issue, we find the plaintiff's reliance on *LaShure* is misplaced. Although the offending instruction in *LaShure* contained the same negative "it is not negligence" language challenged by the plaintiff in this case, the *LaShure* court never discussed this specific language as being problematic. Indeed, that opinion focused solely on the first paragraph of the instruction, and none of the specific criticisms discussed in *LaShure* have any bearing on Instruction No. 15 in this case. Although the *LaShure* court advised against the use of negative instructions in general, it specifically referenced the "use of negatives with negatives" as decreasing a jury's understanding of an instruction and noted that the instruction at issue, "especially the first paragraph," contained such language constructions. 40 Kan. App. 2d at 1010. Unlike the instruction in *LaShure*, which contained multiple negative statements, Instruction No. 15 contained only the single negative statement: "[I]t is not negligence . . . ."

As opposed to the facts in *LaShure*, the facts and legal conclusions in *Foster*—an opinion issued by the Supreme Court 5 years after our court issued *LaShure*—control the outcome of the jury instruction challenged by the plaintiff here. Although the *Foster* court ultimately held the language in PIK Civ. 4th 123.11 (doctor *has a right* to use his or her best judgment in picking a choice of treatment) was an accurate statement of the law, our Supreme Court concluded an instruction stating "it is not negligence" for a doctor to follow one of several possible courses of treatment if the treatment chosen was a recognized and approved approach by peers during the relevant time period does a better job of focusing the jury on the issue of whether a doctor committed malpractice. See *Foster*, 296 Kan. at 310-12. Thus, the instruction given in this case was more or less encouraged by the Kansas Supreme Court in *Foster*, which was decided in 2013, well after the *LaShure* opinion was issued in 2009.

Instruction No. 15 was legally appropriate, as it clearly and accurately expressed the law in effect at the time of the trial in this case.

(2) *Factually appropriate*

In addition to being legally infirm, the plaintiff also contends that Instruction No. 15 was not warranted because the evidence did not support giving an instruction on alternate courses of treatment. Specifically, the plaintiff claims that rather than choosing between two different courses of treatment, the defendant never considered any treatment at all, simply choosing instead not to test and treat Charla's tachycardia.

As support for his argument, the plaintiff cites *Wecker v. Amend*, 22 Kan. App. 2d 498, 918 P.2d 658, *rev. denied* 260 Kan. 1002 (1996). In *Wecker*, the physician defendant performed laser surgery to remove a possible precancerous body in the patient's cervix. As a result of the surgery, the patient suffered excessive bleeding, which ultimately led to a hysterectomy, further surgeries, and injections. The patient sued, alleging that the physician violated the applicable standard of care by treating the condition, which she and her experts claimed should not have been treated. At trial, the district court issued a best judgment instruction at the defendant's request. On appeal, this court held that this instruction was not warranted by the facts of the case because there was no issue as to whether the physician properly selected between two or more courses of treatment; instead, the evidence showed that only one treatment—the laser surgery—was ever considered. Because the instruction was not supported by the evidence, this court reversed and remanded the case for a new trial. 22 Kan. App. 2d at 504-05.

Relying on *Wecker*, the plaintiff asserts the best judgment instruction was not warranted by the facts of this case because, as in *Wecker*, there was no issue as to whether the physician properly selected between two or more courses of treatment. In support of this assertion, the plaintiff argues there is no evidence in the record to establish

that the defendant considered any course of treatment after becoming aware of Charla's tachycardia.

Both the plaintiff and the defendant presented expert testimony at trial on this issue. The plaintiff's experts claimed that that the defendant violated the standard of care by not administering an EKG to determine the type of tachycardia Charla was experiencing, which in turn would have provided the defendant with sufficient facts to determine the proper course of treatment to lower Charla's heart rate. The defendant's experts, on the other hand, did not believe that an EKG was necessary in this particular case in order to distinguish between different types of tachycardia because a reasonable emergency room doctor would have been able to summarily conclude from the presenting symptoms—without EKG testing—that Charla's tachycardia was sinus related and not heart related. They testified that the appropriate treatment for sinus tachycardia is not to directly treat the high heart rate itself but instead to treat its underlying cause. Consistent with the testimony of his experts, the defendant testified that by continuing to treat Charla's underlying condition, he was treating her tachycardia.

As the expert testimony referenced above demonstrates, there is a fundamental disconnect between the parties' arguments related to the propriety of Instruction No. 12 under the facts presented. On the one hand, the plaintiff frames the question presented as whether there existed more than one recognized *course of treatment to resolve the tachycardia*. On the other hand, the defendant frames the question as whether there existed more than one recognized *diagnoses for the cause of the tachycardia* (sinus tachycardia as opposed to cardio tachycardia), which in turn dictated the proper course of treatment. The instruction provided to the jury on this issue generally framed the question as whether "there exists more than one recognized approach to an issue of treatment." Since the definitive or ultimate diagnosis is one upon which a medical treatment program is based, we conclude the instruction as provided was broad enough to encompass the

existence of one or more recognized diagnoses for the cause of the tachycardia, which in this case was sinus tachycardia as opposed to cardio tachycardia.

Notably, our conclusion in this regard is consistent with the Kansas Supreme Court's decision in *Foster*, 296 Kan. at 313-14. One of the plaintiff's claims in *Foster* was that the defendant violated the standard of care by recommending the plaintiff monitor her nerve damage after surgery instead of recommending she have surgery to repair the nerve damage. The defendant doctor responded that immediate surgery would not have been appropriate and that a wait and see approach was better. The Supreme Court found the doctor's decision in this regard created a sufficient dispute regarding course of treatment to justify a jury instruction based upon PIK Civ. 4th 123.11. See 296 Kan. at 308-14. The present case involves a similar controversy. The plaintiff claims that the defendant was required to conduct further testing to determine the cause of Charla's tachycardia once it developed. Conversely, the defendant contends he diagnosed the spike in heart rate as sinus tachycardia caused by the breathing treatment, a diagnosis upon which he determined the proper course of treatment would be continued treatment of the underlying pneumonia in order to resolve the tachycardia over time.

Based on the discussion above, we find sufficient evidence in the record supports the district court's decision to instruct the jury on alternate approaches to an issue of treatment as specifically set forth in Instruction No. 15.

a. *Instruction No. 8*

In order to establish a claim of medical malpractice, a plaintiff must show: (1) The health care provider owed the patient a duty of care, which required that provider to meet or exceed a certain standard of care to protect the patient from injury; (2) the provider breached that duty or deviated from the applicable standard of care; (3) the patient was injured; and (4) the injury proximately resulted from the health care provider's breach of

the standard of care. *Miller v. Johnson*, 295 Kan. 636, Syl. ¶ 15, 289 P.3d 1098 (2012). Consistent with these elements, the district court instructed the jury, in relevant part, as follows:

> "Instruction No. 8
>
> "You must decide in this case if the Defendant is at fault. In doing so, you will need to know the meaning of the terms 'negligence' and 'fault'.
>
> "Negligence is the lack of reasonable care. It is the failure of a person to do something that a reasonable person would do, or is doing something that a reasonable person would not do, under the same circumstances.
>
> "A party is at fault when he or she is negligent and that negligence caused or contributed to the event which brought about the claims for damages."
>
> "Instruction No. 9
>
> "A Physician has a duty to use the learning and skill ordinarily used by other members of that same field of medicine in the same or similar communities and circumstances. In using this learning and skill, the Physician must also use ordinary care and diligence. A violation of this duty is negligence."

The language used in Instruction No. 8 was taken from PIK Civ. 4th 105.01, titled "Comparative Fault Theory and Effect." The PIK Civ. 4th 105.01 Notes on Use provide that "[t]his instruction should be used in every comparative fault case." The language in Instruction No. 9 was taken from PIK Civ. 4th 123.01, which sets forth the duty of a healthcare provider.

At the jury instruction conference, the district court expressed its intent to issue Instruction No. 8, a modified version of PIK Civ. 4th 105.01. The district court judge readily acknowledged that this was not a comparative fault case but explained that he felt it was necessary to use the language from the comparative fault instruction in order to define the term "fault" for the jury. The judge said he "took the standard language about negligence and fault, because even though this is a comparative fault [instruction], we

have issues of negligence. There are allegations of negligence; and also there is the issue of fault. That is how I came up with what we have." The plaintiff objected to this instruction on grounds that it was not a comparative fault case, requesting instead that a modified instruction on issues and burdens of proof, PIK Civ. 4th 106.01, be given. The district court overruled the plaintiff's objection and issued Instruction No. 8 as set forth above.

On appeal, the plaintiff challenges Instruction No. 8 as incompatible with Instruction No. 9 in defining negligence and fault for the jury. Under the first step of our analytical framework for jury instruction issues, we address the reviewability of this issue. Contrary to the plaintiff's assertion in his brief, the record reflects that he did not raise this specific argument in challenging Instruction No. 8 below. Rather, he merely objected on grounds that this was not a comparative fault case. A party must object to the trial court's giving of or failing to give a jury instruction before the jury retires. K.S.A. 2015 Supp. 60-251(c). The party must state clearly what matter is objectionable and give the legal grounds for the objection. When a party raises new grounds challenging an instruction not similar to the objections raised at trial, the issue is treated as a failure to object to the instruction and the clear error analysis applies. See K.S.A. 2015 Supp. 60-251(d)(2); *State v. Cameron*, 300 Kan. 384, 388, 329 P.3d 1158, *cert. denied* 135 S. Ct. 728 (2014). Because the plaintiff did not previously raise the argument he now asserts on appeal, we limit our review to a determination of whether the instruction was clearly erroneous under K.S.A. 2015 Supp. 60-251(d)(2).

A two-step process is used to determine whether the challenged jury instruction was clearly erroneous. First, we must determine whether there was any error at all by considering whether the subject instruction was legally and factually appropriate, employing an unlimited review of the entire record. Then if we find error, we must decide whether we are firmly convinced that the jury would have reached a different verdict had the instruction error not occurred. The party claiming error in the instruction

has the burden to prove the degree of prejudice necessary for reversal. See *State v. Smyser*, 297 Kan. 199, 204, 299 P.3d 309 (2013). A decision regarding clear error must be made based on a review of the erroneous instruction in light of the entire record as a whole, including the other instructions, counsel's arguments, and whether the evidence is overwhelming. See *In re Care & Treatment of Thomas*, 301 Kan. 841, 849, 348 P.3d 576 (2015).

The claim of error alleged by the plaintiff here is that the instructions defining negligence and fault were confusing and misled the jury. Instruction No. 8 defined the term "negligence" as the failure of a person to do something that a reasonable person would or would not do under the same circumstances. Instruction No. 9 defined the term "negligence" as the lack of ordinary care and diligence used by other physicians in that same field of medicine in the same or similar communities and circumstances. Noting that the term "fault" was only defined in Instruction No. 8 ("A party is at fault when he or she is negligent"), the plaintiff argues the jury was permitted to decide whether the defendant was negligent based on the lower "reasonable person" standard set forth in Instruction No. 8 rather than the heightened professional standard set forth in Instruction No. 9.

The concept of fault consists of two components, negligence and causation. In a case like this, negligence is the failure of a physician to use the learning and skill ordinarily used by other physicians. The PIK Committee recommends that the negligence component in a case like this be submitted to the jury pursuant to PIK Civ. 4th 123.01, which defines negligence as a health care provider's violation of his or her duty to use the learning and skill ordinarily used by other providers in that field of medicine in the same or similar communities and circumstances. This instruction was given here as Instruction No. 9.

The PIK Committee recommends that the causation component in a case like this be submitted to the jury pursuant to PIK Civ. 4th 106.01, which is the pattern instruction setting forth the plaintiff's issues and burden of proof. It is in this instruction that the jury is informed that it can find a defendant to be at fault if it finds that the defendant was negligent and that the plaintiff was injured or damaged due to the defendant's negligence. PIK Civ. 4th 106.01 ("The plaintiff claims [that (he) (she) was injured due to the defendant's *fault* in the following respects: (Set forth concisely the specific grounds of *negligence* that are supported by the evidence.)]" [Emphasis added.]). The PIK Committee, in its Notes on Use, recommends that PIK Civ. 4th 106.01 as written be given in every negligence case. This instruction was given here as Instruction No. 14.

Based on the discussion above, the pattern instructions defining negligence of a health care provider (Instruction No. 9), causation (Instruction No. 14), and fault (Instruction No. 14) were all provided to the jury as required. Thus, the question becomes whether providing concurrent definitions of negligence, causation, and fault based on the pattern comparative fault instruction was error and, if so, whether that error requires reversal under the clear error standard. For the reasons stated below, however, we are not firmly convinced that the jury would have reached a different verdict even if providing the instruction at issue constituted error; thus, we find it unnecessary to consider the legal or factual propriety of Instruction No. 8 as given to the jury.

The plaintiff argues that the jury could have been misled by Instruction No. 8 because it defined fault as a violation of a lesser degree of negligence than is required in a medical malpractice case. The plaintiff claims that by defining fault only in Instruction No. 8 and not in Instruction No. 9, the jury was permitted to evaluate the defendant's actions under a lesser, reasonable person standard rather than a heightened professional standard. Based on our review of the record as a whole, however, we are not firmly convinced that the jury would have reached a different verdict if the district court had not issued Instruction No. 8. Most importantly, Instruction No. 8 was not the only instruction

to define fault. As noted above, Instruction No. 14, which set forth the plaintiff's claims and burden of proof, specifically alleged the defendant was at fault for eight stated violations of his professional duty as a physician and that the plaintiff was injured as a result.

Moreover, both instructions defining negligence were correct statements of the law. Instruction No. 8 could be viewed as providing general definitions of negligence and fault, immediately followed by Instruction No. 9, which explained how these general principles applied to a medical malpractice case. And significantly, the jury also was provided with Instruction No. 11:

> "In determining whether a Physician used the learning, skill, and conduct required, you are not permitted to arbitrarily set a standard of your own or determine this question from your personal knowledge. On questions of medical or scientific nature concerning the standard of care of a Physician, only those qualified as experts are permitted to testify. The standard of care is established by members of the same profession in the same or similar communities under like circumstances. It follows, therefore, that the only way you may properly find that standard is through evidence presented by Physician expert witness[es]."

Given Instruction No. 11, Instruction No. 8 would have had little, if any, determinative impact on the jury's view of the evidence because the ultimate determination involved a question of deviation from the applicable standard of care. The evidence in that respect did not appear to be overwhelming on either side; rather, it turned on the credibility of the expert witnesses. The jury heard expert testimony from both parties as to whether the defendant's actions violated the applicable standard of care. The jury was then specifically instructed in Instruction No. 11 that in deciding whether the defendant had met the applicable standard of care, it was required to rely only upon the testimony of experts. During closing argument, counsel on both sides reiterated that the issue to be decided was whether the defendant met the applicable standard of care, based

on expert testimony. There was never any suggestion that any lesser standard should be used in making this determination. In sum, there is no indication in the record that the jury would have returned a different verdict if Instruction No. 8 had not been given. Thus, the plaintiff is not entitled to reversal on this basis.

2. *Motion in limine*

The plaintiff argues that the district court erred in granting the defendant's pretrial motion in limine, which prohibited the plaintiff's witnesses and counsel from using any derivative of the word "safe" or the phrase "needlessly endangering a patient" during trial. The plaintiff claims the court improperly ruled that these concepts were irrelevant in medical malpractice cases. The plaintiff also alleges that the district court's ruling prevented him from fully presenting evidence on the applicable standard of care and why the defendant's actions violated that standard, which are questions of fact to be determined by the jury.

> "A district court's decision on a motion in limine involves a two-prong test. To grant the motion, the court must determine that (1) the material or evidence in question will be inadmissible at trial; and (2) a pretrial ruling is justified, as opposed to a ruling during trial, because (a) the mere offer or mention of the evidence during trial may cause unfair prejudice, confuse the issues, or mislead the jury; (b) the consideration of the issue during trial might unduly interrupt and delay the trial; or (c) a ruling in advance of trial may limit issues and save the parties time, effort, and cost in trial preparation. [Citation omitted.]" *Schlaikjer v. Kaplan*, 296 Kan. 456, 467, 293 P.3d 155 (2013).

Appellate review of a district court's decision concerning a motion in limine traditionally is limited to determining whether judicial discretion had been abused. However, when a motion in limine involves the admission or exclusion of evidence, as it is here, our review of the district court's exercise of discretion necessarily must be framed by our multistep

standard of review regarding the admissibility of evidence. See *State v. Shadden*, 290 Kan. 803, 815-18, 235 P.3d 436 (2010).

A motion in limine is a request for the district court to make an evidentiary ruling in advance of trial as to the admissibility of anticipated testimony or proposed exhibits to be offered at trial. See 290 Kan. at 815-16. Here, the defendant requested a pretrial order in limine prohibiting the plaintiff from referencing, both during the presentation of evidence and closing argument, a physician's duty to "not needlessly endanger a patient," a duty to choose the "safest" option in caring for a patient, and whether it would have been "safer" for the defendant to have taken certain actions in treating Charla. The defendant's request was based on a concern that the plaintiff would utilize the "reptile litigation strategy" at trial, an alleged fear-based strategy that attempts to convince a jury that a defendant's unsafe and dangerous conduct could represent not just a danger to the plaintiff, but to the community as a whole. The defendant claimed that use of the above phrases would mislead the jury by misstating the standard of care and creating a new legal standard. In response, the plaintiff argued that such a limitation would prevent his experts from fully explaining the applicable standard of care, which included various components related to patient safety and not needlessly endangering a patient. After considering the arguments presented by counsel, the district court judge granted the motion in limine, ruling that plaintiff's counsel should instruct witnesses not to respond to questioning with any derivative of the word "safe" or the phrase "needlessly endangering a patient." In support of its ruling, the court reasoned that these terms were "inconsistent with the law in Kansas as to a doctor's duty." But the court gave the plaintiff latitude to request that the issue be revisited at any point during trial within the context of specific testimony.

This issue came up on two occasions at trial. The first was when Dr. Kaiser, one of the plaintiff's experts, testified about the function of an emergency room physician. Dr. Kaiser testified that one of the main responsibilities of emergency room doctors is to

determine the patient's disposition, *i.e.*, to make sure that the patient gets to the right place. He stated that disposition is important in order "to assure patient safety" and that patient safety is the reason "overlying" an emergency room physician's responsibilities. Defense counsel objected that Dr. Kaiser's repeated use of the word safety constituted a violation of the order in limine. Plaintiff's counsel responded that he had advised Dr. Kaiser not to use the word safety and believed that the doctor's use of the word was unintentional. At this point, plaintiff's counsel then reiterated to the court his concern that the order in limine was too restrictive, arguing that safety was a relevant component of the standard of care because the core of the plaintiff's case was that the failure to provide certain diagnoses and treatment endangers a patient's safety. The district court declined to change its ruling and advised Dr. Kaiser not to use the word safety again.

The issue came up again just prior to closing argument when plaintiff's counsel moved for reconsideration of the order in limine. In support of the motion to reconsider, plaintiff's counsel argued that precluding him from using the word safety in his remarks would severely restrict his closing argument. Counsel stated that he did not intend to make a "golden rule" argument or otherwise misstate the standard of care, but he simply wanted to explain to the jury the reasons behind the standard of care. The district court denied the plaintiff's motion to reconsider, reasoning that it would be easy for the jury to interpret counsel's statements as a golden rule argument and noting that there were other descriptive words counsel could use to make the same point.

An order granting a motion in limine is a temporary protective order that is subject to change during the trial. *State v. Breedlove*, 295 Kan. 481, 494, 286 P.3d 1123 (2012). Error may not be predicated on the decision of the trial court in granting such a motion unless a proffer of the evidence in question is made during trial on a motion to reconsider. *Brunett v. Albrecht*, 248 Kan. 634, 640, 810 P.2d 276 (1991); see *State v. Evans*, 275 Kan. 95, 99, 62 P.3d 220 (2003) ("When a motion in limine has been granted, the party being limited by the motion has the responsibility of proffering sufficient

evidence to the trial court in order to preserve the issue for appeal."). K.S.A. 60-405 governs the proffer issue and provides:

> "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless it appears of record that the proponent of the evidence either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions indicating the desired answers."

The purpose of a proffer is to (1) ensure the trial court is advised of the evidence at issue and the nature of the parties' arguments and (2) provide an adequate record for appellate review. *In re Acquisition of Property by Eminent Domain*, 299 Kan. 37, 41, 320 P.3d 955 (2014). When a party fails to provide a sufficient proffer of the substance of the evidence, appellate review is precluded because the appellate court lacks a basis to consider whether the trial court abused its discretion in excluding the evidence. *State v. Hudgins*, 301 Kan. 629, 651, 346 P.3d 1062 (2015). No formal proffer is required, however, if an adequate record is made in a manner that discloses the evidence sought to be introduced. Answers to discovery, the parties' arguments, or in-court dialogue may satisfy K.S.A. 60-405 depending on the circumstances. *In re Acquisition of Property*, 299 Kan. at 42. "The standard for a satisfactory proffer is whether the proffer contains the *substance* of the excluded testimony." *Marshall v. Mayflower Transit, Inc.*, 249 Kan. 620, 623, 822 P.2d 591 (1991).

With respect to the plaintiff's first request for reconsideration of the district court's order in limine ruling, it is questionable whether the plaintiff made a satisfactory proffer of the evidence that was in danger of being excluded by the order in limine. In opposing the motion in limine, plaintiff's counsel argued generally that it would prevent his experts from fully explaining to the jury what the applicable standard of care was and why it was important. Although the district court ultimately granted the motion, it ruled that the plaintiff could revisit the issue during trial by asking the court to reconsider its ruling

within the context of certain testimony. When plaintiff's counsel asked the court to reconsider the issue during Dr. Kaiser's testimony, counsel asserted that discussion of the word safety was important to demonstrate why a proper diagnosis and treatment should have been provided to Charla. Counsel did not make his request in connection with any specific witness testimony that made use of the prohibited words or phrases necessary. Without a sufficient proffer, this issue was not preserved for appeal. See *Evergreen Recycle v. Indiana Lumbermens Mut. Ins. Co.*, 51 Kan. App. 2d 459, 509-10, 350 P.3d 1091 (2015).

The plaintiff maintains that he complied with the proffer requirement while also attempting to reframe the issue into a question of law that this court may review even in the absence of a sufficient proffer. Specifically, the plaintiff claims that he is challenging the district court's legal determination that "'patient safety' and 'needlessly endangering the patient' are wholly *irrelevant* in a medical malpractice case." But to accept the plaintiff's argument would require this court to find that as long as a party frames the argument on appeal to be a challenge to the district court's interpretation of the legal principle that resulted in the grant of the motion in limine, the party is not required to make a proffer of the evidence or argument it seeks to introduce. Such an argument would render the requirement of a proffer meaningless.

Even if this issue was properly preserved for review, however, we would not be persuaded by the plaintiff's argument. Specifically, the argument he makes mischaracterizes the nature of the district court's ruling and confuses two interrelated concepts—a physician's duty of care and a physician's standard of care. Some explanation of these concepts is necessary, as the record reflects that the parties and the district court often referred to them interchangeably. The duty of care owed by all physicians, regardless of the particular medical specialty in which a physician practices, is to exercise reasonable and ordinary care and diligence. This duty is legally defined. But the particular decisions and acts required to satisfy that duty of care vary, *i.e.*, the required

skill depends on the patient's situation and the physician's medical specialty, if applicable. What constitutes negligence in a particular situation is judged by the professional standards of the particular area of medicine involved. *Durflinger v. Artiles*, 234 Kan. 484, 490, 673 P.2d 86 (1983), *disapproved on other grounds by Boulanger v. Pol*, 258 Kan. 289, 900 P.2d 823 (1995). In medical malpractice cases, expert testimony is required to show a deviation from the standard of care if the subject matter falls outside the common, everyday knowledge of the average juror. *Dawson v. Prager*, 276 Kan. 373, 375, 76 P.3d 1036 (2003); see *Nold v. Binyon*, 272 Kan. 87, 103, 31 P.3d 274 (2001) (standard of care in a given case "is not a rule of law, but a matter to be established by the testimony of competent medical experts"). In this case, the jury was properly instructed on a physician's legal duty of care in Instruction No. 9. The jury also was properly instructed in Instruction No. 11 that it must rely on expert testimony in determining whether the defendant had deviated from the applicable standard of care.

In opposition to the defendant's motion in limine, plaintiff's counsel argued that granting the motion would prevent his experts from fully explaining concepts related to the standard of care. The court did not, as alleged by the plaintiff, ultimately grant the order in limine because the concepts of patient safety and needlessly endangering the patient are irrelevant in medical malpractice cases. Rather, the court reasoned that use of these terms was inconsistent with a physician's legally defined duty of care, *i.e.*, the exercise of ordinary care and diligence does not necessarily require the safest option. As previously stated, appellate review of the district court's ruling on a motion in limine is framed by our multistep standard of review regarding the admissibility of evidence. See *Shadden*, 290 Kan. at 815-18. Although the concepts of patient safety and needlessly endangering the patient are arguably relevant in medical malpractice cases, it cannot be said that the district court abused its discretion in determining that the probative value of this evidence was outweighed by the potential that it could mislead the jury with respect to a physician's legal duty of care. See *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106 (judicial action constitutes abuse of

discretion if action is [1] arbitrary, fanciful, or unreasonable; [2] based on error of law; or [3] based on error of fact), *cert. denied* 134 S. Ct. 162 (2013). Assuming that the district court properly excluded the evidence from trial, then the court was also correct to prohibit plaintiff's counsel from discussing this same evidence during closing argument. See *State v. King*, 288 Kan. 333, 351, 204 P.3d 585 (2009) (attorney may not refer to facts not disclosed by evidence during closing argument).

In any event, the plaintiff cannot show that he was prejudiced by the order in limine because the record reflects that he was clearly able to convey to the jury his belief that the defendant's actions were unsafe. The plaintiff presented testimony from expert witnesses who testified extensively as to the applicable standard of care, how the defendant allegedly breached the standard of care, and how those alleged breaches placed Charla in danger and led to her death. These experts also testified about the serious issues, including death, that could result from tachycardia and testified in detail as to all the actions the defendant could have taken that would have saved Charla's life. Notably, the jury also heard Dr. Kaiser's testimony indicating that patient safety was paramount to an emergency room physician, and this testimony was not stricken from the record following the defendant's objection. And during closing argument, plaintiff's counsel emphasized the expert witness testimony. He discussed the actions that the defendant should have taken, but stated the defendant instead chose to "guess," "assume," "speculate," and "gamble," which resulted in Charla's death. Counsel also argued that the defendant's actions and choices were dangerous and stressed the importance of doctors making a differential diagnosis in order to rule certain conditions in or out because "[y]ou don't want somebody to die because you didn't do a simple test." Counsel further stated that the defendant's failure to order an EKG was dangerous and violated the standard of care. Even without the ability to use the word safe or the phrase needlessly endangering the patient throughout trial, the testimony and argument outlined above makes clear that the plaintiff was able to convey to the jury his belief that the defendant's actions were unsafe.

For all these reasons, we conclude the district court did not err in granting the defendant's motion in limine.

Affirmed.