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CLERK COURT OF APPEALS OF GA

IN THE COURT OF APPEALS OF GEORGIA

EHCA DUNWOODY, L.L.C., D/B/A
DUNWOODY MEDICAL CENTER,
EHCA, L.L.C., and JEAN THOMPSON,

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CASE NO. A05A2141

Appellants,

vs.

BONNIE J. DANIEL,

Appellee.

BRIEF OF APPELLEE

Plaintiff Bonnie Daniel proved to the satisfaction of the jury that she is allergic to latex, that Defendant Jean Thompson, LPN., negligently inserted a latex catheter into her bladder, and that this trauma caused Ms. Daniel to develop interstitial cystitis, a severe degenerative disorder of the bladder. That unanimous verdict was abundantly supported by admissible evidence, including well-founded expert testimony. There was no harmful error. Any objectionable evidence was merely cumulative.

PART ONE

FACTS AND PROCEEDINGS BELOW

Ms. Daniel's Allergy to Latex

Bonnie Daniel was first diagnosed latex allergic in 1995. T-III-264. **As** frequently occurs, her initial complaint resulted from a dental procedure. SR-___ (Deposition of D. Winn Walcott, M.D., p. 134); T-II-100. Her dentist, Dr. Ray Johnson, performed a root canal using latex gloves and a latex gasket to keep the tooth sterile. T-III-266-268. The procedure was uneventful. T-III-268. But after Ms. Daniel left the dentist's office, she noticed "a swelling in [her] mouth and a tingling sensation that ~~was~~ not normal." T-II-101 She reported this to Dr. Johnson. T-II-101; T-III-268-269. Dr. Johnson diagnosed her latex allergic. T-

¹ **A** video of Dr. Walcott's deposition was played for the **jury**. T-III-288 *see also* T-I-18-19 (identifying pages omitted from the video). The deposition itself was admitted into evidence as Exhibit P-2. T-I-49, 62. But the transcript contains a court reporter's notation that Exhibit P-2 was not available for inclusion. R-VIII-562. Ms. Daniel is requesting a supplemental appellate record and will file a motion with this **Court** if it becomes necessary.

111-269 *see also* T-111-270-271 (Dr. Johnson’s explanation that, as a dentist, he is qualified to make such a diagnosis). Dr. Johnson opined that Ms. Daniel’s latex allergy is “a classic case” and that the diagnosis was “**an** easy puzzle to put together.” T-III-271.²

Ms. Daniel experienced other problems with latex. In the 1980s, when AIDS became known and gloves became required, Ms. Daniel was working **as** a dental hygienist. T-II-101. She found that she could not use latex gloves, so she always used latex-free gloves. T-II-101. Once, while blowing **up** a balloon, she noticed that her lips “felt tingly and funny.” T-II-101. She never blew up a balloon again. T-II-101. During vaginal exams she noticed, if “touched with a latex glove on [her] labia, that it would present a sensation that was abnormal.” T-11-101-102. Dr. Johnson’s diagnosis and her own experiences satisfied Ms. Daniel that she was latex allergic. T-II-102-104. She made it her practice to tell her health care providers, including Defendants, that she is latex allergic. T-II-102-104.

² The court reporter elected to record each pause by inserting an ellipsis.

Punctuation and sentence breaks are altered herein for clarity.

During the course of this litigation, however, her allergy has become disputed. T-11-84-87 (Defendants' opening statement). Consequently, Ms. Daniel had a blood test and skin patch test performed. T-II-137. The results were negative. T-II-138. Nevertheless, when he gave her that results, the allergist who had performed the tests, Dr. Kemp, gave Ms. Daniel an EpiPen. T-II-140. An EpiPen is an auto-injector that administers epinephrine, an emergency treatment for severe allergic reactions. *EpiPen.com*, (visited August 20, 2005) <<http://www.epipen.com/epipenmain.aspx>>. Ms. Daniel also consulted and was treated by another allergist, Dr. Winn Walcott, who also performed a test which produced a negative result. Notwithstanding the negative test results, Dr. Walcott diagnosed her latex allergic. SR-____ (Walcott deposition, pp. 76, 109). Dr. Walcott further concluded that Ms. Daniel suffered an allergic reaction to the insertion of the latex catheter. SR-____ (Walcott deposition, pp. 77).

Dr. Walcott disregarded the negative test results, because false negatives in latex allergy tests are "a frequent problem." SR-____ (Walcott deposition, pp. 49). "[T]here are multiple proteins involved in the hypersensitivity reaction of latex and the different proteins can be involved with different exposures." SR-____ (Walcott deposition, pp. 56). "[I]f you don't have the correct protein in there for the correct

patient, you can get a false negative skin test.” SR-___ (Walcott deposition, pp. 57). Even defense expert, Dr. Mark Livezey, admitted that tests for latex allergies produce 10% to 27% false negatives. T-III-328.

Latex allergic individuals sometimes suffer extremely severe, even life-threatening, reactions. T-III-270-271; SR-___ (Walcott deposition, pp. 49-51, 59); see *also* SR-___ (Walcott deposition, pp. 118) (describing a lady who, as a result of exposure to latex “molted her skin, lost all her hair and is permanently disabled). Because of the possible severity of latex reactions, Emory Dunwoody Medical Center, the defendant hospital, instituted a policy requiring 15 different precautions to avoid exposing latex allergic patients. T-III-350-351, 353-358.

**Defendants’ Insertion of a Latex Catheter Through Ms. Daniel’s Vaginal
Opening and Urethra and into Her Bladder**

On August 24,2000, Ms. Daniel was admitted to Emory Dunwoody Medical Center for a scheduled abdominal surgery. T-II- 104. At that time, she told hospital personnel that she was latex sensitive, especially in mucosal, i.e. internal areas. T-11-104. She was placed on latex allergy protocols: notations were made in her medical record; signs were posted on her door; and a yellow band was placed on her arm that warned, “allergy alert”. T-II-104-105; T-III-355-359. A latex-free

cart, with latex free products, was placed in her room. In the hospital records, her latex allergy is noted 22 times. T-III-352-373. The hospital's own latex allergy protocol records indicate that "serious reactions are more likely to occur with mucous membrane contact." T-III-35 1; R-X-597, Exhibit P-35.

The day after surgery, August 25,2000, Ms. Thompson removed the non-latex catheter that had been put into Ms. Daniel during surgery. T-II-105. Unable to urinate, Ms. Daniel asked Ms. Thompson to re-catheterize her. T-II-106. While Ms. Thompson performed that procedure, she was distracted by a series of calls from the front desk. T-II-106-107. Ms. Thompson inserted a latex catheter into Ms. Daniel's urinary tract and bladder. T-III-345.

Ms. Daniel did not realize a latex catheter had been inserted; but she did notice that, unlike the non-latex catheter which she had not felt at all, this catheter immediately felt irritating, "like pin pricks." T-II- 107. She told the nursing staff of her discomfort, but they did not even make a note of her complaint. T-II-107. The latex catheter stayed in place for almost twenty hours. T-11-74.

Urine Retention the Night After Ms. Daniel Was Released from the Hospital

Ms. Daniel was released the evening of August 26 and went to her daughter's home. T-II-107- 108. That night she began to experience urine

retention. T-II-108. At 3:00 a.m. she could not urinate at all. T-II-108. At 7:00 a.m., in great discomfort, Ms. Daniel woke her daughter and asked to be rushed to the nearest emergency room. T-II-108. At the emergency room of the Georgia Baptist Medical Center in Cumming, Dr. Clarence Carr catheterized her again. T-11-108, 110.

Over objection at trial, Ms. Daniel testified that Dr. Carr had asked her **if** the second catheter inserted into her at Emory Dunwoody might have been latex and that Dr. Carr had opined that a latex catheter was the cause of her urine retention. T-III- 109-110. Dr. Carr restated that opinion, without elaboration, in a five-line letter. R-X-595, Exhibit P-32. That letter was admitted into evidence over objection as a medical narrative, pursuant to O.C.G.A. § 24-3-18. T-1-25-26.

Ms. Daniel's counsel did suggest, in his opening statement, that Dr. Carr's opinion is evidence that Ms. Daniel suffered an allergic reaction to the latex catheter. T-11-77-78. But Ms. Daniel's allergic medicine expert, Dr. Walcott – who opined that Ms. Daniel is latex allergic and suffered an allergic reaction to the latex catheter inserted into her bladder – did not rely on this urine retention incident as a basis for his opinion. SR-___ (Walcott deposition, pp. 76-77, 104-108, 118-119).

Ms. Daniel's Development of Interstitial Cystitis as a Result of Her Exposure to the Latex Catheter

Dr. Walcott opined that Daniel's allergic reaction to the latex catheter **was of** a severe type, because the catheter was inserted into a wet environment, and latex is water soluble. SR-___ (Walcott deposition, pp. 75, 104-105, 135) see also T-III-349, 352 (recitation in the defendant hospital's written policy on latex-free precautions that serious allergic reactions are more likely to occur with mucus membrane contact – such as inserting a catheter through a woman's vaginal opening and urethra and into her bladder). Predicting the consequences **of** this allergic reaction was outside Dr. Walcott's expertise, but he testified that adverse consequences could be expected. SR-___ (Walcott deposition, p. 86).

In the days and weeks after her surgery, Ms. Daniel began experiencing abnormal sensitivities, frequent urination problems, urgent urination problems, bladder spasms, bladder pain, urinary burning and urgency. T-II-113-117. She was diagnosed as having interstitial cystitis (T-II-118) and the Social Security Administration subsequently deemed her disabled by interstitial cystitis. T-II-130; R-X-589, 590, Exhibits P-25, P-26.

Ms. Daniel's urology expert, Dr. Mickey Karram, testified, "there's really no question in my mind that she has a latex allergy." T-II-211. He opined, "to a reasonable degree of medical probability" that "the insertion of the latex catheter" and the resulting allergic reaction caused Ms. Daniel to develop a severe case of interstitial cystitis. T-II-202-203.

Interstitial cystitis is often difficult to diagnose. The average patient with the illness goes to eight doctors before being correctly diagnosed, but Ms. Daniel's diagnosis was rapid and "crystal clear." T-II-199-200 *see also* T-III-388 (testimony of defense urology expert Peter Rosenblatt that a major problem with interstitial cystitis is that, "often the diagnosis is missed, initially" and a correct diagnosis can take "up to four years or longer.")

Interstitial cystitis is "a chronic disorder that leads to severe bladder pain." T-II-197. A severe case feels "like pouring urine on ~~an~~ open wound." T-III-4 12-413. It is a progressive illness. T-II-209.

Interstitial cystitis occurs when a trauma to the bladder corrodes the superficial or "gag layer" of the bladder, degrading its ability to contain potassium. T-II-198,252-253. Potassium is very irritating to the inner layer of the bladder." T-II-198. The bladder spasms. T-II-198, 253. Various substances are released.

T-II-198. A vicious cycle begins. T-II-198. The bladder becomes more and more contracted. T-II-198. Eventually “very small amounts of urine cause severe pain” and the patient is “going to the bathroom numerous times an hour.” T-II-199. Finally the bladder becomes a “nonfunctional ... red hot organ, that’s extremely irritated.” T-II-199. There is no cure; even removing the bladder does not resolve the problem. T-II-199.

Among the types of trauma to the bladder that can cause interstitial cystitis are “a series of chronic infections” and “traumatic intercourse.” T-II-198. “There is no clearcut understanding of a single causative agent [for interstitial cystitis].” T-11-222. “But we do know that a traumatic event to the bladder – and certainly something like this – could provoke the patient into a state **of** interstitial cystitis.” T-II-203 (testimony of Dr. Karram).

Indeed allergic reactions are more likely than other types of trauma to cause interstitial cystitis, because “allergic reactions play into the development of interstitial cystitis. T-II-207. “[T]he autoimmune system and allergic reactions and histamine release and all **of** that plays into to the development of this problem.” T-II-208. Histamines cause the symptoms normally associated with allergies, such as a runny nose. T-III-417. Histamines are carried in and released

by mast cells. **T-II-208; T-III-416-417.** Mast cell production of histamines at the bladder and degradation of the bladder lining by those histamines have been associated with interstitial cystitis. **T-II-208; T-III-417.**

According to one study, **30%** of patients with interstitial cystitis “had evidence of significant allergies.” **T-II-208.** Some articles suggest that 50 to 60% of women with interstitial cystitis have allergies. **T-III-391.**

In support of his opinion that the insertion of the latex catheter caused Ms. Daniel’s interstitial cystitis, Dr. Karram explained, “the simple thing in my mind that makes this very clear is that she didn’t have any bladder pains before this happened. And it all started after [insertion of the latex catheter].” **T-II-203.** Although Ms. Daniel had some past history of urinary tract infections and of urgency and frequency of urination, there is nothing in her history “even remotely close to any interstitial cystitis before the [latex] catheter was inserted.” **T-II-235.** The operative report prepared by the surgeon who performed the operation on the occasion at issue recites that Ms. Daniel’s bladder was examined and that there “were no abnormalities.” **T-II-241 see also T-II-103.**

But, as detailed above, Dr. ~~Karram~~ formed this opinion in light of his knowledge that a traumatic insult to the bladder can cause interstitial cystitis and

that allergic reactions play into the development of interstitial cystitis. As he testified on cross examination, “this isn’t a mere temporal relationship.” T-11-241.

As to the defense argument that Ms. Daniel should be required to prove that allergies to latex specifically cause interstitial cystitis, Dr. Karram pointed out that the essential fact is not simply that Ms. Daniel was exposed to latex but that her *bladder* was exposed to latex. T-II-225-226. Research of the sort the defense would require will never be performed. T-II-224. Because subjective experiences of pain are central to interstitial cystitis, animal studies are not feasible. T-II-193-194. It would plainly be unethical to intentionally expose the bladder of a latex allergic human being to latex. T-II-224-225. It would not be feasible to find “a whole group of women” who are “known to be latex allergic,” and who have had “a latex catheter in their bladder.” T-II-225.

Severity of Interstitial Cystitis

Interstitial cystitis is “a life-changing disease.” T-III-406. It affects the patient’s quality of life everyday. T-III-406. Interstitial cystitis patients are “miserable.” T-II-2 10. “[T]heir their quality of life disintegrates until it doesn’t exist anymore” T-II-2 10. Some have committed suicide. T-II-2 10.

Ms. Daniel testified about the emotional toll “of dealing with the chronic pain. You get to where you’re afraid to leave your house. I have had thoughts of suicide because of it. Because there’ve been times that I thought, ‘I just cannot live with this pain.’” T-11-96-97.

The psychiatric and emotional effects caused by her interstitial cystitis were further detailed in Ms. Daniel’s Pain Journal, which was admitted, without objection, as Plaintiffs Exhibit 23. R-IX-585. In the first entry, dated January 23, 2002, she wrote,

“My energy level is about 2/3 of what it should be. Today it hurt to (1) ride in the car, (2) walk, and (3) try to play with my 61 lb. grandchild. That is something that bothers me a lot! I cannot run, tumble or even “hug hard,” my grandchildren. I hate having to say to them, “Be careful with Bebe, or I can’t do that, it hurts my tummy.

...

I hurt so bad. I cannot walk **and** I am crying. I am worried about work tomorrow. I get very depressed.

Exhibit 23, **pp.** 1-2.

Her daughter testified, “she got to the point where she couldn’t work anymore. And she can’t come over here to see us very often. When we go to Jackson [Mississippi] to see her, she cannot go with us to the **zoo or** bowling or to play miniature golf. We basically have to stay around her house. If we do go out to eat dinner – she’s able to do that – she has to take medications before we leave, take medicines with her, and make sure that there’s a bathroom available.” T-III-450-451.

For Ms. Daniel, “Everything has changed.” T-II-144. Before her interstitial cystitis she was “independent and energetic.” T-II-144. She sang with her church choir and the Mississippi Chorus. T-II-144. She “played with [her] grandchildren like [she] was one of them.” T-II-144. She would drive to visit friends in Indiana and her grandchildren in Atlanta. T-II-144. Now she cannot sing with the choir or the chorus. T-II-145. She lost her job. T-II-145. She has difficulty riding in a car. T-II-145. She can walk no more than 15 or 20 minutes because it hurts her bladder. T-II-145. She “has to wear a diaper,” which is “embarrassing and humiliating.” T-II-145. She takes Ritalin for lethargy and fatigue. T-II-146.

Ms. Daniel’s “disease is progressing.” T-II-209. As the disease progresses, “you start to get a decreased threshold for pain in the bladder and the more severe

the pain is, the more frequently the patient will need to go to the bathroom, the smaller, the more contracted her bladder gets and over time, the bladder becomes a very, very small, contracted organ. Very small amounts of urine cause severe pain. People are going to the bathroom numerous times an hour. And the end result is this, this bladder that-that's nonfunctional, that's this red-hot organ, that's extremely irritated." T-II- 199-200.

PART TWO

ARGUMENT AND CITATION OF AUTHORITIES

1. The Testimony of Ms. Daniel's Expert Witnesses Was Sufficient to Prove Causation.

As detailed above, Dr. Walcott diagnosed Ms. Daniel as latex allergic and concluded that she had suffered an allergic reaction to the insertion of the latex catheter. **SR-___** (Walcott deposition, pp. 76, 77, 109). Dr. Karram testified "to a reasonable degree of medical probability" that "the insertion of the latex catheter" and the resulting allergic reaction caused Ms. Daniel to develop a severe case of interstitial cystitis. T-II-202-203.

Arguing general causation, Defendants attack Dr. Karram's testimony by taking it out of context. It is true, as Defendants repeatedly point out, that Dr.

Karram said, “We don’t know what causes it.” T-II-198:3-4. But in the following paragraph he clarified: “We don’t know *exactly* what causes it, but something makes the inside of the bladder very sensitive, and it specifically becomes sensitive to potassium.” T-II-198:10-13 (emphasis added). Dr. Karram went on to say, “But we do know that a traumatic event to the bladder – and certainly something like this – could provoke the patient into a state **of** interstitial cystitis.” T-II-203 *accord* T-II-198: 7-10.

An expert can present a sufficient showing of causation “by stating that the only apparent cause of the plaintiffs injury was the defendant’s action.” *Zwiren v. Thompson*, 276 Ga. 498,501,578 S.E.2d 862,866 (2003).

Arguing specific causation, Defendants again misrepresent Dr. Karram’s testimony. Testifying on cross examination Dr. Karram rejected the mischaracterization of his testimony on which Defendants basis their specific causation argument: “this isn’t a mere temporal relationship.” T-II-241. As detailed above, his opinion was supported by his knowledge that “a traumatic event to the bladder – and certainly something like this – could provoke the patient into a state of interstitial cystitis.” T-II-203.

Of course the temporal relationship was a part of the basis for Dr. Karram's opinion. T-II-203. That is entirely proper. "[C]ausation may be demonstrated by close proximity in time between an injury and the onset of symptoms." *Tecumseh Products Co., Inc. v. Rigdon*, 250 Ga.App. 739 (3), 744-745, 552 S.E.2d 910,914 (2001); *Jordan v. Smoot*, 191 Ga.App. 74, 75(1), 380 S.E.2d 714 (1989).

None of the three cases Defendants cite support their specific causation argument. Defendants cite *Akins v. Federated Mut. Implement & Hardware Ins. Co.* 108 Ga.App. 872, 134 S.E.2d 854 (1964); *Payne v. Chandler*, 41 Ga.App. 385, 153 S.E. 96 (1930); and *Cherokee County Hosp. Authority v. Beaver*, 179 Ga.App. 200,345 S.E.2d 904 (1986). All three of those cases involve allegations of causation that were supported by no expert testimony whatsoever.

2. None of the Trial Court's Evidentiary Rulings Constitute Reversible Error.

Defendant's second enumeration of error is compound. It complains of a number of evidentiary rulings, most overruling Defendant's hearsay objections. The evidentiary rulings are gathered into three categories and not assigned their own subheadings.

The short answer to these arguments is that, even if the trial court erred, the evidence admitted as a consequence was cumulative and therefore harmless. “The erroneous admission of hearsay testimony is harmless where it is cumulative of legally admissible evidence of the same fact.” *Davis v. Reid*, 272 Ga.App. 312, 612 S.E.2d 112 (2005) (citations and punctuation omitted); *accord Harris v. Tatum*, 216 Ga.App. 607 (2), 611, 455 S.E.2d 124, 128 (1995); *Pembrook Management, Inc. v. Cossaboon*, 157 Ga.App. 675 (4), 678, 278 S.E.2d 100, 105 (1981).

A second general answer to this compound enumeration is that Georgia “does not follow a ‘cumulative error’ rule of prejudice; any error of record must stand or fall on its own merits and is not aided or aggravated by the accumulative effect of other claims of error.” *Pollard v. State*, 260 Ga.App. 540 (2), 352, 580 S.E.2d 337, 340 (2003).

A. Admitting the Medical Narratives of Drs. Carr and McLain Was Not Reversible Error.

Those narratives are each one-page letters. Dr. Carr is the emergency room doctor who re-catheterized Ms. Daniel on August 27, 2002. T-II-108, **110**. His five-line letter is addressed to whom it may concern and dated January 18, 2002. Exhibit P-32, R-X-595. In his letter, Dr. Carr, expresses without elaboration, his

opinion that the urinary retention Ms. Daniel was suffering on that occasion resulted from her exposure to the latex catheter.

Dr. McLain is Ms. Daniel's treating psychiatrist. His one-page letter is addressed to Defendants' trial counsel and dated April 25, 2003. Exhibit P-30; R-X-593. In his letter, Dr. McLain lists Ms. Daniel's psychiatric diagnoses: "major depressive disorder, recurrent, severe; dysthymia; generalized anxiety disorder; panic disorder with agoraphobia." He tied those diagnoses to Ms. Daniel's interstitial cystitis and tied exacerbations of her psychiatric symptoms to exacerbations of her interstitial cystitis.

Both letters were admitted as medical records pursuant to **O.C.G.A. § 24-3-18 (a)**. Section § 24-3-18 (a) allows medical reports to be admitted into evidence provided "that such report and notice of intention to introduce such report must first be provided to the adverse party at least 60 days prior to trial."

Defendants were timely provided copies of the letters. Dr. Carr's letter was exhibited to Ms. Daniel's deposition in June 2003. T-1-26-27. Dr. McLain's letter was sent to Defendants' counsel in April 2003. Exhibit **P-30; R-X-593**. Defendants listed Dr. Carr's letter in their own list of exhibits. T-1-26, But

Defendants were not expressly notified before the 60 day deadline that the documents would be used at trial.

Defendants acknowledge that decisions to admit evidence are reviewed for abuse of discretion. Brief of Appellant, p. 7 *citing Department of Transp. v. Mendel*, 237 Ga.App. 900 (2), 902,517 S.E.2d 365,368 (1999) and *American Ass'n of Cab Companies, Inc. v. Olukoya*, 233 Ga.App. 731 (1), 733,505 S.E.2d 761,764 (1998). Defendants' arguments about the lack of express notice that the two letters might be admitted at trial are claims of unfair surprise and prejudice. *See* Brief of Appellee, pp. 21-23. "These matters are appropriately within the sound discretion of the trial court." *Mendel*, 237 Ga.App. at 902-903, 517 S.E.2d at 368.

Regardless, the letters are cumulative. "[T]he issues in this case" are "whether Ms. Daniel was in fact allergic to latex and whether an allergic reaction caused her condition." Brief of Appellant, p. 29. The cause of Ms. Daniel's urinary retention the night after she was released from the defendant hospital is relevant only to the extent that it sheds light on that issue. To the extent that Dr. Carr's letter opines that Ms. Daniel had allergic reaction to the latex catheter, Dr.

Carr's letter is cumulative of Dr. Walcott's testimony expressing the same opinion. **SR-__** (Walcott deposition, pp. 76, 77, 109).

Dr. McLain's list of diagnoses is evidence of Ms. Daniel's pain and suffering. As such it is cumulative of testimony regarding that pain and suffering from Ms. Daniel herself, from Dr. Karram, from Defendants' expert Dr. Rosenblatt, from Ms. Daniel's daughter Cheryl Moats, as well **as** of Ms. Daniel's pain journal – all of which is detailed above.

Because the letters are cumulative of properly-admitted testimony, their admission is not a basis for reversal. *Davis v. Reid*, 272 Ga.App. 3 12,612 S.E.2d 112 (2005) (citations and punctuation omitted); *accord Harris v. Tatum*, 216 Ga.App. 607 (2), 611,455 S.E.2d 124,128 (1995); *Pembrook Management, Inc. v. Cossaboon*, 157 Ga.App. 675 (4), 678,278 S.E.2d 100, 105 (1981).

In a three-line argument, Defendants complain of an additional related error: allowing the narratives to go to the jury room. Absent from those three lines is any indication that this issue was brought to the trial court's attention. "Where an entirely different basis of objection is argued on appeal which was not presented at trial, [the Court of Appeals] will not consider this as error, for we are limited **on** appeal to those grounds presented to and ruled upon by the trial **court**, and then

enumerated as error.” *Boggs v. Madison County*, 240 Ga. App. 849,852,524 S.E.2d 252 (1999). “To preserve an objection upon a specific point, the objection must be entered timely on the record upon that specific ground.” *Sharpe v. Department of Transportation*, 270 Ga. 101, 103,505 S.E.2d 473 (1998). This assignment of error was not properly preserved, and should not be considered.

B. Admitting the Medical Records of Drs. McLain, Strong, and Martin Was Not Reversible Error.

Defendants make no effort to demonstrate harm arising from the admission of those medical records. They point to nothing in those records that was not put before the jury through properly-admitted evidence from the numerous physicians who testified.

Because the medical records are cumulative of properly-admitted testimony, their admission is not a basis for reversal. *Davis v. Reid*, 272 Ga.App. 312,612 S.E.2d 112(2005) (citations and punctuation omitted); *accord Harris v. Tatum*, 216Ga.App. 607 (2), 611,455 S.E.2d 124,128(1995); *Pembrook Management, Inc. v. Cossaboon*, 157 Ga.App. 675 (4), 678,278 S.E.2d 100, 105 (1981).

C. Allowing Testimony of Ms. Daniel’s Conversations With Drs. Carr and Kemp Was Not Reversible Error.

Ms. Daniel’s testimony about her conversations with Drs. Carr and Kemp was admitted pursuant to O.C.G.A. § 24-3-2. That statute provides, “When, in a legal investigation, information, conversations, letters and replies, and similar evidence are facts to explain conduct and ascertain motives, they shall be admitted into evidence, not as hearsay, but as original evidence.” “Georgia law favors the admission of any relevant evidence, no matter how slight its probative value may be, and on the balance, evidence of even doubtful relevance should be admitted, and its weight should be left to the jury. *In Re Estate of Love*, ___ Ga. App. ___, ___ S.E.2d ___, Case No. A05A0083, 2005 WL 1620552 (July 12, 2005) (citations and footnotes omitted).

As with Dr. Carr’s letter, Ms. Daniel’s conversation with Dr. Carr was about his opinion that her urine retention was a consequence of an allergic reaction to the latex catheter. T-II-109-110. As detailed above, testimony about Dr. Cam’s opinion that Ms. Daniel had an allergic reaction to the latex catheter is cumulative of voluminous other evidence to the same effect.

Her conversation with Dr. Kemp was about his opinion that her negative test results do not mean that she is not allergic to latex. T-II-140. Her conversation with Dr. Kemp explains why Ms. Daniel continues to avoid latex products; why she continues to assert that she is allergic to latex, even after testing negative for latex allergy; and why she carries an EpiPen.

Testimony about what Dr. Kemp said to Ms. Daniel is cumulative of a great deal of other evidence. It is cumulative of testimony from Dr. Johnson about the prevalence of false negatives in latex allergy tests. T-III-284-287. While the testimony at page 16 of Dr. Walcott's deposition, which dealt with false negatives in latex allergy tests, was cut from the video shown to the jury (T-I-18-19), false negatives were discussed in other portions of his deposition – which the jury did see. **S.R.** (Walcott deposition, pp. 49, 56, 57). Even defense expert Dr. Livezey admitted that the tests for latex allergies produce 10% to 27% false negatives. T-111-328. And testimony about what Dr. Kemp said is not only cumulative of what Drs. Johnson, Walcott and Livezey said; it is cumulative of testimony about what Dr. Kemp did: he gave Ms. Daniel an EpiPen. T-II-140.

Because Ms. Daniel's testimony about her conversations with Drs. Carr and Kemp is cumulative of properly-admitted testimony, that testimony is not a basis

for reversal. *Davis v. Reid*, 272 Ga.App. 312, 612 S.E.2d 112 (2005) (citations and punctuation omitted); *accord Harris v. Tatum*, 216 Ga.App. 607 (2), 611 S.E.2d 124, 128 (1995); *Pembrook Management, Inc. v. Cossaboon*, 157 Ga.App. 675 (4), 678 S.E.2d 100, 105 (1981).

In addition, any possibility of harmful error was eliminated because the trial court gave the **jury** a corrective instruction. He instructed them that the statements of Drs. Carr and Kemp were only to be considered by the **jury** to ascertain Plaintiffs motives, or to explain her subsequent actions, pursuant to OCGA § 24-3-2. T-IV-545. Corrective instructions are routinely given in a trial to negate or minimize some harmful admission of evidence, testimony, or even harmful statements made by the Court itself. *Stovall v. State*, 169 Ga.App. 691, 692, 314 S.E.2d 707, 708 (1984); *Lumpkin v. State*, 249 Ga. 834, 837, 295 S.E.2d 86 (1982); *Johnson v. State*, 238 Ga. 59 (1977); *Showmaker v. State*, 146 Ga.App. 862, 247 S.E.2d 515 (1978).

“Corrective instruction is within the discretion of the court, and when, as here, the impropriety is cured by timely corrective action calculated to preserve the defendant’s right to a fair trial, then we cannot say that the court abused its discretion...” *Stovall*, 169 Ga.App. at 692. In *Lumpkin*, the trial court, while

giving instructions and charges to the jury, stated that the defendant was “involved” in the offenses for which he was on trial. 249 Ga. at 837. The trial court judge then issued to the jury a corrective instruction wherein he admonished the jury to “disregard” and “utterly wipe out of their minds” any actions or statements which in any way intimated or implied that the court had any opinion as to what the jury verdict should be. *Id.* The Georgia Supreme Court did not find that this corrective instruction caused further harm to the defendant by “revisiting the issue” or “focusing the jury’s attention on the issue”, as was argued by Defendants in this matter. To the contrary, the Court held, “we are convinced that this corrective instruction rendered harmless any prejudice to appellant which may have resulted from the court’s earlier inadvertent verbal error. *Id.* (Citing *Godbee v. State*, 232 Ga. 259,263-64,206 S.E.2d 432 (1974); *Dortch v. State*, 158 Ga. App. 233,279 S.E.2d 526 (1981).

CONCLUSION

Ms. Daniel proved that Defendants negligently inserted a latex catheter into her bladder and that this trauma caused her to develop interstitial cystitis, a severe degenerative disorder of the bladder. The verdict in her favor is fully supported by

admissible evidence, including well-founded expert testimony. There was no harmful error. **Any** objectionable evidence was merely cumulative.

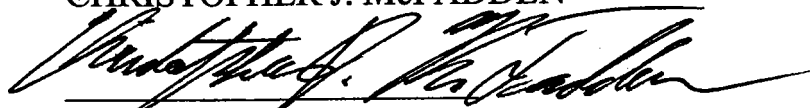
WHEREFORE Appellee Bonnie J. Daniel prays that the judgment below be affirmed.

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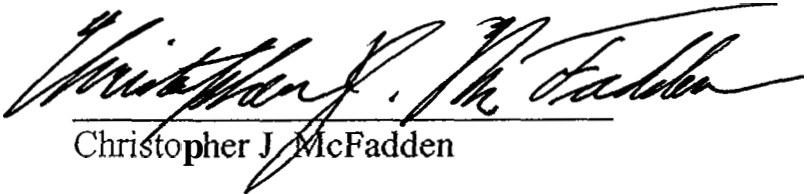
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CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of the foregoing to the following:

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James C. Grant, **Esq.**
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This, the 22 day of August, 2005.


Christopher J. McFadden