SUPREME COURT OF KENTUCKY
CASE NO. 2022-SC-0302-D
(2021-CA-0115)

SAINT ELIZABETH MEDICAL CENTER, INC., D/B/A ST. ELIZABETH FLORENCE — **APPELLANT**

V.

APPEAL FROM BOONE CIRCUIT COURT, DIVISION III
HON. JAMES R. SCHRAND, II, JUDGE
ACTION NO. 16-CI-01672

RONALD N. ARNSPERGER, JR. — **APPELLEE**

BRIEF OF APPELLANT, SAINT ELIZABETH MEDICAL CENTER, INC., D/B/A ST. ELIZABETH FLORENCE

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to RAP 14 and RAP 31(F)(2), the unbound, untabbed original and nine bound, tabbed copies of this brief were served by hand delivery on the 9th day of February, 2023, upon the Hon. Kelly Stephens, Clerk of the Supreme Court of Kentucky, State Capitol, Room 209, 700 Capital Ave., Frankfort, KY 40601. Pursuant to RAP 31(C)(1)(b), a copy of this brief was also served by First Class U.S. Mail, postage prepaid, on the 9th day of February, 2023, to the following: Hon. Kate Morgan, Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. James R. Schrand, II, Judge, Boone Circuit Court, Boone County Justice Center, 6025 Rogers Lane, Room 141, Burlington, Kentucky 41005; Hon. Shane C. Sidebottom, ZIEGLER & SCHNEIDER, PSC, 541 Buttermilk Pike, Suite 500, P.O. Box 175710, Covington, KY 41017; and Hon. Justin A. Sanders, RITTGERS AND RITTGERS, 3734 Eastern Avenue, Cincinnati, OH 45226.

Ellen M. Houston (KBA #89192)

INTRODUCTION

This case involves an alleged re-injury to the surgically-repaired ankle of Appellee, Ronald N. Arnsperger, Jr. ("Arnsperger"). Arnsperger, who had already been diagnosed with a chronic pain condition in the left ankle, underwent ankle surgery in which the surgeon planned to saw through the ankle (an intentional fracture called an "osteotomy"), repair the underlying damage, and then reconnect the ankle bone (referred to as "fixation") with two surgical screws. But, after a drill bit exploded and destroyed a portion of the ankle bone, the surgeon was only able to place one screw. No x-rays were taken immediately post-operative, so four days later, Arnsperger presented to Saint Elizabeth Medical Center, Inc., d/b/a St. Elizabeth Florence ("St. Elizabeth"), for the x-rays needed to determine whether his ankle had been properly aligned and fixated with a single screw.

Arnsperger alleges that before the x-rays were taken, a hospital greeter negligently pushed his wheelchair and caused contact between his left foot and a desk, which thereby re-injured his ankle and required a revision. However, neither of Arnsperger's experts could support this causation theory, and a defense expert opined that the "somewhat laterally displaced" osteotomy seen on the x-ray was simply the best fixation the surgeon could accomplish in light of the surgical complications that occurred four days earlier. St. Elizabeth was granted summary judgment for lack of expert testimony on causation, but the Court of Appeals found that Arnsperger's claim did not require expert testimony at all.

STATEMENT CONCERNING ORAL ARGUMENT

The Court's Rulings from December 15, 2022, indicated that discretionary review with oral argument had been granted. St. Elizabeth agrees oral argument will assist the Court in deciding the questions presented and appreciates the opportunity to be heard.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Prior to the events in issue, which occurred in December of 2015, Arnsperger was a forty-two-year-old baseball umpire with an extensive medical history. For instance, he had undergone twenty-four surgeries on his back, knee, and ankles (among others) as a result of two serious motor vehicle accidents, and he had been treating with a pain management physician, Robert Klickovich, M.D. ("Dr. Klickovich"), for chronic pain issues since 2011. (**Appendix 5**, Excerpts of Dr. Klickovich Dep., p. 79:10 – 80:3; *id.*, p. 77:13 – 78:1)[1] On May 28, 2015, Dr. Klickovich diagnosed Arnsperger with Complex Regional Pain Syndrome ("CRPS") in the left ankle. (*Id.*, p. 143:23 – 145:4) CRPS is a chronic nerve hypersensitivity characterized by exaggerated pain response and pain in response to soft touch. (*Id.*, p. 37:9 – 37:14) Patients with CRPS can experience severe pain in response to even light contact. (*Id.*, p. 47:17 – 47:22)

In August of 2015, Arnsperger re-injured his left ankle while umpiring. (**Appendix 6**, Excerpts of Arnsperger Dep., p. 107:22 – 108:5) As a result, he presented to Bilal Shamsi, D.P.M. ("Dr. Shamsi"), a non-party podiatrist, complaining of constant pain in his left ankle. (**Appendix 7**, Note dated 11/24/15) Arnsperger indicated to Dr. Shamsi that he desired complete surgical repair of his left ankle. (*Id.*)

A. Arnsperger's Ankle Surgery on December 14, 2015

On December 14, Arnsperger underwent ankle surgery with Dr. Shamsi for several conditions, including an osteochondral defect (*i.e.*, damage to the cartilage in the ankle).

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[1] The discovery deposition transcripts are contained within four folders of the certified record on appeal. Deposition excerpts cited herein are included in the Appendix.

(**Appendix 8**, Operative Note, p. SEH005862, highlighting added) Dr. Shamsi performed, among other procedures, a medial malleolar takedown and open reduction internal fixation of the medial malleolus (*i.e.,* the bony prominence on the inner side of the ankle). (*Id.*)

Dr. Shamsi's surgical plan was to create an osteotomy—*i.e.*, to intentionally fracture the medial malleolus by sawing into it, in order to repair the underlying damage—and then align and fixate the osteotomy with two surgical screws. (**Appendix 9**, Excerpts of Dr. Shamsi Dep., p. 96:1 – 96:14; *id.*, p. 76:17 – 76:25) However, Dr. Shamsi encountered a significant complication as he was drilling a pilot hole through Arnsperger's ankle bone, in order to place a screw: "the drill bit broke and destroyed the distal-most aspect of the area that we were drilling[,] and multiple shards were seen." (App. 8, Operative Note, p. SEH005864, highlighting added) The larger, visible shards of the broken metal drill bit were removed from Arnsperger's ankle, but two shards remained behind. (*Id.*, p. SEH005863, highlighting added) Dr. Shamsi then encountered a second complication as a result of the destruction of the distal-most aspect of the bone: he was unable to place a second screw as planned, because "[t]here was not enough real estate at the distal most aspect of the medial malleolus to fixate with two cannulated screws." (*Id.*, p. SEH005865, highlighting added; *see also* App. 9, Dr. Shamsi Dep., p. 76:17 – 76:25)

Following the December 14th surgery, Dr. Shamsi was hopeful that it had been successful, but no postoperative x-rays were taken to confirm radiographically that the osteotomy had been successfully aligned and fixated with the single screw. Further, Dr. Shamsi documented in his Operative Note that Arnsperger was "well aware that he may require further surgery given his arthritic changes and the significant osteochondral defect that was encountered." (App. 8, Operative Note, p. SEH005866, highlighting added)

B. The Gross Examination and Order for X-rays on December 17, 2015

Three days after surgery, Arnsperger presented to Dr. Shamsi for a follow-up visit. Dr. Shamsi performed a gross examination of Arnsperger's left ankle (*i.e.*, he examined it with the naked eye). Based upon the gross examination alone, Dr. Shamsi did not see anything concerning or problematic, and Dr. Shamsi did not see a reason why Arnsperger would need another ankle surgery. (*See* App. 9, Dr. Shamsi Dep., p. 27:20 – 28:7)

Importantly, however, Dr. Shamsi ordered x-rays to ensure "everything is where it's supposed to be" from a radiographic perspective. (*Id.*, p. 26:10 – 26:14) Satisfactory x-rays could not be obtained at Dr. Shamsi's office, so Arnsperger was instructed to obtain x-rays at St. Elizabeth that same day. (*Id.*, p. 26:19 – 27:12; *id.*, p. 87:20 – 88:10) But, Arnsperger did not obtain the x-rays on December 17 as instructed by Dr. Shamsi, therefore the osteotomy site and the positioning of the screw placed on December 14 were not adequately visualized by x-ray on December 17.

C. The Alleged Bump into the Desk on December 18, 2015

On December 18, a voicemail was left to remind Arnsperger to obtain the x-rays, since Dr. Shamsi (per his deposition) wanted to ensure "everything looks, you know, as it should." (App. 9, Dr. Shamsi Dep., p. 90:1 – 90:20) According to the medical record, Arnsperger called back complaining of "severe" and "unbearable" pain and asking for a prescription.[2] (**Appendix 10**, Call Documentation, highlighting added) An assistant made arrangements for pain medication, at which time Dr. Shamsi asked her to "tactfully remind [the] patient that it is very important for him to get the x-rays done today!" (*Id.*)

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[2] This complaint demonstrates that Arnsperger was in severe pain before the alleged incident in this case. (*See* App. 9, Dr. Shamsi Dep., p. 90:21 – 91:10)

Later on December 18, Arnsperger presented to St. Elizabeth for the left ankle x-rays ordered by Dr. Shamsi. Security cameras captured Arnsperger being pushed in a wheelchair by a hospital greeter, with his extended left foot protected by a hard splint. (**Appendix 11**, Security Video Footage, at 00:57)[3] A pillar makes it impossible to determine if Arnsperger's foot actually made contact with a desk as he alleges. (*See id.* at 1:40 – 1:46) However, the video demonstrates that Arnsperger's wheelchair was not being pushed at an "alarming speed" as alleged in a post-incident letter sent to St. Elizabeth's Risk Management Department. (*See* App. 6, Arnsperger Dep., p. 147:17 – 148:9) The video also demonstrates there was no forceful "ramming" as alleged in Arnsperger's Complaint; **if** there was contact with a desk, it was only a slight bump.

D. The First Diagnostic X-rays Show a "Somewhat Laterally Displaced" Osteotomy

Following the alleged incident, Arnsperger obtained the first diagnostic x-rays since his complicated surgery on December 14. The x-ray report stated that the osteotomy appeared "somewhat laterally displaced." (**Appendix 12**, Aff. of Dr. Mihir Patel, ¶ 5)[4]

Dr. Shamsi was not on-site at St. Elizabeth on December 18, so Arnsperger was seen by one of Dr. Shamsi's partners. However, Dr. Shamsi was able to review the x-rays from his location and speak to Arnsperger over the phone. During the phone call, Dr. Shamsi informed Arnsperger that based upon the x-rays, which were the first diagnostic x-rays taken since the December 14th surgery, a revision surgery was needed. (App. 9, Dr. Shamsi Dep., p. 38:1 – 38:4)

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[3] Citations to the video footage are references to the progress of the four-minute video file.

[4] Dr. Mihir Patel is an orthopedic surgery expert disclosed by St. Elizabeth.

On December 24, Dr. Shamsi performed a revision surgery to remove the surgical screw and insert a plate in order to fixate Arnsperger's ankle. (*Id.*, p. 43:1 – 43:10) Dr. Shamsi also removed an additional shard of broken drill bit. (*Id.*, p. 43:14 – 43:17)

II. PROCEDURAL HISTORY

Arnsperger filed suit against St. Elizabeth on December 15, 2016, claiming vicarious liability for the hospital greeter's allegedly negligent pushing of the wheelchair. Arnsperger alleged the "ramming" of his foot into the desk (1) caused a displaced fracture of the ankle; (2) dislodged the surgical screw placed during the December 14th surgery; and (3) necessitated the revision surgery on December 24. (TR Vol. I, p. 5, ¶¶ 18 – 19)

St. Elizabeth produced the security video footage during discovery. To a lay juror, Arnsperger's theory that the slight bump (if any) was capable of fracturing an ankle and dislodging a screw likely strains credulity, even before considering how complicated the surgery was four days prior. Perhaps in recognition of how lay jurors would be unable to make a finding on causation without expert testimony, Arnsperger disclosed his treating surgeon, Dr. Shamsi, and his treating pain management physician, Dr. Klickovich, as experts who would (apparently) offer testimony on causation. (TR Vol. II, p. 130 – 131)

A. The Deposition of Dr. Shamsi

In his expert disclosure, Arnsperger alluded to Dr. Shamsi providing expert opinions regarding "the injury Plaintiff suffered as a result of being rammed into the St. Elizabeth registration desk on December 18, 2015." (TR Vol. II, p. 130) Arnsperger's counsel noticed the deposition of Dr. Shamsi and conducted a direct examination (albeit often with improper leading questions that assumed facts not in evidence) on January 28, 2019. Despite having every opportunity to elicit whatever expert opinions Dr. Shamsi held,

Arnsperger's counsel did not elicit testimony that the alleged bump into the desk on December 18 caused any of the injuries claimed in the Complaint.

First, with regard to Arnsperger's claim that the alleged bump fractured his ankle, Dr. Shamsi explained that he purposely created an ankle fracture (*i.e.*, the osteotomy) during the December 14th surgery. (App. 9, Dr. Shamsi Dep., 96:1 – 96:10) In other words, the fracture pre-dated December 18; it could not have been caused by the bump.

Second, with regard to Arnsperger's claim that the alleged bump "dislodged the surgical screw," Dr. Shamsi testified on direct examination that he had "no opinion" on this claim, because to offer such a causation opinion would require speculation on his part:

> Q. Ron's claim in this case, and what this case is all about is he claims that the surgical site was reinjured or displaced by being run into the desk by the greeter. Are you aware of any other facts that would explain the damage done to the surgical site besides what Ron said happened?
>
> MS. HOUSTON: Objection.[5]
>
> A. I -- I don't have an opinion.
>
> Q. So you're not aware of any other facts that would explain the disturbance to the surgical site?
>
> MS. HOUSTON: Objection.[6]
>
> Q. Am I correct about that?
>
> A. Yeah. I, I don't -- I don't have any other opinions on it. I mean, I would be speculating.

(App. 9, Dr. Shamsi Dep., p. 29:15 – 30:3)

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[5] The question assumed a fact not in evidence—namely, that there was "damage done to the surgical site" on December 18 or otherwise. Dr. Shamsi had not testified to that.

[6] This question also improperly assumed, without a foundation in Dr. Shamsi's previous testimony, that there was a "disturbance to the surgical site."

Dr. Shamsi clarified on cross-examination that he considered this issue with the screw to be "hardware failure"—not "damage done to the surgical site" or a "disturbance to the surgical site" as Arnsperger's counsel attempted to characterize it. He also confirmed he would not be offering any expert opinions about what caused the hardware to fail:

> Q. And you describe what happened in this case as a hardware failure and I just want the record to be clear, you're not going to be coming to trial and telling the jury your opinion on the cause of the hardware failure, correct?
>
> A. Correct.

(App. 9, Dr. Shamsi Dep., p. 79:22 – 80:2)

Finally, Dr. Shamsi was asked directly by Arnsperger's counsel about whether the alleged bump on December 18 necessitated the revision surgery on December 24. Dr. Shamsi explicitly testified he had no opinion on that claim either:

> Q. So considering that the day before on the 17th when you saw Ron, you didn't see any need for a second surgery, and here we are on the 18th, one day later, you're scheduling a revision, is it safe to conclude that the traumatic injury that Ron suffered on December 18th to the surgical site is what caused the second surgery to be required?
>
> MS. HOUSTON: Objection. Form, foundation.
>
> A. I have no opinion on that.

(*Id.*, p. 38:15 – 38:23) On cross-examination, Dr. Shamsi confirmed he was unable to opine on whether the revision surgery was necessitated by an acute injury on December 18, because to do so would require speculation:

> Q. And if I understood your testimony earlier, you're not going to be providing an opinion as to what injury, if any, that Ron suffered either on the 17th or the 18th [of December], if that caused him to need the second surgery correct?
>
> A. Correct.

Q. Because as you said in your words, that would be speculation on your part; correct?

A. Correct.

MR. SANDERS: Object to the form.

(App. 9, Dr. Shamsi Dep., p. 72:9 – 72:17)

Dr. Shamsi's inability to opine on causation without speculating was understandable, given that Arnsperger's counsel elected not to show Dr. Shamsi the video footage, and thus Dr. Shamsi had no knowledge of the nature of the impact with the desk, if any. (*Id.*, p. 93:25 – 94:12) Dr. Shamsi was also not even aware he had been disclosed as an expert; he saw Arnsperger's expert disclosure (which contained putative expert opinions from Dr. Shamsi) for the first time during his deposition. (*Id.*, p. 71:11 – 72:8)

B. The Trial Court's First Summary Judgment Ruling

On May 31, 2019, St. Elizabeth moved for summary judgment on the grounds that Arnsperger's case required expert testimony to prove causation, which Arnsperger had failed to elicit from Dr. Shamsi. (TR Envelope I) In support of its Motion, St. Elizabeth submitted, *inter alia*, an affidavit from its orthopedic surgeon expert, Dr. Mihir Patel, whom Arnsperger had elected not to depose. Dr. Patel had reviewed all of Arnsperger's medical records, the depositions, the radiology films (including the pivotal ankle x-ray from December 18), and the security video footage of the alleged incident (which Dr. Shamsi had not been shown by Arnsperger's counsel). (App. 12, Dr. Patel Aff., ¶¶ 3-6)

Based upon his review of the entire body of evidence, and particularly his interpretation of the December 18th x-ray, Dr. Patel opined that the "somewhat laterally displaced" appearance of the osteotomy was minimal, and thus it was likely the best fixation Dr. Shamsi could accomplish with a single screw in light of the pre-existing

condition of the ankle and the destruction of a portion of the bone by the exploding drill bit. (*Id.*, ¶ 7) In other words, the osteotomy was not properly fixated with a single screw on December 14 and then displaced on December 18. Rather, Arnsperger "most likely emerged from his [December 14th] surgery with the minimally displaced osteotomy described in the December 18th x-ray report." (*Id.*, ¶ 7) It was this suboptimal fixation (not an alleged bump into a desk) that required surgical revision. (*Id.*, ¶¶ 9-10)

Arnsperger opposed the motion by arguing his claim did not require a causation expert, but he disclosed Drs. Shamsi and Klickovich anyway.[7] (TR Volume II, p. 118 – 140) Arnsperger failed to bring forth any expert testimony to rebut Dr. Patel's opinion that the December 18th x-ray only demonstrated a suboptimal fixation from four days earlier—not an acute injury or re-injury to the ankle on December 18.

On July 25, 2019, the trial court denied St. Elizabeth's Motion. Although the court agreed that expert testimony on causation was necessary, it could not (yet) find a failure to provide the necessary testimony, apparently because Dr. Klickovich had not been deposed:

> The Court agrees that expert testimony might not be necessary in certain negligence cases, when the common knowledge or experience of a lay person allows them to infer a causal connection between the alleged negligence and the injury. *See Jarboe v. Harting,* 397 S.W. 2d 775 (Ky. 1965). The Court finds that this "laymen's exception" does not apply here. However, as the Plaintiff has disclosed two expert witnesses, one of which has not been deposed, the Court cannot find at this time that the Plaintiff has failed to provide medical testimony that his injury was caused by the alleged conduct of the Defendant's employee.

(**Appendix 2**, Order dated 7/26/19, p. 3)

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[7] With regard to Dr. Klickovich, Arnsperger's disclosure alluded to an "injury suffered as a result of being rammed into the ... registration desk," but it did not affirmatively state that Dr. Klickovich would establish causation between the alleged bump into the desk and any of Arnsperger's claimed injuries. (TR Vol. II, p. 131)

C. The Trial Court's Second Summary Judgment Ruling

Trial was initially scheduled for December 2, 2019.[8] On October 21, 2019, St. Elizabeth renewed its Motion for Summary Judgment because Arnsperger had not brought forth any causation evidence from Dr. Klickovich. (TR Vol. II, p. 183–194) On November 1, Arnsperger filed a witness list stating Dr. Klickovich would "provide expert opinions establishing a causal connection between Mr. Arnsperger's impact with the registration desk ... and his claimed injury[.]" (TR Vol. II, p. 202) On November 7, Arnsperger filed a summary judgment response representing Dr. Klickovich would opine "that the collision between Ron's foot and the registration desk, more likely than not, caused the re-injury to Ron's fragile, operated-on ankle, dislodged the surgical screw, and caused Ron to suffer serious, continuing medical issues, including but not limited to [CRPS] in his left ankle and foot." (TR Envelope I, p. 20) St. Elizabeth promptly moved to preclude Dr. Klickovich from offering these undisclosed causation opinions. (TR Vol. II, p. 208 – 213)

At the hearing on both motions, the trial court rejected Arnsperger's attempt to revisit the previous ruling about needing a causation expert. The Court stated:

> You keep trying to make the argument you don't need the expert, but just because somebody says they get hurt ... under any kind of accident ... that doesn't mean that's what caused it. I mean, ... they could have had pre-existing [conditions], they could have been treating, and you wouldn't know that. ... That's why we have medical experts. So, I think that's clearly what we need[.]"

(VR 11/12/19 at 2:09:22 – 2:09:45)[9]

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[8] Upon motion by Arnsperger, the trial was continued to September of 2020. (TR Vol. II, p. 160 – 162; *and* TR Vol. III, p. 264) Trial was continued a second time to February of 2021, due to the pandemic. (*See* TR Vol. III, p. 326 – 328; *and* TR Vol. III, p. 350)

[9] The video record is contained in a folder marked "CD's."

However, the trial court denied the Renewed Motion for Summary Judgment, apparently because it appeared Dr. Klickovich would be providing the necessary causation evidence. (**Appendix 3**, Order dated 11/25/19, p. 4) Still, in recognition of how Dr. Klickovich's supposed opinions exceeded Arnsperger's expert disclosure, the trial court ruled that Dr. Klickovich's testimony would be "limited to his own treatment of the Plaintiff and the specific opinions enumerated in the Plaintiff's 26.02 disclosures." (*Id.*)

D. The Deposition of Dr. Klickovich

On August 10, 2020, St. Elizabeth deposed Dr. Klickovich. Like Dr. Shamsi, Dr. Klickovich was also unaware that he had been disclosed as an expert witness, and he entered the deposition believing he would not be providing expert testimony beyond his own treatment. (App. 5, Dr. Klickovich Dep., p. 8:2 – 8:11) Also like Dr. Shamsi, Dr. Klickovich could not offer the causation opinions Arnsperger claimed he held.

First, with regard to Arnsperger's representation that Dr. Klickovich would causally link the alleged bump on December 18 to an ankle "re-injury," Dr. Klickovich testified that he did not even know if Arnsperger re-injured his ankle at all on December 18, 2015:

> Q. But you don't know if, in fact, his ankle was re-injured on December 18, do you?
>
> A. No, I do not.

(App. 5, Dr. Klickovich Dep., p. 204:22 – 204:24) This concession was understandable, given that he had never even reviewed the December 18th x-ray which, according to Arnsperger, demonstrates the so-called "re-injury" to his ankle. (*Id.*, p. 77:9 – 77:12)

Next, with regard to Arnsperger's representation that Dr. Klickovich would testify that the alleged bump "dislodged the surgical screw" and caused the osteotomy site to shift, Dr. Klickovich testified he was not even aware an osteotomy was created during the

December 14th surgery, and he was otherwise not familiar with that surgery. (App. 5, Dr. Klickovich Dep., p. 32:13 – 33:5; *id.*, p. 155:23 – 156:6) Dr. Klickovich was also unaware that Dr. Shamsi was only able to fixate Arnsperger's ankle with a single screw, when he had planned on using two. (*Id.*, p. 162:20 – 162:23) Dr. Klickovich further testified that it would be outside the scope of his practice to even give an opinion on the question of whether an alleged bump into the desk dislodged the screw and caused the osteotomy site to shift. (*Id.*, p. 35:5 – 35:12)

As a result of his unfamiliarity with Arnsperger's osteotomy and single-screw fixation, Dr. Klickovich ultimately testified he would **not** opine the alleged bump caused Arnsperger's hardware to shift; would **not** opine the alleged bump caused Arnsperger's osteotomy to displace; and would **not** opine the alleged bump required the revision surgery:

> Q. Okay. So you are not going to be coming into court, if you're asked to, and tell the Jury that Mr. Arnsperger's contact with the wall caused his hardware to shift, correct?
>
> A. Correct.
>
> Q. You are also not going to come into court and tell the Jury that Mr. Arnsperger's contact with the wall caused his osteotomy to displace; is that correct?
>
> A. Correct.
>
> Q. And you are not going to tell the Jury about cause, if any, of his osteotomy shift and displaced hardware, correct?
>
> A. Correct.
>
> *****
>
> Q. And you're not going to tell the Jury any opinion as to what necessitated the second surgery, correct?
>
> A. Correct.

(*Id.*, p. 163:22 – 164:11; *id.*, p. 177:5 – 177:8)

Next, as to the diagnosis of CRPS that, according to Arnsperger's summary judgment response, Dr. Klickovich would causally link to the alleged bump on December 18, 2015, Dr. Klickovich confirmed that he had diagnosed Arnsperger with CRPS **months before** the alleged incident (*i.e.,* in May of 2015), due to chronic ankle pain. (*Id.*, p. 143:23 – 145:4; *id.,* p. 157:19 – 157:23) Therefore, the alleged bump did not cause CRPS. (*Id.*, p. 201:12 – 201:16) And, Dr. Klickovich testified he would **not** be opining that the alleged bump on December 18 exacerbated Arnsperger's pre-existing CRPS either:

> Q. ... You're not going to tell the Jury that but for the contact with the desk Mr. Arnsperger would have never exacerbated his complex regional pain syndrome, true?
>
> A. True.

(*Id.*, p. 218:2 – 218:5) In short, when questioned under oath, Dr. Klickovich negated every causation opinion Arnsperger claimed Dr. Klickovich would be providing at trial.

E. The Trial Court Grants Summary Judgment to St. Elizabeth

As the parties were approaching the February 2021 trial date, St. Elizabeth filed a Second Renewed Motion for Summary Judgment on November 9, 2020. (TR Vol. IV, p. 462 – 478) While the motion was pending, Arnsperger made it known that he intended to read portions of Dr. Shamsi's deposition testimony into evidence at trial, rather than call him live as a witness.[10] Thus, by the time the Second Renewed Motion was heard on December 8, 2020, the trial court had before it the **precise** testimony from Dr. Shamsi that would have been presented to the jury at trial. In addition, at the December 8th hearing,

[10] In his final witness list, Arnsperger stated he may elect to read portions of Dr. Shamsi's deposition into evidence pursuant to CR 32.01(c)(vi), and if he elected to do so, he would designate those portions of the deposition he intended to read at trial. (TR Vol. III, p. 358) Arnsperger later confirmed it was his intention to proceed in this manner when he designated portions of Dr. Shamsi's discovery deposition. (*See* TR Vol. IV, p. 479)

Arnsperger's counsel effectively abandoned any attempt to rely upon Dr. Klickovich to survive summary judgment.[11]

On December 21, 2020, the trial court granted St. Elizabeth's Second Renewed Motion for Summary Judgment. The trial court found that Arnsperger's experts, Dr. Shamsi and Dr. Klickovich, failed to demonstrate a triable issue of fact on causation:

> Dr. Shamsi and Dr. Klickovich do not opine or testify that Plaintiff's injury was probably caused by the contact caused by Defendant's employee, but merely that it was a possibility. That is not sufficient to meet his burden of causation and Defendant is entitled to summary judgment.

(**Appendix 4**, Order dated 12/21/20, p. 4) Arnsperger's claims were dismissed. (*Id.*)

F. Reversal by the Court of Appeals

In his brief to the Court of Appeals, Arnsperger's first claim of error was an effort to oversimply the issue of causation by, among the things, ignoring the expert testimony from Dr. Patel that the "somewhat laterally displaced" osteotomy was present on December 14 and was not evidence of a re-injury on December 18. Arnsperger's second claim of error asked the Court of Appeals to discard Kentucky's "reasonable medical probability" standard for causation in favor of a "possibility" standard. Arnsperger advanced a third claim, which was relegated to the final two pages of his brief, that it was error to require expert testimony to prove causation.

On June 24, 2022, the Court of Appeals issued an Opinion Reversing. (**Appendix 1**, Opinion dated 6/24/22) The Opinion acknowledged Dr. Shamsi's testimony that he had "no opinion" on causation (*id.*, p. 3), and it did not reference Dr. Klickovich's testimony at

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[11] Arnsperger's counsel stated: "Obviously we would agree that Dr. Klickovich's testimony was not ... where we thought it would be[.]" (VR 12/08/20 at 09:55:25 – 09:55:34) Counsel also stated: "Dr. Klickovich, obviously, he didn't want to give an opinion because he, he didn't ... you know, I'm not sure what happened there." (*Id.* at 09:57:48 – 09:57:57)

all. However, seizing on Arnsperger's tertiary claim of error, the Court of Appeals held that no expert testimony on causation was needed, because Arnsperger was "not claiming his injury resulted from medical staff performing a medical procedure." (*Id.*, p. 9)

On July 22, 2022, St. Elizabeth filed a Motion for Discretionary Review. This Court accepted discretionary review with oral argument on December 14, 2022.

ARGUMENT

I. The Court of Appeals erred by reversing the trial court's first ruling that Arnsperger was required to present expert testimony to prove causation.

The Court of Appeals erroneously concluded that Arnsperger was not required to present expert testimony to establish causation simply because the hospital greeter is not a medical professional and the alleged negligence did not involve a medical procedure. This conclusion ignores controlling Kentucky law, which requires expert testimony, even in ordinary negligence cases, unless causation is "so apparent" to lay jurors with "common knowledge." Alternatively, to the extent the Court of Appeals applied the common knowledge exception (which is not clear), the Opinion improperly expanded the exception in a way that swallows the general rule entirely. The Court of Appeals should be reversed.

A. Even in ordinary negligence cases, expert evidence of causation is necessary unless causation is so apparent that lay jurors with common knowledge would have no difficulty recognizing it.

The seminal case establishing the rule on expert causation testimony is *Jarboe v. Harting*, 397 S.W.2d 775 (Ky. 1965), which held as follows:

> There may, of course, be situations in which causation is so apparent that laymen with a general knowledge would have no difficulty recognizing it. But excepting those situations, we have adhered to the rule that the causal connection between an accident and an injury must be shown by medical testimony and the testimony must be that the causation is probable and not merely possible.

Id. at 778. By its own terms, the *Jarboe* rule (and exception when causation is "so apparent" to lay jurors using common knowledge) applies not just to medical malpractice cases, but also cases of ordinary negligence. This was confirmed in *Tatham v. Palmer*, 439 S.W.2d 938 (Ky. 1969), a vehicle collision case in which Kentucky's highest court applied the *Jarboe* rule but found that the common knowledge exception was met.

In *Tatham,* the issue was whether expert testimony was required to establish that new onset headaches were caused by the plaintiff having severely struck his head into the windshield during the collision. *Id.* at 939. Applying the exception to the *Jarboe* rule, Kentucky's then highest Court held that no expert testimony on causation was needed, because it is "common knowledge that a severe blow to the head will cause headaches." *Id.* However, the Court expressly stated that "the conclusion reached in this case **does not mean we are departing from the rule requiring medical evidence to show causation** when the claimed internal or external injuries allegedly resulting from the accident are not within the realm of common knowledge." *Id.* (emphasis added)

Consistent with both *Jarboe* and *Tatham*, the trial court correctly held that Arnsperger's case required expert testimony to demonstrate a genuine issue of material fact on causation, even though the negligence at issue involved pushing a wheelchair. The trial court also correctly found that the layman/common knowledge exception did not apply to this case, likely because of the complexity of Arnsperger's medical history and the nature of his claimed injuries. (App. 2, p. 3; *see also* App. 4, p. 3: "[t]he Court found *Jarboe* applicable to Plaintiff's case when it found ... that proof [of causation] by medical testimony ... is necessary").

The Court of Appeals, however, took a very different approach to the question of whether Arnsperger's case required expert testimony to establish causation. The Court of Appeals began its analysis by stating it was "important to note" that "ordinary negligence can be established without expert testimony." (App. 1, Opinion, p. 6) (quoting *Chamis v. Ashland Hosp. Corp.*, 532 S.W.3d 652, 656 (Ky. App. 2017)). Then, the Court of Appeals reasoned that the trial court's reliance on *Jarboe* was "misplaced," because the underlying negligence in *Jarboe* was an "errant medical procedure" by a physician, rather than the pushing of a wheelchair by a hospital greeter. (*Id.*, p. 7 – 8) Harkening back to a statement in *Chamis* regarding when *res ipsa loquitur* exempts the requirement of expert testimony on **standard of care** (not causation), the Court of Appeals then erroneously concluded that no expert proof of causation was needed because Respondent "is not claiming his injury resulted from **medical staff** performing a **medical procedure**." (App. 1, Opinion, p. 8 – 9) (emphasis added) By beginning and ending with *Chamis*, the Court of Appeals made clear that in its view, *Chamis* provides the rule on when expert causation evidence is necessary, and the rule is that such testimony is not necessary when "simple" negligence is committed by a non-medical person performing a non-medical task.

The Court of Appeals' focus on the nature of the negligence and the identity of the tortfeasor (rather than whether causation is "so apparent" to lay jurors) is fundamentally inconsistent with controlling law for several reasons. First, *Jarboe* requires expert testimony to establish causation "between an accident and an injury." *Jarboe*, 397 S.W.2d at 778. As stated above, the plain terms of the general rule recognized in *Jarboe* do not limit the rule to medical accidents occurring at the hands of medical staff.

Second, the Court of Appeals ignored *Kelly Contracting Co. v. Robinson*, 377 S.W.2d 892 (Ky. 1964), a pre-*Jarboe* case cited by the trial court. (*See* App. 4, p. 3). *Kelly Contracting* applied the general rule requiring expert causation testimony in a case where the causation issue was whether physical exertion at work—not a medical procedure performed by a medical professional—caused a fatal coronary occlusion. *Id.* at 894. As the former Court of Appeals explained in that case:

> In the absence of medical testimony that the physical stress of Robinson's work did or probably did cause, contribute to or precipitate his coronary occlusion, a court cannot find it so without assuming an expert medical proficiency of its own. ... [T]he relationship between physical activity and coronary occlusion is not so clearly established that we could take judicial notice that if a man has an occlusion while he is engaged in manual labor, or immediately afterward, the exertion is probably a causative factor. **That must come from the mouth of a qualified member of the medical profession before it can be found as a fact in a court of law.**

Id. (emphasis added)

Third, despite attempting to draw a flawed analogy to a vehicle collision case, the Court of Appeals completely ignored *Tatham*—a vehicle collision case which expressly states that the Court's application of the common knowledge exception did not mean the Court was departing from the general rule requiring expert causation testimony **in any case** where "the claimed internal or external injuries allegedly resulting from the accident are not within the realm of common knowledge." *Tatham*, 439 S.W.2d at 939. Instead, the Court of Appeals' Opinion inexplicably cited *Young v. J.B. Hunt Transportation, Inc.*, 781 S.W.2d 503 (Ky. 1989), where the issue was whether the trial court properly excluded medical records the defendants had tried to pile into the record "in mass without ... any physician available to explain the records." *Id.* at 508 – 509. Lack of a causation expert was not at issue in *Young*, thus it does not support the Court of Appeals' statement that

Arnsperger's claim is viable because "[l]ack of a medical expert in *Young* did not keep the case from proceeding to trial on the issue of liability."[12] (*See* App. 1, Opinion, p. 9)

Finally, the error in the Court of Appeals' analysis is confirmed by the federal cases included in the appendix, all of which follow *Tatham* and apply the *Jarboe* rule in non-medical negligence cases.[13] (**Appendices 13 – 20**) If *Chamis* and *Young* govern the issue of when a causation expert is needed as the Court of Appeals held, then substantive Kentucky law has been repeatedly misapplied by prominent federal judges in the Eastern District and Western District of Kentucky for many years. This is certainly not the case.

This Court recently explained the importance of the expert witness rule for causation in the context of a medical-fee dispute (another non-medical negligence context):

> [T]he human body is perhaps the most complex system known to humankind, so very little will ever garner unanimous consensus among medical professionals and experts. But this is exactly why **our legal system requires reliable expert proof on issues such as medical causation and the necessity of medical treatment when they would not be apparent to a layperson.** It does so because this is the only way to reasonably ensure that the fact-finder answers those questions reasonably, rather than arbitrarily. Such questions are solely within the province of medical experts who are equipped with the proper education and experience to enable them to provide reliable answers within a reasonable degree of medical probability.

Kingery v. Sumitomo Elec. Wiring, 481 S.W.3d 492, 499-500 (Ky. 2015) (emphasis added).

St. Elizabeth submits that the Court of Appeals' Opinion is a drastic departure from the

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[12] If anything, *Young* supports the need for experts to explain medical issues like causation to the jury, because the holding in *Young* was that admitting medical records in mass without an expert explaining the records to the jury would cause distortion, confusion, or misunderstanding of the evidence. *Young*, 781 S.W.2d at 508 – 509.

[13] The well-regarded federal judges who applied *Jarboe* and *Tatham* in the attached non-medical negligence cases are Amul Thapar (who now serves on the Sixth Circuit), David Bunning, Gregory Van Tatenhove, Henry Wilhoit, Jr., David Hale, and Thomas Russell.

rule requiring expert proof of causation. If the Court of Appeals' analysis stands, lay juries will be forced to arbitrarily speculate on complex issues of medical causation in any case involving non-medical negligence, including cases based on vehicle collisions, slip and falls, and products liability. This Court should confirm that under the controlling authority of *Jarboe* and *Tatham*, the issue of whether expert evidence of causation is needed depends on the medical complexity of the causation element—not the nature of the alleged negligence or the identity of the tortfeasor.

B. The common knowledge exception cannot apply to this case.

By discarding *Jarboe* because it involved an "errant medical procedure," the Court of Appeals apparently created a *per se* rule against requiring expert testimony to establish causation in "simple" negligence cases. However, one statement in the Opinion could be viewed as an attempt to apply the common knowledge exception: "[e]xpert medical testimony is not needed to explain to a jury the possibility of the ... [cause-and-effect] relationship" between a "wheelchair driver's collision and the patient's exacerbation of an ankle injury." (App. 1, Opinion, p. 8) To the extent this reflects a finding that the common knowledge exception applies to Arnsperger's case, it is clearly erroneous for four reasons.

1. As a matter of law, the causal relationship between the alleged bump into the desk and Arnsperger's claimed injuries cannot be understood by lay jurors using only common knowledge.

Kentucky highest Court has applied the common knowledge exception only once, because it is "common knowledge that a severe blow to the head will cause headaches." *Tatham*, 439 S.W.2d at 939. As illustrated by the Court's opinion in *Tatham*, as well as several Kentucky federal court opinions, the common knowledge exception requires consideration of the nature of each claimed injury, the generally understood causes of the

same, and whether there are any other potential explanations for how/why the injury may have occurred, such as a condition or injury that pre-dates the event. (*E.g.*, App. 20, *Chancellor v. Church & Dwight Co.*, at *6: "application of the layman's exception is seldom allowed when there are additional potential causes for the claimed injury.")

For instance, in the eight federal cases included in the appendix, the only injuries found to be within the common knowledge exception were hand burns. And, those burns were suffered by plaintiffs who did not have a pre-existing burn injury, and who experienced an event that even lay jurors know can cause a burn. (App. 16, *Roark v. Speedway*, at *4: "Nothing in the record suggests that Roark previously suffered a burn[.] ... The causal relationship between an electrical shock and a burn is certainly within the realm of common knowledge;" App. 17, *Hopkins v. Speedway*, at *8: "[I]t is within the realm of common knowledge that a hot liquid will cause a burn to the skin.")

On the other hand, more complicated claimed injuries, particularly those that implicate pre-existing conditions and prior treatment, are routinely found to require expert testimony. For instance, the *Hopkins* case involved a slip and fall right after the plaintiff had poured himself a cup of coffee. The Western District of Kentucky found that a hand burn resulting from the coffee fit within the common knowledge exception, but the claimed aggravation of a pre-existing shoulder injury (which had been surgically repaired a month prior to the fall) required expert testimony to prove causation. According to the Court:

> Unlike the burn injury, the extent and cause of Hopkins' shoulder surgery are not apparent given his extensive history of right shoulder pain and a very recent and complex surgery. Courts have found the layman's exception inapplicable and have required expert medical testimony in situations where the plaintiff, like Hopkins, suffered from a pre-existing injury.

(App. 17, *Hopkins v. Speedway*, at *9) The Court granted summary judgment as to the claimed shoulder injury for failure to present expert causation testimony. (*Id.*, at *14)

Similarly, in *Harris v. Lowes Home Ctrs.*, 2021 U.S. Dist. LEXIS 67531 (E.D. Ky. Apr. 7, 2021), another slip and fall case, the Eastern District of Kentucky found that the plaintiff's alleged knee and ankle injuries did not qualify for the common knowledge exception, "[g]iven the complexity of her pre-existing knee and ankle issues." (App. 19, *Harris v. Lowes*, at *14) According to the Court:

> Ms. Harris' history of knee and ankle issues require[s] expert testimony to determine what, if any, of her ongoing injuries were caused or aggravated by the fall at Lowe's.

(*Id.* at *16) The plaintiff's failure to bring forth the necessary expert testimony resulted in summary judgment. (*Id.*)

In this case, Arnsperger likewise had an extensive history of ankle problems before the alleged bump on December 18. These problems included past ankle surgeries from multiple car accidents (App. 5, Dr. Klickovich Dep., p. 79:10 – 80:9); a diagnosis of Complex Regional Pain Syndrome in the left ankle due to chronic ankle pain (*id.*, p. 144:23 – 145:4); and a complex surgery (*i.e.*, a medial malleolar takedown and open reduction internal fixation of the medial malleolus) that included an extraordinary complication in the form of an exploding drill bit. For these reasons, it is not as if Arnsperger presented to St. Elizabeth on December 18 with a healthy ankle, only to leave the hospital with an injured ankle. The causation element of this case is far more complicated than that.

With this context, the trial court correctly found that Arnsperger's claimed injuries (*i.e.*, a fractured ankle, a dislodged surgical screw, and a revision surgery) were complex and required expert causation testimony. Arnsperger's claimed injuries are more analogous

to the alleged knee and ankle injuries in *Harris* and the alleged post-operative shoulder injury in *Hopkins*, versus new hand burns (as in *Hopkins* and *Roark*) or new onset headaches (as in *Tatham*). The Court of Appeals simply ignored the complexity of the claimed injuries and Arnsperger's pre-existing medical conditions to find that no expert testimony was needed at all. On its face, this finding is clearly erroneous.

2. The Court of Appeals also improperly assumed, without an expert evidentiary basis, that the "somewhat laterally displaced" osteotomy was a new injury or re-injury rather than a suboptimal fixation of the ankle.

A threshold question is whether Arnsperger suffered any sort of harm that could even theoretically be linked to the alleged bump into the desk on December 18. On this issue, the Court of Appeals improperly assumed that Arnsperger either suffered a "new injury" (as alluded to on page 3 of the Opinion), a "re-injury" (as alluded to on page 4), or at least the "exacerbation" of an old injury (as alluded to on page 8). In making this assumption, it appears the Court of Appeals relied primarily on the fact that Dr. Shamsi determined Arnsperger needed a revision after reviewing the x-rays on December 18.

However, none of the experts testified to a reasonable degree of medical probability that the "somewhat laterally displaced" osteotomy described in the December 18th x-ray report represented a new injury, a re-injury, or an exacerbated injury that was suffered on December 18. Actually, the clearest testimony on this issue came from St. Elizabeth's orthopedic surgeon, Dr. Patel, who opined that the "somewhat laterally displaced" osteotomy was simply reflective of a suboptimal fixation from Arnsperger's surgery four days earlier. (App. 12, Dr. Patel Aff., ¶ 7) In other words, there was no new injury or re-injury; the reason Arnsperger needed a second surgery was to "correct the suboptimal fixation that occurred during the first [*i.e.*, December 14th] surgery[.]" (*Id.*, ¶¶ 9-10)

Dr. Patel's testimony that the "somewhat laterally displaced" osteotomy was **not an acute injury** brings Arnsperger's claim within the class of cases in which there is an "additional potential cause for the claimed injury," and in which "application of the layman's exception is seldom allowed." (*See* App. 20, *Chancellor v. Church & Dwight Co.*, at *6) Furthermore, the trial court did not grant summary judgment until more than a year and a half after Dr. Patel provided this expert opinion, and yet at no point did Arnsperger come forward with expert testimony to refute it. This is further reason to find that the common knowledge exception cannot apply. (*See* App. 17, *Hopkins v. Speedway*, at *12) (rejecting application of the common knowledge exception to a claimed shoulder injury where the plaintiff provided no expert testimony to refute a defense expert's opinion that the fall, which was captured on video, did not cause any shoulder injury).[14]

The Court of Appeals also appears to cite Arnsperger's expression of pain as justification for its conclusion (without expert evidence) that Arnsperger's ankle was injured in some capacity on December 18. (*See* App. 1, Opinion, p. 3) However, this ignores Arnsperger's history of chronic pain in his left ankle (CRPS), which Dr. Klickovich testified can cause severe pain in response to even light contact or touch. (App. 5, Dr. Klickovich Dep., p. 47:17 – 47:22) Actually, Arnsperger was suffering from CRPS in the

[14] The Court of Appeals misconstrued Dr. Patel's affidavit by claiming it was St. Elizabeth's position that "Arnsperger re-injured his ankle elsewhere than at the registration desk." (App. 1, Opinion, p. 4) St. Elizabeth's position has always been that there was no acute injury on December 18—just a suboptimal surgery on December 14. The Court of Appeals was apparently referring to an **alternative** causation opinion in Dr. Patel's affidavit: *i.e.*, assuming *arguendo* that the single screw had successfully fixated the ankle on December 14, which Dr. Patel did not believe happened, then the slight impact shown in the video was not even medically capable of causing a "somewhat laterally displaced" osteotomy to an ankle protected by a hard splint. (App. 12, Dr. Patel Aff., ¶ 8) This alternative opinion is relevant because it further illustrates how a lay jury cannot watch the video and make a reliable finding on causation, but it was not an admission of a re-injury.

left ankle **before** Dr. Shamsi sawed through Arnsperger's ankle, drilled a pilot hole for a screw, and was unable to remove all of the metal shards when the drill bit exploded. In addition, Arnsperger was complaining of "severe" and "unbearable" pain and asking for pain medication hours **before** he presented to the hospital on December 18.[15] (App. 9, Dr. Shamsi Dep., p. 90:21 – 91:10) In this context, the Court of Appeals erroneously assumed (without expert assistance) that because Arnsperger reported pain after the alleged incident, the "somewhat laterally displaced" osteotomy was possibly caused by the alleged bump.

In 1964, Kentucky's highest court warned that a court of law cannot "assum[e] an expert medical proficiency of its own" by making medical findings in the absence of expert testimony. *Kelly Contracting Co. v. Robinson*, 377 S.W.2d 892, 894 (Ky. 1964). That is precisely what the Court of Appeals did by finding that Arnsperger's "somewhat laterally displaced" osteotomy represented a "new" or "exacerbated" injury. And, this improper finding was the foundation upon which the Court of Appeals apparently held that the common knowledge exception excuses Arnsperger's obligation to prove his injuries with expert testimony. Neither the improper medical finding nor the holding can stand.

3. Where one expert is not qualified to opine on causation and another expert cannot form an opinion without speculating, a lay jury cannot base a finding on common knowledge alone.

The common knowledge exception to the *Jarboe* rule also requires consideration of the expert testimony on causation, which the Court of Appeals ignored. After all, experts

[15] Arnsperger's pre-existing CRPS, coupled with the complicated December 14th surgery, may explain why Arnsperger was already reporting "severe" and "unbearable" pain before coming to St. Elizabeth on December 18, as Dr. Klickovich opined that Arnsperger's CRPS could have been exacerbated by the December 14th surgery alone. (App. 5, Dr. Klickovich Dep., p. 202:13 – 202:23) Or, as Arnsperger would tell Dr. Shamsi later on December 18, the severe pain could have been because he "bumped his splint yesterday," *i.e.*, on December 17. (App. 9, Dr. Shamsi Dep., p. 30:4 – 30:21)

inherently possess more than common knowledge, so if experts cannot form an opinion on causation, then neither can a lay jury. (*E.g.*, App. 15, *McFerrin v. Allstate*, at 936: "Surely, in such circumstances where doctors have been unable to determine causation, a jury of lay people cannot be expected to determine [causation].")

In this case, Arnsperger's own experts defeat any suggestion that a lay jury can make a reliable causation finding with common knowledge. For instance, Dr. Klickovich is a board-certified physician in Interventional Pain, Pain Medicine, and Anesthesiology. (TR Vol. II, p. 131) Dr. Klickovich treated Mr. Arnsperger both before and after the events in issue, and Arnsperger disclosed him as an expert witness in this case. Yet Dr. Klickovich declined to provide an opinion on whether the alleged bump caused the hardware to fail, caused the osteotomy to displace, or was the reason Arnsperger required a revision surgery. (App. 5, Dr. Klickovich Dep., p. 163:22 – 164:11; *id.*, p. 177:5 – 177:8)

But, Dr. Klickovich went further than simply declining to provide opinions on these issues. He actually testified it would be outside the scope of his practice to even form opinions on these issues. (*Id.*, p. 35:5 – 35:12) In other words, by his own admission, even Dr. Klickovich is **not qualified** to make causation findings in this case. If Dr. Klickovich does not possess the knowledge necessary to make a reliable finding on causation, then lay jurors armed only with common knowledge cannot make a reliable finding either. (*See* App. 16, *Roark v. Speedway*, at *7: "Dr. Brackett's concession reveals the complexity of [the] complained-of injuries. If Dr. Brackett—Roark's treating physician and the would-be expert in this case—cannot rule out Roark's prior accidents as the cause of some of his current pain, how could a lay jury do so without an expert's aid?")

As for Dr. Shamsi, who is qualified to testify regarding the causation issues in this case, he testified that he could not support any of Arnsperger's three claimed injuries. Specifically, Dr. Shamsi testified as follows:

(1) Arnsperger's claim that the alleged bump fractured his ankle on December 18 was medically incorrect, because Dr. Shamsi intentionally created an ankle fracture on December 14. (App. 9, Dr. Shamsi Dep., p. 96:1 – 96:10)

(2) Dr. Shamsi had "no opinion" on Arnsperger's claim that the alleged bump caused the hardware from the December 14th surgery (*i.e.*, the single screw) to fail, because he "would be speculating" if he were to offer such an opinion. (*Id.*, p. 29:15 – 30:3; *id.*, p. 79:22 – 80:2)

(3) Dr. Shamsi had "no opinion" on whether the alleged bump necessitated the revision surgery, because to give an opinion would also require speculation. (*Id.*, p. 38:15 – 38:23; *id.*, p. 72:9 – 72:17)

Unlike lay jurors, Dr. Shamsi was familiar with the pre-existing injuries to Arnsperger's ankle, including the most recent re-injury that required the December 14th surgery; he actually performed the December 14th surgery; he evaluated Arnsperger's ankle grossly on December 17 and radiographically on December 18; and he performed the revision surgery on December 24. If Dr. Shamsi cannot form an opinion on causation despite his medical expertise and his extensive personal involvement in Arnsperger's care both before and after the alleged bump into the desk on December 18, then a lay jury cannot make a finding with common knowledge either.

4. Even if a lay jury could reliably find a "possibility" of causation in this case, that would still be insufficient.

The Court of Appeals' statement that expert testimony is not needed to explain "the possibility" of the cause-and-effect relationship in this case demonstrates another fundamental flaw. The Court of Appeals framed the dispositive issue of causation from the wrong standard of possibility, when it is well-established that causation "must be shown

by a reasonable degree of medical probability, rather than mere possibility or speculation." *Ashland Hosp. Corp. v. Lewis*, 581 S.W.3d 572, 576 (Ky. 2019) (emphasis added).[16]

Kentucky's probability standard for causation applies to non-medical negligence cases as well. For instance, in *Kelly Contracting Co. v. Robinson*, 377 S.W.2d 892 (Ky. 1964), the Court reversed an award by the Workmen's Compensation Board because the sole expert witness could only testify that physical exertion at work was a "questionable factor" that could have caused the fatal coronary occlusion, but to opine further "would be speculation." *Id.* at 893. The Court explained why this testimony was insufficient to support the Board's award:

> But there is a significant difference between probability and possibility. A possibility is not enough to support a finding. In our opinion the words "could" and "could have" speak in terms of possibility only, not probability. The excerpt from Dr. Wahle's testimony ... amounts to nothing more than a conjecture of what might have been.

Id. at 894.

Here, the trial court viewed the testimony of Dr. Shamsi and Dr. Klickovich in the light most favorable to Arnsperger and (rather generously) concluded that their testimony supported, at most, a possibility of causation in this case. (App. 4, Order dated 12/21/20, p. 4) But as the trial court correctly found, a possibility is not sufficient to meet Arnsperger's burden of proof. (*Id.*) The Court of Appeals' conclusion that a jury can

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[16] The Court of Appeals' Opinion is comparable to the expansive view of the common knowledge exception that this Court rejected in *Ashland Hospital*. *See Ashland Hospital,* 581 S.W.3d at 576 (reversing the Court of Appeals' holding that no causation expert was needed in a stroke case because "it has become common knowledge that 'time lost is brain lost' as to timely medical intervention"). This Court rejected such a drastic expansion of the exception in medical malpractice cases because it would "virtually eliminate" the need for expert testimony to support causation and violate Kentucky's "long-standing practice" of requiring expert evidence to help the finder-of-fact understand matters of science that are beyond the ordinary experiences and knowledge of typical jurors. *Id.* at 579.

perceive the "possibility" of a cause-and-effect relationship in this case is further reason to reverse its apparent ruling that the common knowledge exception applies. (*See* App. 16, *Roark v. Speedway*, at *5: "If Roark's physicians only say that the shock *could* have caused Roark's seizures, how could the causal relationship be so apparent that lay jurors will have no difficulty in recognizing it?")

For all of these reasons, the trial court correctly found that Arnsperger's case required expert testimony on causation. The Court of Appeals erred by finding otherwise.

II. The trial court (and apparently the Court of Appeals) correctly found that Arnsperger's experts failed to demonstrate a triable issue of fact on causation.

Where, as here, expert testimony is necessary to establish causation as a matter of law, the Court "must next consider whether the expert opinion evidence in this matter was sufficient to raise a genuine issue of material fact" on the causation element. *Ashland Hospital*, 581 S.W.3d at 579. The causation element of Arnsperger's case "must be analyzed under the facts and circumstances of this particular case." *Id.* at 580.

The Court of Appeals' Opinion did not reference Dr. Klickovich's testimony in any respect. And, the Opinion acknowledged Dr. Shamsi's testimony that he had "no opinion" on causation. (App. 1, Opinion, p. 3) Therefore, it appears the Court of Appeals recognized, at least implicitly, that the testimony of Dr. Shamsi and Dr. Klickovich did not move the causation needle for Arnsperger's case.

This was the only conclusion correctly reached by the Court of Appeals. As was the case in *Ashland Hospital*, "when the expert witnesses were asked to consider the specifics of this case, they were unable to state with a reasonable degree of medical probability" that the alleged incident with the wheelchair caused injury to Arnsperger. *See Ashland Hospital*, 581 S.W.3d at 580. Accordingly, the trial court correctly found that

Arnsperger failed to produce the expert testimony necessary to demonstrate a genuine issue of material fact on causation. The Court of Appeals should be reversed, and the trial court's summary judgment in St. Elizabeth's favor should be reinstated.

CONCLUSION

Based upon its Opinion in this case, the Court of Appeals apparently believes lay jurors, using only common knowledge, can interpret the December 18th x-ray and make two separate causation findings: (1) that the "somewhat laterally displaced" osteotomy demonstrates an acute injury or re-injury, and (2) that the new injury/re-injury was caused specifically by the alleged bump captured on (unimpressive) video footage. However, Arnsperger's own experts—who have far more than common knowledge and are at least qualified to interpret x-rays—could not reach these conclusions when questioned under oath. Additionally, St. Elizabeth produced **unrefuted** expert testimony defeating both putative causation findings, in the form of Dr. Patel's primary opinion that the "somewhat laterally displaced" only reflected a suboptimal fixation from the December 14th surgery (not an acute injury), and Dr. Patel's alternative opinion that the bump (if any) seen on video was not even medically capable of displacing an osteotomy (assuming Arnsperger's ankle had been properly aligned and fixated, which neither St. Elizabeth nor Dr. Patel believe happened).

The trial court correctly concluded that Arnsperger's case required expert testimony on causation, and that neither Dr. Shamsi nor Dr. Klickovich provided the testimony needed to demonstrate a genuine issue of material fact. St. Elizabeth respectfully requests that the Court reverse the Court of Appeals and reinstate the summary judgment entered by the learned trial court.

Respectfully submitted,

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