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other than the alleged failure to file a direct appeal. We also find no error in the district court's dismissal of these remaining claims of ineffective assistance of counsel.

AFFIRMED.

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## TRACEY L. CURTIS, PERSONAL REPRESENTATIVE OF THE ESTATE OF PRESTON M. CURTIS, DECEASED, APPELLANT, V. STATES FAMILY PRACTICE, LLC, ET AL., APPELLEES.

823 N.W.2d 224

Filed October 30, 2012. No. A-11-637.

1. **Motions for New Trial: Appeal and Error.** A motion for a new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
2. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives the litigant of a substantial right or a just result in matters submitted for disposition through the judicial system.
3. **Appeal and Error.** Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.
4. **Jury Instructions: Appeal and Error.** Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.
5. **Appeal and Error.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
6. **Actions: Negligence: Liability: Parties: Words and Phrases.** The term "defendant" in Neb. Rev. Stat. § 25-21,185.10 (Reissue 2008), which governs joint and several liability and allocation of liability involving more than one defendant, also includes a third-party defendant brought into the action.
7. **Wrongful Death: Words and Phrases.** In the context of the wrongful death statutes, "next of kin" is defined as those persons nearest in degree of blood surviving the decedent, who ordinarily are those persons who take the personal estate of the deceased under the statutes of distribution.
8. **Trial: Expert Witnesses.** *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), require the trial court to act as a gatekeeper to ensure that expert testimony is scientifically valid and can be properly applied to the facts in issue and is therefore helpful to the trier of fact.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS, Judge. Affirmed.

James E. Schneider, of Schneider Law Office, P.C., and Terrence J. Salerno for appellant.

Mark A. Christensen and Shawn D. Renner, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees.

INBODY, Chief Judge, and PIRTLE, Judge.

INBODY, Chief Judge.

## INTRODUCTION

Tracey L. Curtis, mother of Preston M. Curtis and personal representative of Preston's estate, appeals the judgment of the district court for Lincoln County in favor of the appellees.

## STATEMENT OF FACTS

On April 13, 2011, Tracey, as personal representative of her son Preston's personal estate, brought a wrongful death action against Dr. Douglas J. States, Jill McAdam, and States Family Practice, LLC, by and through its employees, alleging that each was negligent and had committed medical malpractice in the death of Preston, who was then only 6 years old. The complaint requests general damages, $10,165.59 in medical and hospital expenses, and $1,173.50 for funeral and burial expenses.

On Friday, April 6, 2007, Preston fell and injured his left arm while swinging his legs, which he did by placing one arm on a table and the other on a freezer. On Sunday, Preston began to complain of his arm "burning like the sun," and Tracey made an appointment first thing on Monday morning at States Family Practice with McAdam, a physician's assistant for Dr. States. X rays were taken of Preston's elbow, and Tracey was told that the x rays appeared normal. McAdam prescribed a sling for Preston and also ordered that Preston take 600 milligrams of ibuprofen three times a day.

Preston continued to complain of pain in his elbow and began to experience difficulty sleeping. On Tuesday, Tracey took Preston back to States Family Practice, where he was seen

by McAdam and Dr. States. Preston experienced pain when he bent his elbow, and the elbow had started to swell. Dr. States ordered a CAT scan for Preston, and an appointment was also made with an orthopedic doctor for Preston for Friday of that week. On Wednesday, Preston continued to complain of pain and had difficulty sleeping. Tracey continued to administer the ibuprofen as directed, and at 1 a.m. on Friday, Tracey contacted Dr. States after Preston had become "cold and clammy" to the touch and had complained of pain all over his body. Preston's father, Michael Curtis, took Preston to the emergency room at 1:30 a.m. Preston quickly deteriorated and was pronounced dead at 5:35 a.m. The cause of Preston's death was streptococcus pyogenes sepsis.

The appellees filed an amended answer admitting that Preston had died on April 13, 2007, and denying the majority of the allegations contained within the amended complaint. The amended answer also alleged a contributory negligence defense asserting that Tracey and Preston's "next-of-kin" caused or contributed to Preston's death.

Trial on the matter was held over a period of 5 days. Tracey testified that she was Preston's mother and was married to his father, Michael. Tracey testified that in addition to Preston, they also had a 4-year-old daughter. Tracey testified that generally, Preston was a healthy child and was in good condition. Tracey testified that on Monday, April 2, 2007, Preston was sent home from school with a fever, which she treated with over-the-counter medication. On April 6, Tracey was home when Preston fell. Tracey testified that she examined Preston's arm immediately after the fall and that Preston could move his arm and had no apparent bruises. Tracey testified that the arm was tender and sore but that she thought that he had hit his "funny bone."

Over the weekend, Tracey applied ice to Preston's elbow, in addition to a homeopathic cream. On Saturday, Preston continued to show no symptoms, other than indicating that the elbow was sore. However, on Sunday, Preston complained that his arm was "burning like the sun." Tracey made an appointment for first thing Monday morning, since the doctor's office was closed on Sunday. Tracey requested an appointment

with Dr. States, but was instead given an appointment with McAdam because Dr. States was busy. Tracey explained that her family members had been patients with States Family Practice and went to that clinic if they were experiencing problems. On Monday, April 9, 2007, after a brief examination by McAdam, Tracey took Preston to get an x ray of the elbow, which was very tender by that time. The x ray indicated that everything was normal, and McAdam prescribed Preston ibuprofen and a sling. McAdam instructed that if Preston was not feeling better in 5 days, Tracey should bring him back to the clinic for a followup visit.

Tracey testified that she took Preston home and administered the ibuprofen as directed by McAdam. Tracey explained that Preston began to experience difficulty sleeping due to pain in his elbow and that on Tuesday morning, his elbow was swollen, discolored, and warm to the touch. Tracey made a second appointment for Preston and took him back to States Family Practice. McAdam again examined Preston and instructed Tracey that if Preston was not feeling better in 5 days, she should bring him back to the clinic for a followup visit. Tracey testified that Preston was becoming increasingly "fidgety." Tracey explained that Preston did not want to bend his elbow because of the pain and that he tried to keep his arm straightened as much as possible. At the appointment on Tuesday, Tracey requested that Dr. States provide her a second opinion, which request was granted. Dr. States examined Preston, and a CAT scan was ordered for Preston's elbow. Thereafter, McAdam indicated to Tracey that the scan of Preston's arm appeared normal. Tracey testified that she knew something was wrong and that she indicated to McAdam her disagreement that everything was normal. McAdam prescribed Tylenol with codeine for Preston and informed Tracey that an appointment had been made for Preston with an orthopedic doctor, but that Preston could not get an appointment with that doctor until Friday morning.

Tracey testified that she gave Preston the Tylenol with codeine for his pain, but that Preston immediately threw up that medication, so she went back to administering the ibuprofen prescribed on Monday. Tracey testified that Preston

began to sleep less and less, but continued to eat normally until Wednesday. On Wednesday evening, Preston did not want to eat much and was still complaining of pain, but did not have any further physical symptoms. Tracey testified that even though she did not have a working thermometer, she thought Preston was running a low-grade fever because he was warm to the touch.

Tracey testified that after she and Michael attempted to put Preston to bed on Thursday night, Preston took a turn for the worse. Preston began to moan, was cold and clammy, and refused to walk. Tracey contacted Dr. States at around 1 a.m. on Friday, and Michael took Preston to the emergency room. Michael arrived at the emergency room first, with Preston, as Tracey needed to make arrangements for someone to care for their daughter. Upon Michael and Preston's arrival at the emergency room, doctors began to administer Preston intravenous fluids and applied a warming blanket to bring up his body temperature. Tracey testified that Dr. States did not arrive at the hospital for several hours and that she could not remember his being in the room to examine Preston, but only that he was at the nurses' station. At some point, there was discussion that Preston would be taken to Children's Hospital in Omaha by "Life Flight" or ambulance, and Tracey went home to pack some personal belongings, during which time Michael called her to tell her, "I think we lost him." Tracey described watching the emergency room personnel attempt to resuscitate Preston for approximately 45 minutes.

Tracey explained that Dr. States spoke with her and Michael privately and explained that Preston may have been suffering from necrotizing fasciitis or from a blood clot. Tracey testified that on the next day, in another conversation with Dr. States, he indicated to Tracey that there had been a pool of blood evident in the elbow on the CAT scan which had not been previously mentioned to Tracey. Tracey further testified that in yet another conversation with Dr. States, he indicated the necrotizing fasciitis was due to a flesh-eating bacteria in the arm and told her "[Preston] would have possibly, had he lived, had his

arm amputated and a kidney transplant." She testified that he said, "[Y]ou wouldn't have wanted that."

Michael testified about much of the same information as did Tracey. Michael testified that he had no knowledge of Preston's fall on Friday, April 6, 2007, but became aware on the following Sunday, when Preston told him that "his arm was burning like the sun." Michael explained that on that Sunday morning, there did not appear to be anything physically wrong with Preston's arm, but that as the day progressed, Preston's arm began to swell and he had difficulty sleeping. Michael testified that on Monday evening, after he returned home from work, Preston's arm was more swollen and that Preston had even more difficulty sleeping on Monday night. Preston was restless and was experiencing more pain in his arm. Michael testified that on Tuesday, Preston's arm was discolored and Preston refused to bend the arm, insisting that it remain straight to avoid additional pain. Michael testified that he attended the CAT scan at the hospital with Preston and Tracey and that on Tuesday night, Preston could no longer play video games due to the pain it caused him in the arm. Again, Preston had difficulty sleeping.

On Wednesday, Michael testified, he was off from work and stayed home with Preston all day and Preston continued to struggle with sleeping that night. Michael explained that by Thursday, it seemed as if Preston did not even have the energy to be restless, but Michael indicated that he and Tracey believed it was because of the lack of sleep which the family had accumulated over the past four nights. Michael explained why he and Tracey did not consider taking Preston to the doctor on Wednesday:

> [W]e were at the doctor's office on Monday. We had an x-ray. [Preston's] condition got worse. We went back on Tuesday. We were told again that everything was fine. [Preston] went to the hospital and got a [CAT] scan. That's normal. That's what we know at this point in time. We asked for a second opinion. Dr. States comes in and sees him. We have had [McAdam] look at him and now Dr. States look at him. We have had two x-rays, and an

> appointment for Friday in hopes that we could hold on to some new information.

Michael explained that on Wednesday and Thursday, he and Tracey found that baths were soothing to Preston and gave him numerous baths, in addition to allowing him to eat whatever food he wanted because Preston was eating very little.

In the early morning hours of Friday, Michael got out of bed to check on Preston and found him lying on the floor in the living room. Michael recalled that Preston felt "cold and clammy" and that Tracey immediately contacted Dr. States. Michael did not hear the conversation between Tracey and Dr. States, but testified that he did not really care what was said because he had already determined that they were going to take Preston to the emergency room. Preston asked Michael to carry him because Preston did not want to walk, and Michael testified that he picked Preston up immediately and took him to the hospital. Michael testified that during Preston's treatment, "red splotches" began to develop on Preston's arm and eventually spread to his chest and down his legs. Michael testified that he focused on Preston, singing songs to him and asking Preston to say his "ABCs" to keep Preston's attention away from the doctors; however, while fluids were being administered, Preston indicated that he could no longer move his legs. Michael testified that Preston's legs were stiff, with muscles contracted, and would not bend. Michael testified that the room became very chaotic and that Tracey was sent home to get some personal belongings for the trip to Children's Hospital in Omaha. Michael testified that he asked the attending emergency room doctor if Preston's leg condition was normal, to which the doctor responded, "If you're a praying man, pray." Michael testified that this was the first indication given to him by the medical staff that Preston's condition was very serious. Michael testified that thereafter, Preston's eyes became dilated and the medical staff began attempts to resuscitate Preston.

Throughout the trial, depositions of medical professionals were received into evidence and read to the jury in addition to the live testimony of several experts.

Portions of McAdam's deposition, taken on October 21, 2009, were read to the jury, in addition to her live testimony given at trial, in which McAdam testified that she had a master's degree in physician's assistant studies and was nationally certified as a physician's assistant. McAdam began working at a family practice clinic as a physician's assistant in 1995 and worked at various clinics before working for Dr. States. McAdam explained that she was taught to document each examination and to ask thorough questions of the patient. McAdam also indicated that she utilized the differential diagnosis approach in her evaluation and treatment of patients. McAdam explained that a differential diagnosis is the process by which the physician or physician's assistant considers all of the possible causes for a patient's complaint and then proceeds with treatment from there.

McAdam testified that on April 9, 2007, she first examined Preston by assessing his alertness and examining his shoulder. McAdam checked for pain, tenderness, or swelling, and then assessed the shoulder's range of motion. McAdam did the same examination for Preston's elbow and indicated that he was not able to do the range of motion test of his elbow because of pain. McAdam testified that the elbow was "boggy" or swollen, but was not hot and was not red. McAdam did not do a review of Preston's bodily systems because the examination was part of a "problem-focused" visit based upon pain resulting from an injury and, typically, she did not engage in such a comprehensive review on a "one-problem complaint" visit. McAdam testified that Preston was then sent to undergo an x ray, which revealed no fracture. McAdam instructed Preston to take ibuprofen, wear a sling, and follow up in 5 days if there was no improvement in the elbow. McAdam explained that she did not feel that the elbow was infected on this day, because of a "lack of warmth" in Preston himself or in the joint.

McAdam indicated that on Preston's second visit, on April 10, 2007, she assessed Preston and also brought Dr. States into the examination room to assess Preston because Preston's pain and the swelling of his elbow were worse. McAdam testified

that a review of Preston's bodily systems was not completed because she and Dr. States were focused on the worsening of the elbow, although McAdam did not recall the specifics of the examination because there were no notes regarding Dr. States' examination on that day in the chart. McAdam testified that there was an escalation of Preston's pain and increased swelling in his elbow. McAdam testified that Dr. States contacted an orthopedic surgeon, who recommended a CAT scan of the elbow, which scan was then ordered and performed on that same day, April 10. McAdam testified that the CAT scan revealed that there was no fracture, dislocation, or growth plate injury, but there were abnormal findings consistent with hemarthrosis, or blood in the joint. McAdam testified that because Preston still lacked a fever on this day, she and Dr. States had "kind of established that [infection] wasn't currently the problem." McAdam testified that in her opinion, there was no indication at either the April 9 or the April 10 examination that Preston's elbow should have been "tapped."

Portions of Dr. States' deposition were read to the jury, in addition to live testimony given at trial, during which Dr. States testified that he graduated from medical school in 1992 and completed a family practice residency in 1995. For the following 10 years, Dr. States worked with two other family physicians until opening his own practice in 2005. Dr. States explained that there were no formal guidelines set forth regarding staff procedures other than the constant communication which took place throughout the day. Dr. States described the policy as "an open-door policy," through which he was open to discuss any patient with the staff at any time. Dr. States indicated that he did not review McAdam's record of Preston on April 9, 2007, and was not involved in the case on that date, but that he had reviewed the radiology report of Preston's x ray.

Dr. States testified that on April 10, 2007, he assisted McAdam with Preston's examination, but did not make any entries on Preston's medical chart. Dr. States testified that in situations which involve a problem-focused visit, such as a localized injury, a review of bodily systems was not necessary for diagnosis, treatment, or documentation. Dr. States explained

that he thought that Preston had most likely sustained a soft tissue injury to the elbow because there was no fracture evident on the x rays. Dr. States examined Preston but did not maneuver the arm due to Preston's severe pain. Dr. States testified that he most likely ordered the CAT scan of Preston's elbow because of the possibility of a "nondisplaced hairline fracture" which would be invisible on an x ray. Dr. States testified that Preston's CAT scan was not normal and indicated that there was "joint effusion," but that it did not cause Dr. States to reevaluate his diagnosis. Dr. States did not consider infection at any time because he determined there was a lack of symptoms of an infection. Dr. States testified that Preston had a small collection of fluid in his elbow with no heat and no redness to indicate an infection. Dr. States further testified that regarding the April 10 visit, "[Preston] had no swelling in his arm, he had no systematic symptoms, so he had no symptoms whatsoever of septic arthritis, sepsis, fasciitis or shock." Dr. States did not recall discussing the CAT scan results with Tracey, but knew that an orthopedic appointment had been scheduled for Preston for Friday, April 13.

Dr. States testified that it was not until Tracey's telephone call to him in the early morning hours on Friday that he first considered "sepsis" as a diagnosis for Preston. Dr. States testified that the triage time for Preston was 1:25 a.m., but that he did not immediately come to the emergency room. Annotations in the attending nurse's notes indicate that Dr. States was at the hospital at 2:45 a.m. Dr. States explained that Tracey indicated to medical staff in the emergency room that Preston was ill, feverish, vomiting, having difficulty breathing, and lethargic and that his arm was markedly swollen. Dr. States testified that he contacted numerous physicians and specialists for advice on the best course of treatment for Preston, in addition to calling additional physicians in to the hospital.

Upon Preston's death, Dr. States completed a discharge summary which, among the circumstances as set forth above, indicated as follows:

> [Tracey] relates that on [April 11, 2007,] the following day after being seen in the office [on April 10, Preston] began developing worsening arm pain and some

> systematic symptoms of illness with a flu type syndrome of vomiting, diarrhea, fevers, chills, and increasing edema and erythema of the arm. She apparently did not seek medical attention with his clinical deterioration until the early morning hours of this April 13th where she called me at my home and related the history to me of his clinical condition being lethargic, febrile and his arm pain being worse and having increased edema. She was then instructed to bring him to the emergency room as I suspected a septic joint as a differential diagnosis.

Dr. States testified that at the emergency room on Friday, April 13, 2007, Preston's arm looked dramatically different than it had on Tuesday, April 10. Dr. States described that the arm "looked more like the size of a leg, markedly discolored and edematous, mottled, as we have heard and it had spread out on to his chest wall." On cross-examination, Dr. States indicated that based upon nurses' notes, the details regarding the drastic change in skin coloration and mottling may have taken place after Preston's arrival, but before Dr. States actually arrived at the emergency room. Dr. States further admitted that he was not able to recall where he got all of the information included in his discharge summary and that it came from a variety of sources.

Dr. Wayne Kirk Weston, a board-certified physician, testified that he was working in the emergency room when Preston was admitted on April 13, 2007. Dr. Weston described that when Preston was admitted, he was "extremely pale [and] somewhat lethargic" and "[h]is left arm was completely blue, cold from his fingertips up to include his shoulder; and he had petechaie down his — in his axilla under his arm and down his side. He had no blood pressure and his temperature was approximately 94." Dr. Weston testified that blue coloration is also referred to as "mottling" and that the mottling was present before the intravenous fluid and warming blanket were administered. Dr. Weston testified that he believed Preston was in severe hypovolemic shock due to a lack of fluids in his vascular system and that Tracey and Michael had indicated that Preston had some vomiting and diarrhea for 2 days prior. Dr. Weston testified that after the intravenous fluids and warming

blankets were administered, the mottling spread to Preston's entire body because Preston was so "toxic" that most of his blood vessels had become damaged and were leaking fluid and blood.

Dr. Christine Odell testified via a video deposition that she was a pediatrician at the Boston Medical Center and specialized in pediatrics, pediatric emergency medicine, and pediatric infectious disease. Dr. Odell indicated that she had reviewed Preston's medical records generated from the States Family Practice clinic and the depositions of McAdam and Dr. States. The crux of Dr. Odell's testimony was that neither Dr. States nor McAdam had met the standard of care in the care provided to Preston. Dr. Odell testified that McAdam's initial examination of Preston was insufficient and failed to address several important factors such as medications being taken, recent history, and symptoms Preston experienced. Dr. Odell explained that a differential diagnosis approach, which was commonly taught in medical school for both physicians and physician's assistants, was not utilized for Preston's examination and would have been important in formulating a medical plan. Dr. Odell testified that in circumstances where a child has a swollen, tender joint and was unable to move the joint fully, one of the considerations in a differential diagnosis would have been infection in that particular joint. Dr. Odell further explained that while the order of the x ray was appropriate, there should have been further consideration of Preston's history of a sore throat, which would have also led to taking a blood culture or fluid from the joint to evaluate whether or not there was an infection.

Dr. Odell testified that there clearly was a suggestion of possible infection or septic arthritis, even with Preston's limited history requested by McAdam at the April 9, 2007, examination. Dr. Odell testified that from her review of the records, it appeared clear to her that Preston had septic arthritis on April 8 which continued to worsen on April 9 and 10. Dr. Odell testified that septic arthritis is a medical emergency and would have required immediate treatment by an orthopedic surgeon. The joint would have been irrigated to remove the infectious material, and Preston would have immediately

been placed on antibiotics. Dr. Odell opined that the failure of both McAdam and Dr. States to make that diagnosis led to Preston's death and that had that diagnosis been made, Preston would be alive. Dr. Odell further indicated that the CAT scan taken of Preston's elbow indicated that there was a "great deal of fluid in the joint" but that the medical records contain no indication that an orthopedic surgeon was called to discuss the fluid.

On cross-examination, Dr. Odell admitted that upon her first review of a portion of the records, she believed that the parents and McAdam and Dr. States may have been equally responsible for Preston's death, but that she did not have the complete set of records and information to review. Dr. Odell testified that after reviewing the depositions, she opined that 20 percent of the responsibility was on the parents. Dr. Odell explained that she did not believe Tracey's testimony given in her deposition that there was no change in Preston's arm from the second visit with Dr. States, on Tuesday, April 10, 2007, until Preston was taken to the emergency room the following Friday.

Dr. Frank Brodkey, a general internist from Janesville, Wisconsin, testified that he reviewed all of the office and medical records in this case, in addition to the depositions of other expert testimony given, including the depositions of McAdam and Dr. States. Dr. Brodkey testified that to a reasonable degree of medical certainty, McAdam had breached the standard of care in Preston's diagnosis on April 9 and 10, 2007. Dr. Brodkey explained that Preston's elbow would have been infected by the time of the medical examination on April 9, and still been infected at the examination on April 10. Dr. Brodkey testified that both McAdam and Dr. States breached the standard of care by not pursuing an appropriate differential diagnosis and by not prescribing appropriate therapy for Preston. Dr. Brodkey testified that the lack of any fever in a patient should not rule out infection in a differential diagnosis and that all of Preston's other symptoms clearly warranted a diagnosis of infection along with the trauma diagnosis made by McAdam and Dr. States. Dr. Brodkey testified that "not all

patients with septic arthritis have fever and not all patients with low grade fevers have septic arthritis." Dr. Brodkey explained that the same reasoning applied to a lack of redness in the joint inasmuch as redness is not a common symptom, whereas pain and restriction of range of motion are universal symptoms, of septic arthritis.

Dr. Brodkey testified that the orders for an x ray and a CAT scan were appropriate, but that the next step for an inflamed joint that is swollen and has an effusion, and where the patient is getting worse and in pain, is to tap the fluid out of the joint to release the pressure and diagnose what is going on by analyzing the fluid from the joint. Dr. Brodkey testified that one of the tests of the fluid which can be immediately completed is a "gram stain" which indicates if there are bacteria in the fluid. Dr. Brodkey testified that even though Dr. States was, according to his testimony, uncomfortable with tapping an elbow joint, he should have referred Preston to a physician who was able to perform the procedure, and that such procedure should have been done on either April 9 or 10, 2007. Dr. Brodkey testified that to a reasonable degree of medical certainty, had the procedure been done with Preston on either of those 2 days, Preston would have survived. Dr. Brodkey opined that Tracey acted reasonably in taking Preston to the clinic on both April 9 and 10 and that she should not be blamed for not bringing Preston in thereafter. Dr. Brodkey explained, "[Tracey] has already had Preston to see her physician assistant and physician who she trusts. She has already been seen not once, but twice that same week including just the day before, so I don't see what would motivate her to take him back the very next day."

On cross-examination, Dr. Brodkey testified that from his review of the records, Preston's arm was remarkably more swollen upon admission to the hospital than at the appointment on April 10, 2007. Dr. Brodkey agreed that streptococcus toxic shock syndrome was a rapidly moving and developing illness and could cause a child's death in less than 2 days.

Dr. Thomas Scott Stalder, an infectious disease physician in Lincoln, Nebraska, testified that he previously practiced

internal medicine for over 10 years and then elected to specialize in infectious disease by completing a 2-year fellowship at Creighton University in Omaha, Nebraska. Dr. Stalder explained that his current practice focused on treating patients with infections. Dr. Stalder testified that his practice has a very active orthopedic program and so it was not unusual for there to be patients with septic joints, although he has limited his practice to patients over the age of 14. Dr. Stalder testified that the treatment for a septic joint is typically a 4-week course of antibiotics which would begin in the hospital and be followed by outpatient care. Dr. Stalder explained that septic joints in children are rare.

Dr. Stalder testified that he reviewed States Family Practice office records, hospital records, and all of the depositions in this case, and he opined that the infection in Preston's elbow occurred subsequently to his office visit on April 10, 2007. Dr. Stalder testified that at the office visits on April 9 and 10, there was an absence of most of the signs and symptoms which one would expect to see when an infection is present, such as pain, warmth in the joint, and redness. Dr. Stalder explained that as the symptoms begin to develop, a loss of appetite would also be common.

Dr. Stalder suspected that Preston had not previously suffered from "strep throat" and that it was very uncommon that a person would develop an infected joint from strep throat, even if there were blood in the joint, as there was in Preston's case. Dr. Stalder opined that McAdam and Dr. States met the standard of care and that a full review of bodily systems was not necessary on either of the two office visits Preston had. Dr. Stalder testified that there was not sufficient evidence to create a level of suspicion necessary to tap Preston's joint and that "Preston would still [have been] salvageable" 12 to 24 hours before he presented in the emergency room.

Dr. Donald Frey, a family physician and administrator with Creighton University, testified that he also has had a number of professor and assistant or associate professor positions in which he both taught in a classroom and worked in a clinic. Dr. Frey testified that within some of those courses, he taught about "problem-focused" visits like that which McAdam

testified about. Dr. Frey testified that a full patient examination could take up to 3 hours and so his courses focused on teaching physicians how to combine their skills and focus on the visit that is occurring by addressing the particular problem presented by the patient.

Dr. Frey testified that he had reviewed the office records from States Family Practice, the hospital and autopsy records, and the depositions taken prior to trial. Dr. Frey testified that both McAdam and Dr. States provided the appropriate standard of care in this case. Dr. Frey testified that a full review of bodily systems was not necessary in this case because McAdam would have been asking too many questions, most of which would not have been relevant to the issue, and that the short time which Dr. Odell testified was necessary for a bodily systems review was insufficient. Dr. Frey explained that the problem-focused approach taken in this case was appropriate and that the history taken was also appropriate. Dr. Frey expanded that a full physical examination was not "a productive way of determining what was going on with a patient." Dr. Frey testified that Preston should not have been referred to an orthopedic surgeon to have the elbow tapped because there was no indication at the examinations that there was an infection. Dr. Frey testified that in determining whether to tap an elbow, a physician would look for redness in the elbow, a warm feeling, fever, indications in the overall disposition of the patient, and consistent pain. Dr. Frey disagreed with Dr. Brodkey's testimony that patients can experience septic joints without redness, warmth, or fever and stated that in his 30 years of practice, he had never seen a septic joint that did not have at least one of those symptoms. Dr. Frey testified that in his opinion, the infection was not present in Preston's elbow on either April 9 or 10, 2007, but by April 12, Preston would have been worse and the family should have sought out medical attention. Dr. Frey admitted that he was not an infection specialist but stated that in his opinion, it was highly probable that had Preston been brought in as little as 12 hours earlier, he could have been saved.

On cross-examination, Dr. Frey acknowledged that one of the teaching texts which he relies upon indicates that within a focused examination, it is still important to recognize that a

focused diagnosis does not mean that the physician should skip the differential diagnosis.

After the presentation of the parties' respective cases, Tracey made a motion for a directed verdict, which was overruled. The matter was submitted to the jury, which found, although not unanimously, against Tracey and for the appellees—McAdam, Dr. States, and States Family Practice. The jury found that both Tracey and the appellees had met their burdens of proof and attributed the percentages of negligence as follows: Tracey, 25 percent; Michael, 25 percent; McAdam, 15 percent; and Dr. States, 35 percent. The trial court accepted the jury's verdict and entered judgment in favor of the appellees, with costs taxed to Tracey.

Thereafter, Tracey filed a motion for a new trial alleging that the trial court erred by admitting the testimony of Dr. Stalder and Dr. Frey and for an unspecified "[e]rror of law occurring at trial." A hearing was held on the motion, after which the trial court overruled the motion. Tracey has now timely appealed to this court.

## ASSIGNMENTS OF ERROR

Tracey assigns that the trial court erred (1) in overruling her motion for new trial, (2) by entering judgment for the appellees pursuant to the jury verdict, (3) in sustaining the objections to deposition testimony identified in a court order of May 13, 2011, and (4) in sustaining objections made by the appellees to the testimony of Dr. Odell identified in two exhibits. However, after a careful review of Tracey's brief, we note the brief contains no argument regarding the motion for directed verdict, the sustaining of the objections to deposition testimony identified in the May 13 order, or the sustaining of the appellees' objections to the testimony of Dr. Odell in the specified exhibits. As such, we will not address these assignments of error, nor will we address the arguments set forth in the brief for which errors have not been specifically assigned. See *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011) (in order to be considered by appellate court, alleged error must be both specifically assigned and argued in brief of party asserting error).

## STANDARD OF REVIEW

[1,2] A motion for a new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Murray v. UNMC Physicians*, 282 Neb. 260, 806 N.W.2d 118 (2011). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives the litigant of a substantial right or a just result in matters submitted for disposition through the judicial system. *In re Petition of Omaha Pub. Power Dist.*, 268 Neb. 43, 680 N.W.2d 128 (2004).

## ANALYSIS

*Jury Instructions.*

Upon our review of the record, we determined that before addressing Tracey's assignment of error, it was necessary to address an issue regarding jury instructions which was not raised to either the trial court or this court on appeal. Prior to oral arguments, the parties were ordered to be prepared to address the issue to the court.

[3-5] Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *Krumwiede v. Krumwiede*, 258 Neb. 785, 606 N.W.2d 778 (2000); *Deterding v. Deterding*, 18 Neb. App. 922, 797 N.W.2d 33 (2011). We are mindful that failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error. See *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001). Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *In re Interest of Markice M.*, 275 Neb. 908, 750 N.W.2d 345 (2008).

The potential error is that the trial court, in its verdict form regarding the allocation of negligence, instructed that "[i]f the negligence of [Tracey and Michael] equals 50% or more, then [the jurors] must return a verdict for the defendants on the first cause of action for wrongful death." At the jury instruction

conference, Tracey's counsel objected to "the submission of the comparative." The jury instruction form sets forth the following list which was submitted to the jury:

**LIST OF PERCENTAGES:**

What percent, if any, of the negligence was that of [Tracey]?

What percent, if any, of the negligence was that of [Michael]?

What percent, if any, of the negligence was that of [Dr.] States . . . ?

What percent, if any, of the negligence was that of . . . McAdam?

At oral arguments, the appellees argued that as Preston's next of kin, Michael could be found contributorily negligent, and that the jury was properly instructed as to the allocation of contributory negligence. The appellees argued that "next of kin" negligence can be imputed to Michael, without a formal introduction into the case as a third-party defendant or a claimant under contributory negligence statutes. In support of their position, the appellees cited the court to *Tucker v. Draper*, 62 Neb. 66, 86 N.W. 917 (1901); *Weber v. Southwest Nebraska Dairy Suppliers, Inc.*, 187 Neb. 606, 193 N.W.2d 274 (1971); and *Richardson & Gillispie v. State*, 200 Neb. 225, 263 N.W.2d 442 (1978), *modified* 200 Neb. 781, 265 N.W.2d 457.

In *Tucker v. Draper, supra*, the plaintiff, the father and next of kin in the case, sued as administrator of his son's estate. The son was killed by falling into a well on the defendant's premises, and the father alleged that he had been damaged "'by reason of the loss of the service and society and fellowship of the [son] in the sum of $5,000.'" *Id.* at 68, 86 N.W. at 918. A jury trial was held, and the trial court excluded evidence offered by the defendant to show contributory negligence on the part of the father. At the close of the evidence, the court submitted the matter to the jury with an instruction that "'contributory negligence on the part of either or both . . . parents under the law is no bar to this action.'" *Id.* at 75, 86 N.W. at 920. The jury returned a verdict for the father. In reversing, and remanding the matter for a new trial, the

Nebraska Supreme Court found, in part, that in an action by the father for his own benefit to recover for the pecuniary injury suffered through the death of his son, the question of contributory negligence of the father should have been submitted to the jury.

In *Weber v. Southwest Nebraska Dairy Suppliers, Inc., supra*, a wrongful death action pursuant to Neb. Rev. Stat. § 30-810 (Reissue 1964) was brought on behalf of a deceased wife after an automobile accident during which a friend of the husband and wife was driving the vehicle owned jointly by the husband and the wife. The action was brought by an administrator of the wife's estate, who was not the husband, and the husband was not a party to the case. The court noted that the husband was the only person sustaining pecuniary loss in the death of his wife and determined that there was no

> distinction between a situation where the action is brought by a personal representative other than the beneficiary and one where the beneficiary himself is the plaintiff, if in both situations he is the sole and only person who can be benefited by the action and is guilty of negligence as a matter of law.

187 Neb. at 611, 193 N.W.2d at 277. The court held, "Where the evidence is clear that the only person within the class for which an action may be brought under [§] 30-810 . . . is guilty of negligence as a matter of law, it is the duty of the court to direct a verdict for the defendant."

In *Richardson & Gillispie v. State, supra*, actions for property damage and wrongful death were brought under the State Tort Claims Act after a one-vehicle accident was allegedly caused by the negligent maintenance of a state highway. A husband and wife were driving with their 18-month-old daughter, and the husband and the daughter survived, while the wife was killed in the accident. As to the negligence issue, the trial court, sitting without a jury, determined that the proximate cause of the accident was the driver of the vehicle, the husband, and it dismissed the actions. It appears that the case was brought on behalf of both the administrator of the wife's estate and the husband himself. The court found as follows:

> Even if the court's findings on remand were to determine that the negligence of [the husband] was a bar to recovery for his own damages, that finding does not necessarily affect the issue of liability in the action brought by the administratrix of [the wife's] estate, at least so far as the interest of [the daughter] is concerned. Neither [the wife] nor [the daughter is] chargeable with contributory negligence in this case. The general rule in a wrongful death case is that although the action will not be barred by the contributory negligence of one beneficiary, the amount of recovery will be reduced (if properly requested) to the extent of the contributorily negligent beneficiary's share in the recovery.

*Richardson & Gillispie v. State*, 200 Neb. 225, 232-33, 263 N.W.2d 442, 447 (1978), *modified* 200 Neb. 781, 265 N.W.2d 457.

The appellees also cited this court to an Oregon Court of Appeals case, *Robinson v. CSD*, 140 Or. App. 429, 914 P.2d 1123 (1996). In that case, the mother, as the personal representative of her son's estate, brought a wrongful death action against the children's services division of Oregon's department of human resources arising from her son's suicide after that agency placed her son in a facility. On appeal, the Oregon Court of Appeals determined that the jury could properly consider the alleged fault of both the mother and her husband (nonparties in the case) in causing the death, through physical and verbal abuse of the son, because they were both beneficiaries who were entitled to recover damages for the son's wrongful death. *Id*. Oregon's comparative fault statute has since been amended, but at that time, it provided as follows:

> Contributory negligence shall not bar recovery in an action by any person or the legal representative of the person to recover damages for death or injury to person or property if the fault attributable to the person seeking recovery was not greater than the combined fault of the person or persons against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the percentage of fault attributable to the person

> recovering. This section is not intended to create or abolish any defense.

Or. Rev. Stat. § 18.470 (1993).

The Oregon Court of Appeals compared the relationship between the comparative fault statute and the wrongful death statute and found that the conduct of beneficiaries should be considered when determining whether contributory negligence bars a wrongful death claim under the Oregon statute. The court held that "contributory negligence by the sole beneficiaries of a wrongful death claim is a defense to the claim if the beneficiaries are people who are designated as beneficiaries under the wrongful death statute." *Robinson v. CSD*, 140 Or. App. at 437, 914 P.2d at 1128.

[6] Under Neb. Rev. Stat. § 25-21,185.10 (Reissue 2008), it is possible, under certain circumstances, for multiple defendants to have a percentage of noneconomic damages allocated to them by the finder of fact based on each defendant's percentage of negligence, and in its application, § 25-21,185.10 operates only at the point when a finder of fact has determined the liability of the parties involved in the case and is apportioning damages between the parties. Because the statute's effect is on only the apportionment of damages between multiple defendants after liability has been established, the proper timeframe to consider in determining whether there are, in fact, multiple defendants in a case is when the case is submitted to the finder of fact. *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001). The term "defendant" in § 25-21,185.10, which governs joint and several liability and allocation of liability involving more than one defendant, also includes a third-party defendant brought into the action. See *Slaymaker v. Breyer*, 258 Neb. 942, 607 N.W.2d 506 (2000).

In this case, the amended complaint names two defendants, McAdam and Dr. States. Tracey is not a named defendant, but is a claimant, by virtue of being the personal representative of Preston's estate who brought and maintained the action. See Neb. Rev. Stat. § 25-21,185.07 (Reissue 2008). Neb. Rev. Stat. § 25-21,185.09 (Reissue 2008) provides in part:

> Any contributory negligence chargeable to the claimant shall diminish proportionately the amount awarded

> as damages for an injury attributable to the claimant's contributory negligence but shall not bar recovery, except that if the contributory negligence of the claimant is equal to or greater than the total negligence of all persons against whom recovery is sought, the claimant shall be totally barred from recovery.

In their amended complaint, the appellees allege the defense of contributory negligence against Tracey and Preston's "next of kin," but the record contains no evidence that Michael was ever formally brought into the action either as a claimant within the meaning of Neb. Rev. Stat. § 25-21,185.12 (Reissue 2008) or as a third-party defendant pursuant to Neb. Rev. Stat. § 25-331 (Reissue 2008).

[7] However, under Nebraska's wrongful death statutes, a wrongful death claim is brought in the name of the decedent's personal representative "for the exclusive benefit" of the decedent's next of kin. § 30-810 (Reissue 2008). Section 30-810 goes on to provide that the "avails [of any verdict or judgment of damages] shall be paid to and distributed among the widow or widower and next of kin in the proportion that the pecuniary loss suffered by each bears to the total pecuniary loss suffered by all such persons." In the context of the wrongful death statutes, "next of kin" is defined as those persons nearest in degree of blood surviving the decedent, who ordinarily are "'those persons who take the personal estate of the deceased under the statutes of distribution.'" *Reiser v. Coburn*, 255 Neb. 655, 659, 587 N.W.2d 336, 339 (1998), quoting *Mabe v. Gross*, 167 Neb. 593, 94 N.W.2d 12 (1959). Thus, under the wrongful death statutes, Tracey and Michael would be Preston's next of kin and would be awarded the avails of any judgment of damages as beneficiaries of Preston's estate.

Therefore, we find that as next of kin and a beneficiary of Preston's estate, Michael was properly included in the court's instruction to the jury regarding the allocation of the percentages of contributory negligence.

*Motion for New Trial.*

Tracey argues that the trial court erred by overruling her motion for new trial. In her motion, Tracey argued that the

trial court erred by allowing the expert testimony of Dr. Stalder and Dr. Frey and alleged unspecified "[e]rror of law occurring at trial."

During the lengthy trial in this case, and on the morning that Dr. Stalder was set to testify, Tracey filed a motion in limine regarding the testimony of Dr. Stalder. That motion has not been included in the record before this court, but during arguments before the trial court, Tracey indicated that there "is no competent methodology and no reliability established [and Dr. Stalder's testimony] should be excluded under" Neb. Rev. Stat. § 27-702 (Reissue 2008) and under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001) (*Daubert/Schafersman*). At the conclusion of Dr. Stalder's testimony, Tracey renewed the motion to exclude Dr. Stalder's testimony in addition to making an oral motion to strike the testimony, both of which were overruled by the trial court, which found, "Dr. Stalder did have board certification in infectious disease as well as internal medicine, so I will find that he did have a sufficient basis for the opinions."

Similarly, just prior to Dr. Frey's testimony, Tracey also asked the court to limit his testimony due to the fact that he was not an infectious disease specialist and did not have the "basis, methodology and reliability" pursuant to § 27-702. The trial court overruled Tracey's motion, finding that Dr. Frey was sufficiently qualified as an expert.

Section 27-702 allows the admission of expert testimony "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue[;] a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

We disagree with Tracey's argument and find that both Dr. Stalder and Dr. Frey were properly qualified as experts in this case. Dr. Stalder completed his undergraduate degree at the University of Nebraska-Lincoln; medical school at the University of Nebraska Medical Center in Omaha; his residency in internal medicine at the Maine Medical Center in

Portland, Maine; and a fellowship in infectious diseases at Creighton University. Dr. Stalder was board certified in internal medicine and infectious diseases and was licensed to practice in Nebraska. Dr. Stalder was active in clinical practice in the areas of internal medicine, "HIV/AIDS," and infectious diseases. Dr. Stalder was an adjunct instructor of internal medicine at the University of Nebraska Medical Center and had also been involved in teaching at various other programs. Dr. Stalder also held many administrative positions at various medical centers and was an active member of various medical committees. Dr. Stalder testified that his current practice was a hospital-based practice wherein another physician would suspect or have documentation of an infection and would contact Dr. Stalder for review, interview, examination, diagnosis, and development of a treatment plan for the patient. Dr. Stalder indicated that his current practice was limited to adolescent and adult patients, but that during his previous practice experience, he treated children and young adolescents as well. Dr. Stalder's opinion in this case was based upon his review of the office records from Dr. States' office, hospital records, autopsy reports, and depositions from Tracey, Michael, McAdam, Dr. Weston, Dr. Odell, and Dr. Brodkey, as well as Dr. Michael McGuire, a board-certified orthopedic surgeon practicing in Columbus, Nebraska.

Dr. Frey attended undergraduate school at William Jewell College in Liberty, Missouri, and medical school at the University of Missouri at Columbia. Dr. Frey practiced family medicine for a few years before becoming the director of the family medicine residency program at various facilities such as United Hospital Center in Clarksburg, West Virginia; Bishop Clarkson Memorial Hospital in Omaha; and Creighton University School of Medicine in Omaha. Dr. Frey has also served as medical director of a nursing facility, chief of family medicine service at Creighton University, and chairperson of the department of family medicine at Creighton University. Dr. Frey currently was the vice president for health sciences, held an endowed chair, and was a faculty associate at Creighton University. Dr. Frey had several medical staff memberships, was active in numerous medical professional

organizations, and had published numerous peer-reviewed articles on various subjects, including family practice, in addition to numerous non-peer-reviewed articles and book reviews. Dr. Frey was also active in the medical community with professional presentations, both internationally and in the United States.

Upon our review of the record, it is clear that both Dr. Stalder and Dr. Frey were qualified and that sufficient foundation was given to allow the expert testimony of both of these medical professionals pursuant to § 27-702.

[8] Tracey also objected to the testimony of Dr. Stalder pursuant to the requirements of *Daubert/Schafersman*. *Daubert/Schafersman* requires the trial court to act as a gatekeeper to ensure that expert testimony is scientifically valid and can be properly applied to the facts in issue and is therefore helpful to the trier of fact.

In the case of *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010), the Nebraska Supreme Court found that to sufficiently call specialized knowledge into question under *Daubert/Schafersman* is to object with enough specificity so that the court understands what is being challenged and can accordingly determine the necessity and extent of any pretrial proceeding. Assuming that the opponent has been given timely notice of the proposed testimony, the opponent's challenge to the admissibility of evidence under *Daubert/Schafersman* should take the form of a concise pretrial motion. *State v. Casillas, supra*. It should identify, in terms of the *Daubert/Schafersman* factors, what is believed to be lacking with respect to the validity and reliability of the evidence and any challenge to the relevance of the evidence to the issues of the case. *State v. Casillas, supra*. In order to preserve judicial economy and resources, the motion should include or incorporate all other bases for challenging the admissibility, including any challenge to the qualifications of the expert. *Id*.

In this case, Tracey's last-minute motion, just prior to Dr. Stalder's testimony, did not meet these criteria. There is nothing in the record to suggest that notice was not given that Dr. Stalder would be testifying, and in fact, well before trial had been contemplated, both parties had the opportunity to and

did in fact depose each of the expert witnesses testifying in this case, including Dr. Stalder. The actual motion in limine is not in the record for our review, and the oral motion merely indicates that Dr. Stalder's testimony should be excluded under *Daubert/Schafersman*. See *In re Interest of Britny S.*, 11 Neb. App. 704, 659 N.W.2d 831 (2003) (appellant bears burden of presenting adequate record on appeal). Furthermore, the motion was filed in the midst of the trial and instead should have been addressed in a pretrial motion to the court.

## CONCLUSION

In sum, we find that the trial court did not abuse its discretion by overruling Tracey's motion for a new trial and that Tracey's assignment of error to that effect is without merit. Therefore, we affirm.

AFFIRMED.

IRWIN, Judge, participating on briefs.

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## LORINA HEESCH, APPELLANT, V. SWIMTASTIC SWIM SCHOOL AND TECHNOLOGY INSURANCE COMPANY, ITS WORKERS' COMPENSATION INSURANCE CARRIER, APPELLEES.

823 N.W.2d 211

Filed October 30, 2012. No. A-12-140.

1. **Workers' Compensation: Appeal and Error.** With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong.
3. **Jurisdiction: Words and Phrases.** Ancillary jurisdiction is the power of a court to adjudicate and determine matters incidental to the exercise of its primary jurisdiction of an action.
4. **Workers' Compensation: Courts: Statutes.** A statutorily created court, such as the Workers' Compensation Court, has only such authority as has been conferred upon it by statute, and its power cannot extend beyond that expressed in the statute.