COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NO. 2011-CA-001921

MARILYN ROBBINS, ADMINISTRATRIX FOR THE ESTATE OF GLENN JOHNSON, JR. **PLAINTIFF/APPELLANT**

v.

CSX TRANSPORTATION, INC. **DEFENDANT/APPELLEE**

ON APPEAL FROM THE
GALLATIN CIRCUIT COURT
CIVIL ACTION NO. 08-CI-00280

BRIEF FOR DEFENDANT/APPELLEE, CSX TRANSPORTATION, INC.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by mail on April 26, 2012: The Honorable J.R. Schrand, Gallatin County Court Judge, 100 Main St., Warsaw, KY 41095; James B. Helmer, Jr. and Jennifer L. Lambert, Helmer, Martins, Rice & Popham Co., LPA, co-counsel for appellant Peggy Berry, 600 Vine Street, Suite 2704, Cincinnati, OH 45202; Meredith L. Lawrence, co-counsel for appellant Peggy Berry, 107 East High Street, Warsaw, KY 41095; and Charles J. Davis, Patsfall, Yeager & Pflum, LLC, counsel for appellant Marilyn Robbins, 205 W. Fourth Street, Suite 1280, Cincinnati, OH 45202. The undersigned does further certify that the record on appeal was not withdrawn by the party filing the brief.

Of Counsel:
ANDREW E. TAUBER
SCOTT M. NOVECK
MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006-1101
Telephone: (202) 263-3000
Facsimile: (202) 263-3300
atauber@mayerbrown.com
snoveck@mayerbrown.com

LARRY C. DEENER
ELIZABETH A. DEENER
LANDRUM & SHOUSE LLP
P.O. Box 951
Lexington, KY 40588-0951
Telephone: (859) 255-2424
Facsimile: (859) 233-0308
ldeener@landrumshouse.com
edeener@landrumshouse.com

STATEMENT CONCERNING ORAL ARGUMENT

Although Defendant/Appellee CSX Transportation, Inc. ("CSXT") believes the arguments raised in this appeal lack merit, oral argument might assist the court in understanding the factual record presented in this case. CSXT would therefore welcome the opportunity to address any questions from the Court during oral argument.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

Page(s)

COUNTERSTATEMENT OF POINTS AND AUTHORITIES
(continued)

Page(s)

COUNTERSTATEMENT OF POINTS AND AUTHORITIES
(continued)

Page(s)

COUNTERSTATEMENT OF POINTS AND AUTHORITIES
(continued)

Page(s)

COUNTERSTATEMENT OF THE CASE

This appeal by Marilyn Robbins is a companion to a separate appeal from the same jury verdict by plaintiff Peggy Berry in Case No. 2011-CA-001870. The relevant facts are set forth in greater detail in CSXT's brief in the Berry appeal.[1]

Sometime after December 27, 2007, the car in which the Johnson family was traveling failed to negotiate a sharp right curve on KY 467, drove over a collapsed guardrail, and plunged into Lost Branch Creek. The car was not discovered until January 15, 2008. Subsequent autopsies revealed that all five members of the Johnson family—Glenn Johnson, Jr., Kendra Johnson, and their three children—had drowned.

Many possible causes of the accident have been identified. Many of those causes are attributable to the Kentucky Transportation Cabinet, which was responsible for maintaining the roadway, repairing the guardrail, supplying adequate lighting, and providing appropriate signage. Other possible causes include inattention, distraction, or impairment on the part of the driver. In particular, toxicology tests performed on samples from the bodies of Kendra and Glenn Johnson report that Kendra Johnson had taken a supratherapeutic amount of diphenhydramine, a drug often used as a sleep aid, and Glenn Johnson had cocaine in his bloodstream when the accident occurred.

None of those possible causes can be attributed to CSXT, which was named as the defendant in this wrongful-death action. Nevertheless, plaintiffs speculate that CSXT must somehow be responsible because the accident occurred in an area where KY 467 runs alongside and underneath CSXT's railroad tracks. The jury in this case rejected

[1] Plaintiff Robbins adopts and incorporates by reference all of the arguments raised by plaintiff Berry in her appeal. (*See* Robbins Br. 1.) CSXT rebuts each of those arguments in the brief that it has filed in response to Berry's appeal, and incorporates by reference that rebuttal in this brief.

such speculation, finding that plaintiffs failed to prove that the accident was caused by a failure to exercise ordinary care on the part of CSXT.

Because the jury found that CSXT was not liable in the first instance, it had no occasion to consider whether the Johnsons were comparatively negligent, and therefore had no reason to consider the toxicology reports challenged by Robbins in this appeal. For that reason, admission of the toxicology reports could not possibly call the verdict into question. But even if the verdict were somehow implicated, the trial court's decision to admit the toxicology reports was correct and certainly did not constitute reversible error. Nor was there any error in the trial court's instructions on causation. The judgment should therefore be affirmed.

A. The Accident Scene

On January 15 and 17, 2008, local authorities received reports of a car spotted in Lost Branch Creek. The car was located near a sharp right curve in KY 467, just before the roadway passes over the creek. Yellow paint on the car's left front wheel and marks on the car's underside indicate that the car ran into and over a collapsed guardrail as it drove off the road. (VR 9/15/11 10:16:33-10:17:50; VR 9/19/11 12:33:58-12:34:53; VR 9/20/11 9:30:56-9:31:25.) The location of the guardrail and where the vehicle was found in the creek both indicate that the car continued straight ahead as the road curved sharply to the right, proceeding over the edge of the roadway and into the creek. (VR 9/15/11 3:50:06-3:50:25; VR 9/19/11 3:08:43-3:10:30; VR 9/20/11 9:18:20-9:18:32, 9:31:37-9:32:29, 10:06:03-10:06:10; VR 9/21/11 12:20:30-12:21:44.)

Based on evidence at the scene, CSXT's accident reconstruction expert estimated that the vehicle was traveling approximately 30 miles per hour at the time of the accident. (VR 9/21/11 11:59:18-12:00:50.) Other experts testified that the maximum safe speed

for this curve was no more than 15 to 20 miles per hour. (VR 9/9/11 12:39:00-12:43:40; VR 9/15/11 3:48:54-3:50:06; VR 9/20/11 9:26:46-9:29:00.) At the time of the accident, the only road sign warning drivers about the dangerous curve ahead was a single arrow sign. (VR 9/15/11 2:04:45-2:05:24; VR 9/20/11 9:19:00-9:19:15, 9:40:52-9:41:04.) After the accident, the Kentucky Transportation Cabinet (KTC) installed new signs warning drivers not to exceed a speed of 5 miles per hour through the curve. (VR 9/20/11 9:28:05-9:29:15.)

B. The Toxicology Reports

Autopsies were performed by Dr. Gregory Wanger, a state medical examiner. (CSXT Exs. 66-67.) During the autopsies, Dr. Wanger was able to collect peripheral blood samples from both Glenn and Kendra Johnson, as well as a urine sample from Glenn. (VR 9/16/11 10:48:26-10:54:21; CSXT Exs. 66-69.) The blood and urine samples were sent to a state laboratory for toxicology testing, which was overseen by Tracy Easton. Easton personally performed the blood tests for both Glenn and Kendra Johnson, and she reviewed the urine test performed by one of her colleagues. (VR 9/19/11 10:29:28-10:30:04, 10:37:30-10:37:35.)

Glenn Johnson's blood and urine both tested positive for active levels of cocaine. (VR 9/16/11 10:53:15-10:53:40, 11:01:28-11:01:42; VR 9/19/11 10:22:45-10:28:12, 10:30:43-10:37:35; CSXT Exs. 68, 68A.) His samples also tested positive for cocaine metabolites, which are byproducts produced when the body digests cocaine. (VR 9/16/11 11:01:33-11:02:17; VR 9/19/11 10:30:31-10:33:26; CSXT Ex. 68, 68A.)

Kendra Johnson's blood sample tested positive for diphenhydramine (VR 9/16/11 10:57:49-11:00:46; VR 9/19/11 10:40:08-10:49:58; CSXT Ex.69, 69A), a drug that causes drowsiness and is commonly used as a non-prescription sleep aid (VR 9/16/11

10:59:37-10:59:57; VR 9/19/11 2:20:17-2:21:00, 2:24:52-2:25:51, 2:27:51-2:27:57). Her blood sample also tested positive for diphenhydramine metabolites. (VR 9/16/11 10:58:31-10:59:26; VR 9/19/11 10:41:10-10:49:58; CSXT Ex. 69, 69A.) The level of diphenhydramine in Kendra's blood was "above what's usually considered the therapeutic concentration for diphenhydramine" and "would put most people to sleep." (VR 9/19/11 2:44:40-2:46:08.)

C. Proceedings In The Trial Court

Testimony in this case commenced on September 8, 2011, and lasted eight days. The jury heard from 31 witnesses, including numerous expert witnesses.

At the close of evidence, the jury was instructed to first determine whether CSXT failed to exercise ordinary care and, if so, whether that failure was a substantial factor in causing the accident. (VR 9/21/11 3:56:25-3:59:35; Jury Instr. No. 3, *at* R. 2896-98.) If, but only if, the jury found CSXT partly responsible for the accident, it would have been required to apportion liability among CSXT, Glenn Johnson, Kendra Johnson, and two third-parties. (VR 9/21/11 7:51:06-8:09:25; Jury Instr. Nos. 4-6, *at* R. 2899-909.)

After deliberating just over two hours, the jury found that CSXT was not liable for the accident. (VR 9/21/11 7:51:06-8:09:25; Verdict Form, *at* R. 2898.) Having found that CSXT was not at fault, the jury did not consider the comparative negligence of Glenn and Kendra Johnson or apportionment of fault to the two third-parties.

Although plaintiffs filed no post-trial motions, two appeals ensued: this appeal, filed by plaintiff Marilyn Robbins on behalf of the Estate of Glenn Johnson, and a separate appeal, filed by plaintiff Peggy Berry on behalf of the Estates of Kendra Johnson and the Johnson children, which is before this panel as Case No. 2011-CA-1870.

ARGUMENT

Robbins' appeal is procedurally deficient and without merit. It should, therefore, be denied.

I. Robbins' Brief Should Be Stricken, And Her Appeal Denied, For Failure To Comply With Rule 76.12.

Kentucky Rule of Civil Procedure 76.12 is unambiguous. Each appellate brief must contain a statement of the case "with ample references to the specific pages of the record, or tape and digital counter number in the case of untranscribed videotape or audiotape recordings, or date and time in the case of all other untranscribed electronic recordings, supporting each of the statements narrated in the summary." CR 76.12(4)(c)(iv). Furthermore, each appellate brief must contain an argument "with ample supportive references to the record." CR 76.12(4)(c)(v). But Robbins' brief does not contain ***any***—much less ample—references to the trial record.

Robbins' failure to comply with CR 76.12 has prejudiced CSXT and hindered this Court's review. As this Court has recognized, "[a]dherence" to CR 76.12 "enables opposing counsel to respond in a meaningfully way to the arguments." *Hallis v. Hallis*, 328 S.W.3d 694, 697 (Ky. App. 2010). Here, Robbins' failure to comply with CR 76.12 has prejudiced CSXT, which could not be sure what, if anything, in the record might conceivably support her factual assertions. Her failure to comply with CR 76.12 makes it similarly impossible for this Court to conduct "a meaningful and efficient review," thereby creating a substantial risk that her arguments are not "intellectually and ethically honest" but rely instead "on red herrings and straw-men arguments." *Id.* at 696-97; *see also id.* ("the rules are not only a matter of judicial convenience").

Accordingly, Robbins' brief should be stricken and her appeal denied. *See* CR 76.12(8); *see also, e.g.*, *Hawkins v. Miller*, 301 S.W.3d 507, 508 (Ky. App. 2009) (striking brief for failure to comply with CR 76.12(4)(c)(iv)); *Cherry v. Augustus*, 245 S.W.3d 766, 781 (Ky. App. 2006) (refusing to consider issue raised on appeal where appellant failed to comply with CR 76.12(4)(c)(v)). At the very least, this Court should limit its review to one "for manifest injustice only." *Hallis*, 328 S.W.3d at 696 (citing *Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky. App. 1990)). Because there is no injustice, let alone manifest injustice, Robbins' appeal should be denied.

II. The Trial Court Did Not Commit Reversible Error By Admitting The State Toxicology Reports For Glenn and Kendra Johnson.

Robbins raises a series of objections to the admission of state toxicology reports showing that Glenn Johnson was on cocaine at the time of the accident and that Kendra Johnson had consumed a supratherapeutic amount of diphenhydramine. There is no merit to any of Robbins' objections, and none warrants reversal.

A. The Verdict In This Case Was Independent Of The Toxicology Reports.

As an initial matter, admission of the toxicology report cannot be grounds for reversal because the verdict in this case did not turn on the toxicology results. The jury was instructed not to consider the comparative negligence of Glenn Johnson or Kendra Johnson unless it first found liability on the part of CSXT. (*See* Jury Instrs. at 5, *at* R. 2898 (directing jury to "return to the courtroom" in the event that its "answer to Question No. 1"—the liability question—"is 'no'"); *see also* VR 9/21/11 3:58:40-3:58:56 (same).) Because the jury found that CSXT was ***not*** liable (*see* Verdict Form, *at* R. 2898), it did not reach the question of the Johnson's comparative negligence.

The toxicology reports had no bearing on CSXT's liability, the only issue addressed by the jury. CSXT's liability depended on two questions: whether CSXT had breached its duty of ordinary care and, if so, whether that breach was a substantial factor in the Johnsons' accident. (*See* Jury Instr. No. 3, *at* R. 2896-98.) The toxicology reports were not relevant to, and thus could not have influenced the jury's consideration of, either of those questions. The toxicology reports were relevant only to the issue of whether the Johnsons were contributorily negligent. Because the jury never reached that issue, the admission of the toxicology reports had no conceivable effect on the jury's verdict. Accordingly, even if it were improper, the admission of those reports necessarily was harmless and cannot support reversal. *See* CR 61.01; *see also*, *e.g.*, *St. Luke Hosp., Inc. v. Straub*, 354 S.W.3d 529, 540-41 (Ky. 2011) (evidence of plaintiff's drug use, even if erroneously admitted, was harmless); *Brosnan v. Brosnan*, 359 S.W.3d 480, 485 (Ky. App. 2012) (because the "court did not rely on Lacock's testimony . . . . we conclude that the admission of her testimony was harmless error."); *Combs v. Stortz*, 276 S.W.3d 282, 293 (Ky. App. 2009) (admission of medical testimony reviewed for harmless error).

B. The Toxicology Reports Were Properly Admitted.

In fact, contrary to Robbins' assertions, the admission of the toxicology reports was entirely proper. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *See Rossi v. CSX Transp., Inc.*, 357 S.W.3d 510, 515 (Ky. App. 2010). In this case, the trial court's decision to admit the toxicology reports was correct, and certainly not an abuse of discretion.

1. CSXT offered a sufficient chain of custody.

Robbins first argues that CSXT failed to establish a "proper" chain of custody for the blood and urine specimens. (Robbins Br. 2-3.) Under Kentucky law, however, "it is

unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification." *Muncy v. Commonwealth*, 132 S.W.3d 845, 849 (Ky. 2004) (internal quotation marks omitted). It instead suffices to show a "'reasonable probability'" that the evidence "'has not been tampered with or changed in any fashion.'" *Id.* (quoting *Rabovsky v. Commonwealth*, 973 S.W.2d 6, 8 (Ky. 1998)). So long as this minimum standard has been met, "[g]aps in the chain [of custody] normally go to the weight of the evidence rather than to its admissibility." *Mollette v. Ky. Pers. Bd.*, 997 S.W.2d 492, 495 (Ky. App. 1999); *accord Muncy*, 132 S.W.3d at 849.

The chain of custody produced in this case easily satisfies the standard for admissibility. Glenn Johnson's blood and urine samples were drawn from his body by a state medical examiner, with a Kentucky State Police officer present. (VR 9/16/11 11:52:03-11:52:29.) The samples were treated with a preservative, sodium fluoride, to prevent any changes or chemical reactions while in transit (VR 9/19/11 11:22:03-11:22:51) and were then immediately sealed (VR 9/16/11 11:52:36-11:53:13). The samples were sent by United States mail directly from the medical examiner to the state medical lab. (*Id.* 11:26:33-11:26:56.) Records reflect that the samples were mailed on a Friday and delivered the following Wednesday. (VR 9/19/11 10:07:45-10:08:55, 11:21:05-11:21:54, 12:10:43-12:11:42; CSXT Exs. 66-69.)

Robbins suggests that this chain of custody is insufficient because the record does not detail the precise movement of the samples through the postal system (Robbins Br. 2-3). But the Kentucky Supreme Court has held that there is no need to "account for every hand-to-hand transfer of the items" when there is "other persuasive evidence in the case to indicate the sample remained sealed" throughout the process. *Penman v.*

Commonwealth, 194 S.W.3d 237, 246-47 (Ky. 2006), *overruled on other grounds by Rose v. Commonwealth*, 322 S.W.3d 76 (Ky. 2010); *see also Love v. Commonwealth*, 55 S.W.3d 816 (Ky. 2001). That is the case here, where the medical examiner testified to sealing the samples (VR 9/16/11 11:52:36-11:53:13) and the toxicologist testified that the seals were fully intact when the samples arrived (VR 9/19/11 11:21:54-11:22:02).

Once at the lab, the samples were stored in a secured refrigerator. (VR 9/19/11 10:05:49-10:06:29.) Only the toxicology personnel had access to the samples. (*Id.*) All samples were required to be logged out when removed and logged back in when returned; those logs were produced at trial. (*Id.*; *see also id.* 11:22:55-11:27:40.)

Robbins contends that this chain of custody within the lab is incomplete because the toxicologist who testified at trial, Tracy Easton, did not personally observe the samples every time they were being handled by other toxicologists. (*See* Robbins Br. 3.) But Robbins does not point to anything in Kentucky law that requires each individual toxicologist who handled a sample to testify in court, nor does she offer any affirmative evidence to suggest that the samples were mishandled. As the Kentucky Supreme Court has instructed, "[a]ll possibility of tampering does not have to be negated. It is sufficient . . . that the actions taken to preserve the integrity of the evidence are reasonable under the circumstances." *Pendland v. Commonwealth*, 463 S.W.2d 130, 133 (Ky. 1971). The log files presented at trial, together with Easton's testimony, demonstrate that the state medical lab followed procedures that were reasonable under the circumstances.

This evidence was sufficient to establish a reasonable probability that the evidence was not altered, tampered, or misidentified, and Robbins has not offered any reason to question the chain of custody beyond rote speculation. Any remaining doubts

go at most to the weight of the evidence, not its admissibility. The trial court accordingly did not err in finding a sufficient chain of custody to admit the toxicology evidence.

2. The toxicology reports were admissible under *Daubert*.

Robbins next argues that the toxicology reports failed to meet the minimum reliability threshold required for admission of scientific evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). (*See* Robbins Br. 3-5.) She does not, however, challenge the science of blood or urine testing, nor does she offer any affirmative evidence to suggest there were any deficiencies in the execution of those tests in this case. Rather, she speculates that the testing equipment might not have been properly calibrated or maintained. (Robbins Br. 3-4.) Such unsupported speculation is not only legally insufficient, *Hunt v. Commonwealth*, 304 S.W.3d 15, 29-30 (Ky. 2009), but directly contrary to the evidence presented at trial, which provided compelling proof of the reliability and accuracy of the toxicology results in this case.

To begin with, there was extensive testimony about the regular testing and evaluation in place to ensure that both the lab equipment and the lab staff performed reliably. According to Tracy Easton, lab instruments were tuned every week and were calibrated every two weeks. (VR 9/19/11 10:01:52-10:02:40, 11:47:13-11:49:53.) In addition to the frequent testing of the lab's instruments, the entire lab staff participated in two separate blind proficiency tests each year. (*Id.* 10:00:20-10:00:41, 10:04:45-10:04:54.) The reliability of the lab was also attested to, both by the state medical examiner who performed the Johnsons' autopsies, who, in response to a question about the possibility of lab error, testified that "I haven't seen that since I worked here" (VR 9/16/11 11:23:48-11:24:03), and by one of Plaintiffs' expert witnesses, Dr. George

Nichols, the former Chief Medical Examiner under whose leadership the laboratory was established (VR 9/12/11 12:31:41-12:37:00).

It is true, as Robbins points out, that complete calibration and testing logs for the lab are not available.[2] (*See* VR 9/19/11 11:17:40-11:19:00.) But Easton testified that, to the best of her knowledge, the testing and maintenance procedures were routinely followed throughout her time at the lab. (*See, e.g.*, VR 9/9/11 11:19:43-11:19:02 ("I was responsible for quality control. I would have had to look at that curve myself, personally. No curves went into use unless I approved. Even though I may not be able to lay my hands on it, I did look at it, I did review it, and I did sign off on it.").) Robbins has not offered any reason to doubt that testimony. Pure speculation that mistakes could have been made—speculation that is not supported by any evidence—is insufficient to render the toxicology results unreliable or inadmissible. *Hunt*, 304 S.W.3d at 29-30.

In addition to this routine testing, there were multiple controls in place which confirm that all equipment used to test the Johnsons' samples was functioning correctly when the Johnsons' samples were tested. Easton explained that each toxicology test was first performed on a neutral solvent to confirm there was no contamination within the instrument. (VR 9/19/11 10:12:05-10:12:16.) Each test was then run on six "internals," or known substances, to ensure that the machine was returning the correct result. (*Id.* 10:12:24-10:14:08, 11:33:55-11:34:40.) For blood testing, a test was then run on a sample of "blank blood" to ensure that the machine did not turn up any anomalous

---

[2] The state toxicology laboratory was closed for budgetary reasons in July 2008; the Commonwealth now outsources toxicology testing to private labs. (*See* 9/12/11 Tr. 41-43; 9/19/11 Tr. 119.) A portion of the calibration records were not preserved when the state laboratory closed.

results. (*Id.* 10:14:10-10:14:36.) Only after a machine passed each of these control tests was any testing performed on an actual blood or urine sample. (*Id.* 10:11:36-10:15:34.)

At trial, Easton presented copies of the "batch run sheets" for Glenn and Kendra Johnson, which report the results of these control tests. According to Easton's testimony, the batch run sheets report that "[e]verything behaved as I had anticipated," which "tells me that my extraction procedure worked" and that "my instrument is performing normally." (*Id.* 10:16:00-10:17:49.) When asked on cross-examination whether she could confirm that the injection port on one of her machines was not contaminated, Easton again testified that "the internals themselves indicate . . . that this sample ran correctly and there was not any trouble with the injection port." (*Id.* 11:34:28-11:34:40.)

Easton also testified that there was an additional control in this case because she tested Kendra and Glenn's blood samples back-to-back. If the machine were malfunctioning or contaminated, she would expect to see an anomalous result appear for both samples. But only Kendra tested positive for diphenhydramine, and only Glenn tested positive for cocaine. These results, Easton explained, are inconsistent with Robbins' speculation that the machines could have been contaminated. (*See id.* 11:35:36-11:36:38, *id.* 11:35:36-11:36:38.) Robbins points to no evidence to contradict Easton's testimony.

Most significantly, the reliability of Glenn Johnson's toxicology results is confirmed by the multiple independent tests all reporting the same result. The blood sample yielded consistent levels of cocaine when tested against two separate calibrators. (*Id.* 10:25:36-10:26:43.) Both the blood sample and the urine sample independently tested positive for cocaine. (VR 9/16/11 10:52:12-10:55:38, 11:01:30-11:01:40.)

Plaintiffs' own counsel described the urine sample as "a double check" for the blood tests. (*Id.* 11:28:48-11:23:53.) In Easton's words, "If you think of this . . . as a puzzle, the urine sample is another little piece of the puzzle that helps confirm what you're doing." (VR 9/19/11 12:05:03-12:08:17.) And not only did Glenn Johnson's samples test positive for cocaine, they also tested positive for cocaine metabolites, which are byproducts produced when the body digests cocaine. (VR 9/16/11 10:53:00-10:54:00, 11:01:30-11:01:40; VR 9/19/11 10:30:46-10:37:03.) The reliability and accuracy of each of these individual tests is thus corroborated by the consistent results obtained in other testing. Again, Robbins identifies no evidence to the contrary.

3. The cocaine evidence was highly relevant.

Contrary to Robbins' claim that the cocaine evidence is "not relevant to any issue in the case" (Robbins Br. 6), the presence of cocaine and cocaine metabolites in Glenn Johnson's blood and urine is highly relevant. It is relevant because there was expert testimony that the level of active cocaine in Johnson's bloodstream would have impaired his driving, and thus could have been a cause of the accident. *Cf. St. Luke Hosp.*, 354 S.W.3d at 540-41 (evidence of drug use by plaintiff at the time of an alleged tort is admissible when it goes to a material issue in dispute).[3]

[3] This case is unlike *Burton v. Commonwealth*, where an expert witness testified that a urine test "indicated absolutely nothing about whether [the defendant] was impaired at the time of the accident" because the test detected only inactive byproducts of the drug, not the drugs themselves, and was unable to establish concentration levels or to determine when the drugs had been taken. 300 S.W.3d 126, 131-32 (Ky. 2009). Here, by contrast, the state toxicology lab performed both a urine test *and* a blood test, which is recognized as "the key indicator for whether or not there is impairment." *Id.* at 132. The blood test not only detected active cocaine in Glenn Johnson's bloodstream, but also quantified the concentration level of cocaine in the blood. (VR 9/16/11 10:53:43-10:54:01; VR 9/19/11 10:26:03-10:26:47, 10:36:49-10:37:09; CSXT Ex. 68.) Expert testimony was presented at trial that this concentration of cocaine present would have caused impairment. (VR 9/19/112:39:25-2:43:45, 2:59:12-3:00:44.)

Multiple expert witnesses testified at trial to the effects of cocaine on driving. Dr. Gregory Wanger, a state medical examiner, testified that cocaine "can alter your impulse control, it can make you paranoid; those things can certainly influence your behaviors while you're operating a car." (VR 9/16/11 11:04:02-11:04:26; *see also id.* 11:01:40-11:02:19 ("It can produce adverse effects such as paranoia [and] violence. It can increase your tendency toward impulsive kind of actions.").) Another expert, Dr. Gregory Davis, testified that cocaine can make people "very confident of their abilities, whether that's justified or not," "can cause them to be impulsive" and to engage in "risk-taking behavior," can induce delusions in which they "see[] or hear[] things . . . that aren't real." (VR 9/19/11 2:23:33-2:24:33.) As a result, people under the influence of cocaine are "more likely to do everything from drift out of their lane to pull out in traffic ahead of a speeding car." (*Id.* 2:42:15-2:42:58.)

Robbins disputes this testimony, insisting that "small amounts of cocaine can actually increase[] one's ability to perform simple physical tasks and activities." (Robbins Br. 7.) Although Robbins attributes this claim to Dr. Davis, Dr. Davis specifically ***rejected*** the suggestion that cocaine could improve a person's driving. According to Dr. Davis, although cocaine might assist with "very simple tasks like staying awake," it has "a negative effect" on "complex tasks . . . like driving a car." (VR 9/19/11 2:41:45-2:42:20.) And even if this were a matter of genuine dispute, disputes about the effects of narcotics on a person's behavior are ordinarily for the jury to resolve with the help of expert testimony, not a ground for excluding the evidence. *See, e.g.*, *State v. Plew*, 745 P.2d 102, 104-08 (Ariz. 1987) (trial court erred by excluding expert testimony on behavioral effects of cocaine); *People v. Humphries*, 230 Cal. Rptr. 536,

548-49 (Ct. App. 1986) (trial court erred by excluding expert testimony on behavior effects of PHP), *abrogated on other grounds by People v. Carter*, 70 P.3d 981 (Cal. 2003).

Robbins nonetheless continues to insist that the cocaine evidence was irrelevant as a matter of law because there was, supposedly, "no evidence presented at trial that [Glenn] was driving the vehicle, or that he was even the *probable* driver of the vehicle, at the time of the accident." (Robbins Br. 5-6.) That contention is frivolous, both as a matter of fact and as a matter of law.

There was in fact extensive evidence that Glenn, rather than Kendra, was the likely driver.[4] To begin with, the evidence at trial was that Kendra Johnson did not even have a valid driver's license, having allowed her license to lapse in June 2006—a year and a half before the accident. (VR 9/16/11 1:26:50-1:27:45; VR 9/19/11 8:43:53-

---

[4] Robbins asserts that "the Estate of Kendra Johnson," represented by plaintiff Berry, "made a judicial admission during trial that [Kendra] was the driver of the vehicle." (Robbins Br. 6.) Consistent with her complete failure to comply with CR 76.12, Robbins cites nothing in the record to support this assertion. In fact, the Estate of Kendra Johnson had alleged in its initial complaint that "Glenn Johnson, Jr. was as driver responsible" for the accident (CSXT Ex. 95), and had answered in a sworn interrogatory that "Glenn Johnson, Jr. was driving the vehicle when the family left Hamilton, Ohio on the date they were last seen alive" (CSXT Ex. 97). And at trial, counsel for the Estate of Kendra Johnson told the court that "[t]he truth is, Judge, that nobody knows who was driving that car, and we all admit it." (VR 9/20/11 4:41:15-4:41:19.)

But even if one assumes for purposes of argument that the Estate of Kendra Johnson had admitted that Kendra Johnson was driving, such an admission would bind only the Estate of Kendra Johnson, not CSXT. *See Newark Ins. Co. v. Bennett*, 355 S.W.2d 303, 304 (Ky. 1962) ("[f]or the purpose of determining whether one party is to be bound by another party's judicial admission" an "[a]bsolute identity of interest is essential" (internal quotation marks omitted)); *cf. Zapp v. CSX Transp., Inc.*, 300 S.W.3d 219, 223-24 (Ky. App. 2009) (improper finding of judicial admission "invaded the province of the jury to decide a disputed factual issue"). Kentucky law disfavors the extension of judicial admissions even to co-parties, *e.g. Newark Ins. Co.*, 355 S.W.2d at 304; *Fisher v. Duckworth*, 738 S.W.2d 810, 814 (Ky. App. 1987), and surely does not countenance Robbins' audacious attempt to bind an ***opposing*** party.

8:44:25; CSXT Ex. 70.) CSXT also presented testimony from Ronald Spencer, a close friend with whom the Johnson family had lived for approximately two years, who testified that he had "never seen [Kendra] drive" (VR 9/20/11 3:29:35-3:29:57); that "she did not like to drive, period" (*id.* 3:55:56-3:56:06); and that if anyone claimed Kendra was driving, "I'd say they're full of s--t, period" (*id.* 3:55:42-3:56:06).[5]

The physical evidence also indicates that Kendra Johnson was not driving at the time of the accident. As her toxicology report shows, Kendra had taken a large dose of diphenhydramine, a drug that causes drowsiness and is often used as a sleep aid. (VR 9/16/11 10:59:10-11:00:15; VR 9/19/11 2:20:19-2:20:59, 2:24:52-2:25:21, 2:27:25-2:27:36.) In fact, the level of diphenhydramine in her blood was so high that it "would put most people to sleep," and would certainly make her too drowsy to drive. (VR 9/19/11 2:45:47-2:46:08.) In addition, Kendra was not wearing any shoes when her body was recovered (VR 9/16/11 10:56:53-10:57:33), which would be extremely unusual for someone driving a vehicle.[6]

As a legal matter, Robbins is also incorrect when she asserts, without citation to authority, that the cocaine evidence is not relevant unless there is a *probability* that Glenn was the driver.[7] Rather, because this is a question of conditional relevance, the cocaine

---

[5] Contrary to the unsupported assertions on page 6 of Robbins' brief, neither Jerry Pigman nor Dan Aerni expressed an opinion as to whether Glenn or Kendra Johnson was the driver, nor did Robbins ask them about this at trial.

[6] The certainty with which Robbins now insists that Kendra Johnson was the driver of the car is inconsistent with statements made by Robbins' counsel at trial. At trial, Robbins' counsel admitted that "[w]e're not sure if she was driving." (9/16/11 Tr. 173; *see also* 9/8/11 Tr. 54 ("No one is going to know for sure.").)

[7] Robbins' failure to provide a "citation[] of authority pertinent to [this] issue of law" (CR 76.12(4)(c)(v) is itself sufficient ground for rejecting her assignment of error. *See supra* pp. 5-6. Furthermore, even if (contrary to fact) Robbins were correct about the applicable legal standard, the standard she advances would be satisfied here because the

evidence is admissible so long as there is sufficient evidence from which "the jury could reasonably conclude" that Glenn was the driver. *Davis v. Commonwealth*, 147 S.W.3d 709, 724-25 (Ky. 2004); *see* KRE 104(b) ("When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."). That standard unquestionably was satisfied by the evidence at trial. *See supra* pp. 15-16.

Finally, even if it could not be determined with certainty whether Glenn or Kendra Johnson was driving, the cocaine evidence was relevant to show that ***both possible drivers were impaired***—Kendra by diphenhydramine; Glenn by cocaine. There can be no question that Glenn Johnson's toxicology results were relevant when considered jointly with the other evidence in this case.

4. The trial court did not abuse its discretion in refusing to exclude the cocaine evidence under Rule 403.

The trial court likewise did not commit reversible error by declining to exclude the cocaine evidence under KRE 403. (*Cf.* Robbins Br. 6 n.7.) To exclude relevant evidence under that rule, the opponent bears the burden of showing that "its probative value is ***substantially outweighed*** by the danger of undue prejudice." KRE 403 (emphasis added). A trial court's evidentiary ruling under KRE 403 is reviewed only for abuse of discretion. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000); *Woolum v. Hillman*, 329 S.W.3d 283, 288-89 (Ky. 2010); *Love*, 55 S.W.3d at 822.

---

evidence shows it far more likely that the car was driven by Glenn than by Kendra. *See supra* pp. 15-16.

The trial court did not abuse its discretion in concluding that Robbins failed to meet that burden. The fact that a possible (and, indeed, the probable) driver of the vehicle was impaired at the time of the accident is highly probative of the accident's cause, and would not be outweighed, much less substantially outweighed, by any undue prejudice here. *St. Luke Hosp.*, 354 S.W.3d at 540-41 (probative evidence of plaintiff's drug use at the time of alleged tort not substantially outweighed by undue prejudice); *see also Meece v. Commonwealth*, 348 S.W.3d 627, 667 (Ky. 2011) ("[T]his statement . . . is clearly relevant. Being relevant, its probative value [was not] substantially outweighed by the danger of undue prejudice" (internal quotation marks omitted)). Moreover, Robbins does not even attempt to articulate a theory of prejudice, let alone a theory of ***undue*** prejudice, choosing to rely instead on the utterly conclusory and plainly insufficient assertion that the evidence's "prejudicial effect far outweighed its probative value." (Robbins Br. 5.) There is, however, no indication that the cocaine evidence influenced the verdict in any way. As noted above, the jury found that the accident was not caused by CSXT's failure, if any, to exercise ordinary care. (*See* Jury Instrs. at 5, *at* R. 2898.) Robbins points to nothing in the record (*cf.* CR 76.12(4)(c)(v)) to suggest that the jury's determination was based on anything other than plaintiffs' failure to prove that CSXT's purported negligence had anything to do with the Johnsons' accident.

III. The Trial Court Did Not Commit Reversible Error By Declining To Provide A Definition Of "Substantial Factor In Causing."

Robbins' final contention is that the trial court erred by failing "to provide a legal definition of the term 'substantial causative factor'" in response to a jury question. (Robbins Br. 8-9.)[8] This argument is wholly frivolous.

To begin with, Robbins failed to preserve this issue. She did not request a definition of this phrase in her proposed jury instructions (*see* R. 2237-48); she did not request a definition or object to the phrase when it was proposed by the trial judge (*see* VR 9/21/11 8:25:15-8:46:13); and she did not request that a definition be given upon receipt of the jury question (*see* VR 9/21/11 3:59:42-8:07:55). In fact, contrary to Robbins' representation to this Court that "Plaintiffs requested the Court provide the jury with a legal definition of the term" (Robbins Br. 8), Robbins' attorney took the position that the jury should ***not*** be given any further definition, specifically advocating that the jury be told to "[j]ust use your common—you know, you need to use those words as common usage in the English language, understand them in the common usage." (VR 9/21/11 7:48:06-7:48:59.)

Even if the issue had been presented to the trial court, Robbins would not have been entitled to the instruction that she now implicitly requests because that instruction is not correct. Without citation to authority, Robbins argues—and suggests that the jury should have been told—that "substantial causative factor" means "one percent or more of all causative factors." (Robbins Br. 8.) But that is not how the Kentucky Supreme Court has defined the term "substantial factor in causing." Instead, in *Deutsch v. Shein*, the

[8] Robbins' brief repeatedly refers to the phrase "substantial causative factor," but the actual language at issue was "substantial factor in causing." (*See* VR 9/21/11 3:59:36-4:01:42, 5:59:42-8:07:55; Jury Instr. No. 3, *at* R. 2896-98.)

court adopted the definition of "substantial cause" from the Restatement (Second) of Torts, which states:

> "In order to be a legal cause of another's harm, . . . [t]he negligence must also be a substantial factor in bringing about the plaintiff's harm. The word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense,' which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called 'philosophic sense,' yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes."

597 S.W.2d 141, 144 (Ky. 1980) (quoting Restatement (Second) of Torts § 431 cmt. a (1965)). "Substantial factor in causing" thus is simply shorthand for proximate cause. *Id.* at 144.

Finally, even if Robbins had asked the trial court to provide an expanded definition, it would have been improper for the court to do so. As the foregoing quotation from *Deutsch* readily demonstrates, the definition of "substantial factor in causing" is highly detailed. Under Kentucky's "bare bones" approach to jury instructions, however, jury instructions "should not contain an abundance of detail, but should provide only the bare bones of the question for jury determination." *Rogers v. Kasdan*, 612 S.W.2d 133, 136 (Ky. 1981). Under the bare-bones approach, the trial court must "leav[e] it to counsel to assure in closing arguments that the jury understands what the instructions do and do not mean." *CSX Transp., Inc. v. Begley*, 313 S.W.3d 52, 60 (Ky. 2010). It was thus plaintiffs' own duty, not the trial court's, to flesh out the instructions in sufficiently clear terms for the jury to understand. Robbins' failure to do so, and her ultimate failure to persuade the jury to adopt her view of the law, is not grounds for reversal on appeal.

CONCLUSION

The judgment of the circuit court should be affirmed.

Respectfully submitted,

BY: _____