Rel: May 27, 2022

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1200623

Icylene Pearce, as personal representative of the Estate of Dewitt Ray Pearce, deceased

v.

The Estate of Daniel Lea Day, deceased, and Enterprise Leasing Company-South Central, LLC

Appeal from Dale Circuit Court (CV-17-900057)

MENDHEIM, Justice.

Icylene Pearce ("Pearce"), as the personal representative of the estate of her late husband, Dewitt Ray Pearce ("Dewitt"), appeals from a judgment entered on a jury verdict in favor of the defendants in her wrongful-death action commenced in Dale Circuit Court against the estate of Daniel Lea Day, deceased, and Enterprise Leasing Company-South Central, LLC ("Enterprise"). Dewitt was killed when the vehicle Day was driving collided head-on with Dewitt's vehicle. Pearce's appeal concerns the defense that Day suffered a sudden loss of consciousness before the collision. Pearce objects to the trial court's exclusion of certain evidence that she believes relates to that defense, and she asserts that, even without considering that evidence, the trial court should have ordered a new trial. We affirm.

I. Facts

At the time of the accident at issue, which occurred on April 7, 2017, Dewitt had been married to Pearce for 33 years; they had 5 children and 2 grandchildren.

Day began working for Enterprise in 2016 as a part-time driver. Before working for Enterprise, Day had been a commercial truck driver, but he had been forced to retire from that profession due to his inability

to meet the health requirements set by the United States Department of Transportation. At the time of the accident, Day was 63 years old, was 5 feet, 9 inches tall, weighed 261 pounds, and received Social Security disability benefits. It appears that Day's retirement from truck driving and his eligibility for Social Security disability benefits stemmed at least in part from his having an aortic-valve replacement in 2009.[1]

Day's primary job duty for Enterprise involved transferring rental vehicles from one Enterprise location to another. On March 1, 2017, Day transported a vehicle from the Enterprise location near the Montgomery airport to an Enterprise location in Demopolis. Another Enterprise employee, David Montgomery -- a friend of Day's who had known Day since 2015 from recreational motorcycling they did together -- traveled with Day, transporting another vehicle. Montgomery testified that Day "was not feeling well that day" from the start. Montgomery stated that, after he and Day picked up vehicles in Demopolis to take back to

[1]As is explained later in this opinion, the trial court granted a motion in limine filed by Enterprise seeking to exclude from evidence many of Day's past medical records, including the medical record documenting that Day had received an aortic-valve replacement in November 2009. However, the jury was made aware that Day had a mechanical aortic valve from testimony by witnesses David Montgomery, Dr. David Rydzewski, and Dr. Amy Cooper.

Montgomery, Day pulled over on the side of the road outside Uniontown because he "was having a hard time." Montgomery asked Day if he needed an ambulance, but Day said that he would try to make it back to Montgomery. However, a mile or so later Day pulled over again, and Montgomery testified that Day was "not doing well at all" because he was "having a hard time breathing" and "having pains in his chest." So, Montgomery said, they called an ambulance, and Day was transported to Vaughan Regional Medical Center ("VRMC") in Selma, where he was diagnosed with having a heart attack. Day had surgery at VRMC, during which a stent was implanted to relieve a blockage around his heart. Day was discharged from VRMC on March 4, 2017. Montgomery testified that Day's demeanor and appearance before and after he had the stent implanted was "[l]ike night and day" and that, after the stent had been implanted, Day was "feeling so much better, and his color was back to normal." Montgomery stated that, after he received the stent, Day never complained to Montgomery "about any issues with his heart."

Portions of the video-deposition testimony from Day's cardiologist, Dr. Amy Cooper of Montgomery Cardiovascular Associates, were shown to the jury, and other portions of her testimony were read into the record.

Dr. Cooper testified that Day first started seeing her in late 2016. She stated that, during a scheduled visit to her on February 8, 2017, Day received an echocardiogram, "which is just a way to look at that valve and the function of his heart to be clear that everything was working appropriately. And it was a normal study. The [aortic] valve replacement was stable, and everything was normal." Dr. Cooper placed no limitations on Day's "everyday activities" at that time, and he was okay to drive as far as she was concerned. Dr. Cooper was aware that Day drove cars for Enterprise, and she did not "restrict his ability to shuttle vehicles back and forth as an employee of Enterprise." Day visited Dr. Cooper again on March 9, 2017, for a follow-up appointment after his heart attack of March 1, 2017. Dr. Cooper testified that Day "really had no complaints at that time. He denied any issues with recurrent chest pain or shortness of breath. He was really stable." Day's "[e]lectrocardiogram … and blood pressure rate values were all normal." At that time, Dr. Cooper gave Day a "return to work" authorization, signifying that he was cleared to work for Enterprise driving vehicles. Dr. Cooper stated that she saw no reason why Day should not be "cleared to drive vehicles like he had been" and that she had "no reservations" about allowing Day to return to work.

On cross-examination by Pearce's counsel, Dr. Cooper addressed the fact that Day had a history of sleep apnea, which she stated can have a "long-term" effect on a person's heart by "increas[ing] the risk of rhythm disturbances and heart failure if left untreated." Dr. Cooper admitted that Day's medical records showed that he had a history of being "noncompliant" with the use of his continuous positive airway pressure ("CPAP") machine, which, she said, could "induc[e] the tendency for arrhythmias and increased strain on the heart." Dr. Cooper also stated that Day's body mass index at the March 9, 2017, visit was rated to be 38.5, which indicated that "he [was] morbidly obese," a condition, she said, that "absolutely" could contribute to heart issues. Dr. Cooper also noted that Day had "elevated blood pressure" and "coronary arteriosclerosis," which, she said, "means coronary artery disease that led to his [March 1, 2017,] heart attack, blockage in the heart arteries." Dr. Cooper testified that Day had been counseled to exercise, to lose weight, and to eat a healthier diet but that, to her knowledge, he had not been doing those things. Dr. Cooper stated that Day's lack of compliance with taking medications or following "lifestyle instructions" had placed him at a "certainly higher" risk of having another heart attack "than

someone that did follow those instructions." Dr. Cooper admitted that she was unaware that Day had been diagnosed with chronic obstructive pulmonary disease ("COPD"), and she stated that COPD can have heart implications because "[t]he more advanced the lung disease is, the more strain it puts on the heart." Dr. Cooper then reiterated on redirect examination that there was "nothing obvious in the information that we had at the time [March 9, 2017,] that would indicate there was something going on with [Day's] heart."

Day returned to work for Enterprise on March 13, 2017. Day's supervisor, Joseph Lumansoc, testified that he asked Day how he was feeling on the day he returned to work and that Day replied that he was "[b]etter than ever." Lumansoc also stated that, between March 13 and April 7, 2017, he did not observe anything out of the ordinary with Day's demeanor as far as his health, his attitude, or his mental state. Lumansoc further testified that he had no concerns during that period about Day's "physical, mental or emotional ability and well-being such that he could drive an automobile, shuttling cars as he had been doing for Enterprise."

On April 7, 2017, Day and four other Enterprise employees were assigned to transfer rental vehicles between Montgomery and Dothan.

The employees met at the Enterprise location near the Montgomery airport at 8:00 a.m., and each drove in a separate vehicle toward Dothan on Highway 231 heading south.[2] Enterprise employee Susan Frances testified that she saw Day that morning when they met at the airport location, when the group stopped at a Circle K gas station in Troy for drinks, and then when they arrived at the Dothan Enterprise location. She stated that she did not observe anything unusual about Day's health or behavior on that day. Frances also testified that, in general, after Day had received the stent "his color was much better. He was more spry. I think he could breathe better," and that Day had told her that "he felt a lot better."

Enterprise employee Sandra George testified that she knew Day fairly well because he lived near her in addition to their being coworkers

[2]There are some discrepancies in the testimonies of Enterprise employees regarding whether they each drove a separate vehicle to Dothan on April 7, 2017. Susan Frances testified that each employee drove separately. Sandra George testified that she and Susan Frances had their own vehicles, but that Day rode with two other men in a vehicle, and that James Berry was in the "chase van" that day. The employees' supervisor, Joseph Lumansoc, testified that all the employees rode together to Dothan and that each employee drove a separate vehicle back to Montgomery. The witnesses agreed, however, that each employee rode in a separate vehicle on the return trip to Montgomery.

at Enterprise. She stated that they would talk on the telephone, text, and go to each other's houses on occasion. She testified that Day had told her about his health issues, i.e., that "[h]e had high blood pressure. He had COPD. He had sleep apnea. He had heart issues." She stated that she knew that Day had sustained a heart attack about a month before the accident and that "after [the heart attack] he got the stent put in, [and] he was feeling much better." George further testified that she sometimes felt the need to "fuss at [Day] about his medication and about wearing his CPAP [device] and about wearing his seatbelt" because "he wouldn't necessarily do it." She also stated that she did not observe Day make any lifestyle changes after the March 1, 2017, heart attack even though "he was way overweight"; she "tried to get him to, but he didn't." However, George also admitted that Day neither complained about his health after the heart attack nor said that he was worried about his health or the condition of his heart. George described Day as someone who "joked a lot and laughed a lot and cut up, but I also think he suffered from depression."

George testified that on the day of the accident she remembered being with Day and the other employees at the Enterprise location near

the Montgomery airport before they left for Dothan and that Day and the other employees "were just laughing and talking while waiting to get our assignment for the day, and [Day] was drinking hot chocolate." She did not notice anything unusual about Day that morning before they started driving. George stated that the last time she saw Day was in Dothan before they got in their individual cars to drive back to Montgomery, that they waived to each other, and that she did not notice anything unusual with Day at that time either.

Enterprise employee James Berry testified that he drove the "chase van" that followed the other employees on their April 7, 2017, trip. Before leaving the Dothan Enterprise location, Day notified Berry that his car, a Jeep Grand Cherokee, needed gas, so Day and Berry stopped at a gas station in Dothan while the other employees started back to Montgomery. Berry testified that he did not notice anything unusual about Day's manner or health when they stopped for gas: no fatigue, shortness of breath, or any other health issue. Berry stated that, after Day pumped the gas, both drivers got in their vehicles and got onto Highway 231 heading north. Berry initially did not notice anything unusual about Day's driving on the highway. Berry testified that, at approximately

11:00 a.m., he was driving behind Day's Jeep Grand Cherokee in the left-hand lane of the northbound portion of Highway 231, near Ozark, when he observed that Day

> "gradually ran off the left edge of the road into the weeds. And then he didn't correct that steering. He just continued there and continued to ease further into the median. ... [H]e got all the way into the median off of the pavement and then was slowing down, of course, as he did that. And I passed him as he was moving in the median. And so I started to -- at that point, I'm not watching him anymore, of course. I can't turn around and look at him and drive too. But I had to work my way back to the right lane and then off of the highway to park to go back and see what happened to him.
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> "....
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> "Q. [Enterprise's counsel:] And, at any point that you saw Mr. Day's car veer into the median, did you ever see any brake lights from behind?
>
> "A. No. I specifically remember thinking to myself that he did not put on brakes, and he didn't appear to try to correct his steering, I mean, or nothing. The car did not -- it just very easily veered into the weeds, and there were no brake lights and no change of steering. So, you know, it was just interesting to me that he didn't try to brake, and he didn't try to steer back onto the highway or anything. So then I passed, and I didn't know what happened after that until I walked back down and found out."

The evidence at trial indicated that Day drove off the road, into the median, and then into the oncoming traffic of the southbound lanes of

Highway 231. Day's Jeep Grand Cherokee hit two vehicles and a semitruck. One of the vehicles Day's Jeep Grand Cherokee collided with was a Cadillac driven by Dewitt. Both Dewitt and Day were killed in the accident.

Dr. David Rydzewski, a forensic pathologist and senior medical examiner for the Alabama Department of Forensic Sciences, performed an autopsy on Day's body. Dr. Rydzewski testified that the immediate cause of Day's death was blunt-force trauma. However, Dr. Rydzewski examined the body further and discovered that Day had an "enlarged" heart, "what we call cardiac hypertrophy," and Dr. Rydzewski stated that such a condition can cause a heart attack or that "a person can die suddenly with an enlarged heart." He also discovered that Day's coronary arteries had a "narrowing" "from about 75 percent to 95 percent." Dr. Rydzewski testified that such a narrowing can cause "arrhythmia" and a "loss of consciousness." He stated that the blunt-force trauma did not cause those conditions in Day: "the findings that I basically described in the heart were of a chronic nature, meaning that he had them before the accident." Dr. Rydzewski explained that the reason he listed blunt-

force trauma -- not a heart attack or another cardiac issue -- as the cause of Day's death in his autopsy report was because

> "if a person has a heart attack and then dies in an accident and gets all banged up and traumatized -- I can't really tell whether he had a heart attack before when someone gets all banged up. Because when someone dies, the body isn't working to repair anything, and I can't age when a person had a heart attack. …
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> "….
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> "And when someone has that trauma and, let's say, a heart condition, which could also be fatal in the right context, we basically default as far as the cause and manner of death to the blunt force trauma. We give it precedence because we know that it's obviously fatal, okay? …
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> "So, in the right circumstances, what I saw in the heart would be -- if someone was found dead and there was nothing else to suggest an alternative cause of death, I would call the cause death, you know, due to his heart."

On April 17, 2017, Pearce commenced this action by filing a complaint in the Dale Circuit Court against Day's estate and Enterprise.[3] On September 12, 2018, Pearce filed a motion to appoint an

[3]Joseph Lumansoc also was a named defendant in the action, but Lumansoc was dismissed at the summary-judgment stage of the litigation.

administrator ad litem to represent Day's estate pursuant to § 43-2-250, Ala. Code 1975,[4] because, Pearce indicated, no estate had been opened for Day and, thus, Pearce had not been able to perfect service upon Day's estate as a party to the litigation. On September 14, 2018, the trial court granted Pearce's motion and appointed an administrator ad litem to represent Day.[5]

Pearce filed the operative second amended complaint on December 12, 2018. In that complaint, Pearce asserted counts against Day's estate and/or against Enterprise alleging: (1) negligence and/or

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[4]Section 43-2-250, Ala. Code 1975, provides:

> "When, in any proceeding in any court, the estate of a deceased person must be represented, and there is no executor or administrator of such estate, or he is interested adversely thereto, it shall be the duty of the court to appoint an administrator ad litem of such estate for the particular proceeding, without bond, whenever the facts rendering such appointment necessary shall appear in the record of such case or shall be made known to the court by the affidavit of any person interested therein."

[5]Aside from a single summary-judgment motion, the record is devoid of any arguments submitted directly by Day's administrator ad litem. It appears that Enterprise's counsel argued on behalf of both defendants at trial and on appeal. Therefore, when this opinion refers to arguments by Enterprise, it generally encompasses both defendants.

wantonness; (2) vicarious liability; (3) negligent and/or wanton entrustment; (4) negligent hiring; and (5) negligent supervision.[6] On January 11, 2019, Enterprise filed an answer in which it pleaded, among other defenses, the defense of sudden loss of consciousness.

Following discovery and multiple summary-judgment filings, the trial court on December 17, 2019, dismissed Pearce's claims of negligent entrustment, negligent hiring, and negligent supervision. The trial court expressly ruled that "claims of negligence (Count One) and vicarious liability (Count Two) plead[ed] in [Pearce's] Second Amended Complaint dated December 12, 2018, remain justiciable for subsequent resolution at trial, including as to [Enterprise's] defense of sudden loss of consciousness ...."[7]

On January 27, 2020, Enterprise filed three motions in limine seeking to exclude certain evidence. First, Enterprise sought to exclude

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[6]The remaining counts of Pearce's second amended complaint asserted claims against fictitiously named defendants that Pearce never identified before trial. "'[T]he beginning of trial operates as a dismissal of fictitiously named parties,' Ex parte Dyess, 709 So. 2d 447, 452 (Ala. 1997) (citing Rule 4(f), Ala. R. Civ. P.)." Ryals v. Lathan Co., 77 So. 3d 1175, 1181 (Ala. 2011).

[7]Pearce conceded her claim of wanton entrustment before trial.

evidence, testimony, and argument regarding whether Day had "committed suicide, intended to commit suicide, or suffered from suicidal ideations." Enterprise argued that such evidence was irrelevant under Rule 402, Ala. R. Evid., because Enterprise could not be held vicariously liable if Day had committed suicide. Enterprise additionally argued that, under Rule 403, Ala. R. Evid., such evidence should be excluded because, even if such evidence was relevant, the unfair prejudice it would produce outweighed any relevance. Second, again under Rule 403, Enterprise sought to exclude Pearce from "introducing, referencing, or otherwise discussing at trial the Toxicology Report prepared by the Alabama Department of Forensic Sciences, and any evidence, testimony, or argument that [Day] consumed marijuana or other controlled substance on the day of the subject motor vehicle accident" because, it said, any relevance of such evidence was outweighed by unfair prejudice. Specifically, Enterprise argued that "evidence of one's mere consumption of a controlled substance is inadmissible to prove liability in a vehicle accident unless it is also established that the person was impaired at the time of the accident," for which, it said, there was no evidence in this case. In this regard, Enterprise noted that Dr. Curt Harper, the chief

toxicologist for the Alabama Department of Forensic Sciences, had testified by deposition that there was no scientific basis to conclude that Day was impaired to any degree based on the level and type of THC, the chief intoxicant in marijuana, found in Day's body fluid. Enterprise also observed that Pearce had attempted to offer expert testimony as to when Day had consumed marijuana, but the trial court previously had excluded that expert's report and testimony. Third, Enterprise sought to exclude Pearce from "introducing, referencing, or otherwise discussing at trial any evidence, testimony, or argument regarding the medical history of [Day] that has no causal relationship to the subject accident." Specifically, Enterprise conceded that medical records and testimony directly concerning Day's March 1, 2017, heart attack were relevant, but it contended that evidence of sleep apnea, COPD, the aortic-valve replacement, and depression should be excluded because, it said, there was no evidence that those conditions contributed to the accident.

On January 29, 2020, Enterprise filed a fourth "omnibus" motion in limine in which it sought to exclude Pearce from "introducing, referencing, or otherwise discussing" several topics. Pertinent to this appeal, Enterprise sought exclusion of evidence pertaining to Day's

alleged previous noncompliance with taking medications and the number of hours per day driven by Enterprise employees. Enterprise argued that such information was not relevant to this particular accident and that any possible relevance would be outweighed by unfair prejudice.

On February 14, 2020, Pearce filed a response in opposition to Enterprise's motions in limine in which she argued that the evidence Enterprise sought to exclude was relevant to refuting the defense of sudden loss of consciousness. Specifically, Pearce contended that evidence indicating that Day had smoked marijuana, regarding his plethora of medical conditions -- including his aortic-valve replacement, sleep apnea, depression, obesity, high blood pressure, high cholesterol, COPD, and ideations of suicide -- and regarding his noncompliance with medications and failure to use his CPAP machine were all "extremely relevant" to establishing that Day had knowledge that he could suffer a heart attack while driving.

After multiple delays in the case due to COVID-19, the trial court entered an order granting each of Enterprise's motions in limine on February 27, 2021. With respect to each motion, the trial court concluded that the subject evidence was due to be excluded "pursuant to Rule 403

of the Alabama Rules of Evidence as the probative value is substantially outweighed by the danger of unfair prejudice, it would be misleading to the jury, and it would confuse the issues." On March 2, 2021, Pearce filed a motion to reconsider the trial court's evidentiary rulings. Following a hearing on that motion, the trial court, on March 5, 2021, denied the motion to reconsider.

The case proceeded to trial on March 8, 2021. The evidence and arguments at trial focused on Enterprise's sudden-loss-of-consciousness affirmative defense. On March 10, 2021, the jury returned a verdict in favor of Day's estate and Enterprise; the same day, the trial court entered an order confirming the jury's verdict. On March 26, 2021, Pearce filed a postjudgment motion for a new trial or, in the alternative, to vacate, amend, or alter the judgment. Following a hearing, the trial court denied Pearce's postjudgment motion on May 24, 2021. On June 4, 2021, Pearce appealed.

II. Standard of Review

In her appeal, Pearce challenges the trial court's order granting Enterprise's motions in limine, and she also argues that the verdict was against the great weight of the evidence.

> "'"[T]he trial court has great discretion in determining whether evidence ... is relevant and whether it should be admitted or excluded." Sweeney v. Purvis, 665 So. 2d 926, 930 (Ala. 1995). When evidentiary rulings of the trial court are reviewed on appeal, "rulings on the admissibility of evidence are within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion." Bama's Best Party Sales, Inc. v. Tupperware, U.S., Inc., 723 So. 2d 29, 32 (Ala. 1998), citing Preferred Risk Mut. Ins. Co. v. Ryan, 589 So. 2d 165 (Ala. 1991).'"

Van Voorst v. Federal Express Corp., 16 So. 3d 86, 92 (Ala. 2008) (quoting Bowers v. Wal-Mart Stores, Inc., 827 So. 2d 63, 71 (Ala. 2001)).

> "'A strong presumption of correctness attaches to a jury verdict in Alabama. Christiansen v. Hall, 567 So. 2d 1338, 1341 (Ala. 1990). This presumption of correctness is strengthened by a trial court's denial of a motion for new trial. Id. This Court will not disturb a trial court's denial of a motion for new trial when evidence has been presented that, if believed, would support the jury's verdict.'"

City of Birmingham v. Moore, 631 So. 2d 972, 974 (Ala. 1994) (quoting Fidelity & Guar. Ins. Co. v. Sturdivant, 622 So. 2d 1279, 1280 (Ala. 1993)).

III. Analysis

Pearce argues that the trial court erred in granting Enterprise's motions in limine, thereby excluding evidence related to several topics that Pearce believes are relevant to Enterprise's defense of sudden loss of consciousness. Pearce also contends that, even without the excluded

evidence, the verdict was against the great weight of the evidence. Both of those arguments -- and Enterprise's counterpoints -- hinge on the sudden-loss-of-consciousness defense.

As Pearce observes, the sudden-loss-of-consciousness defense "is rarely used and has little [Alabama] caselaw interpreting it." Pearce's brief, p. 38. Sudden loss of consciousness was first mentioned as a possible defense in Alabama in Moore v. Cooke, 264 Ala. 97, 84 So. 2d 748 (1956), in which the Court noted that the appellant in that case had "cited cases from other jurisdictions wherein it has been held that a driver of an automobile is not liable for injuries sustained in a collision which resulted solely from the fact that the driver fainted or became unconscious from an unforeseen cause immediately before the collision." 264 Ala. at 101, 84 So. 2d at 750-51. The Moore Court did not expound upon the defense because the Court concluded that, unlike the cases the appellant had cited, Moore was not a case "where the evidence of the driver's sudden unconsciousness was uncontradicted or would support no other reasonable inference." 264 Ala. at 101, 84 So. 2d at 751. In Walker v. Cardwell, 348 So. 2d 1049 (Ala. 1977), the Court implicitly approved the availability of the sudden-loss-of-consciousness defense by quoting

the jury charge on the defense in that case and then concluding that the evidence supported the jury's finding that the defense applied:

> "Part of the jury charge read as follows:
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> > "'The Court charges the jury that if you are reasonably satisfied that Donald Frank Cardwell had lapsed into unconsciousness prior to the accident without any warning symptoms, or knowledge that such a condition would occur, then he could not be considered guilty of negligence or wantonness for anything which would have occurred after he lost consciousness.'[8]
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> "The question of whether Donald Cardwell lapsed into unconsciousness without prior knowledge was a jury question. We hold that sufficient evidence existed to support the jury's conclusion: no alcohol was found in Donald's blood; he had a history of fainting spells but his last one occurred at least 2 years before the accident; he had driven 3/4 of a vacation visiting three states a few months prior to the accident; and his car was seen drifting back and forth down the wrong side of the highway for 1/2 mile preceding the accident."

Id. at 1051. The only other Alabama case that has addressed the sudden-loss-of-consciousness defense is Malone v. Noblitt, 65 So. 3d 404 (Ala. Civ. App. 2010), in which the Court of Civil Appeals reasoned that the

[8]In this case, the charge to the jury on sudden loss of consciousness tracked the charge from Walker with nearly identical language.

defendant had introduced substantial evidence for being able to invoke the defense.

> "Noblitt's testimony that he had no recollection of anything between the time he terminated his call with his stepson several miles before the accident occurred and the time he woke up in the hospital; his testimony denying that he had consumed alcohol since 1971; his testimony that the only drugs he had taken the day of the accident were prescription medications for high blood pressure and high cholesterol and that he had never had any adverse reactions to those drugs; Poe's testimony that, after the accident, he did not detect any indication that Noblitt had consumed alcohol; Dr. Arora's testimony that, after the accident, he did not detect any indication that Noblitt was under the influence of alcohol or drugs; and Noblitt's testimony that he had never suffered a similar loss of consciousness or awareness before he suffered such a loss immediately before the accident, and the absence of any evidence indicating that Noblitt suffered a head injury in the accident that would have caused amnesia, constituted substantial evidence tending to prove that Noblitt suffered an involuntary and unforeseeable loss of consciousness or awareness immediately before the accident ...."

65 So. 3d at 410.

Pearce's arguments in this appeal focus on what constitutes "'knowledge that such a condition [sudden loss of consciousness] would occur.'" Walker, 348 So. 2d at 1051. More specifically, Pearce does not dispute, for purposes of this appeal, that Day suffered a heart attack or other cardiac event that rendered him unconscious before the April 7,

2017, accident.[9] Instead, she contends that Day was aware that he was likely to have a heart attack and that, therefore, it was dangerous for him to be driving on the roadway at all on April 7, 2017.

With that general background in mind, we will first examine Pearce's arguments with respect to Enterprise's motions in limine, and then we will evaluate her argument that the verdict was against the great weight of the evidence.

A. Whether the Trial Court Erred in Granting Enterprise's Motions in Limine

Preliminarily, we note that Enterprise contends that Pearce did not preserve for appellate review her objections to the motions in limine because, it asserts, the trial court's rulings on those matters were not absolute and unconditional and Pearce did not make an offer of proof at trial. This Court has explained:

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[9]For example, Pearce states: "Mr. Day suffering another heart attack is, in fact, what one would reasonably expect, given his continued noncompliance with his doctors' instructions and reckless disregard for his own health." Pearce's brief, p. 38. It is true that, in her rendition of the facts, Pearce notes that Dr. Rydzewski could not definitively state that Day had suffered a heart attack on the day of the accident. However, the whole tenor of Pearce's arguments center on contending that Day knew or should have known that he was susceptible to suffering another heart attack and that, therefore, the sudden-loss-of-consciousness defense should not apply.

> "'In some cases an order granting a motion in limine is not absolute, but only preliminary, and the non-moving party may offer the disputed evidence at trial and, if the other party objects and the court sustains the objection, the party offering the evidence may appeal from this ruling.' Ex parte Houston County, 435 So. 2d [1268] at 1271 [(Ala. 1983)]. A prohibitive-absolute or unconditional granting of a motion in limine preserves the issue for review at the pretrial stage and eliminates the need for a specific objection at trial. See Bush v. Alabama Farm Bureau Mut. Cas. Ins. Co., 576 So. 2d 175 (Ala. 1991). Thus, whether an order granting a motion in limine is 'absolute' or 'preliminary' merely determines how the issue is preserved for review on direct appeal."

Ex parte Sysco Food Servs. of Jackson, LLC, 901 So. 2d 671, 674 (Ala. 2004).

We find Enterprise's argument unpersuasive for two reasons. First, it is debatable whether the trial court's February 27, 2021, order granting the motions in limine was preliminary or absolute. Although the order did not expressly exclude Pearce from making an offer of proof at trial, the order also did not indicate that the trial court would reconsider its rulings at trial. Compare Ex parte Houston Cnty., 435 So. 2d 1268, 1271 (Ala. 1983) (concluding that "[t]he order entered below appears to be of the preliminary sort allowing offers at trial, because it ends with the words 'without further order of this Court'"), with Bush v. Alabama Farm Bureau Mut. Cas. Ins. Co., 576 So. 2d 175, 178 (Ala. 1991) (finding that

"[t]here is no evidence that the ruling on the motion in limine was absolute or unconditional" because the trial court "did not prohibit counsel from making an offer of proof of the excluded evidence"). Moreover, as Pearce observes in her reply brief, the trial court initially granted the motions in limine but then granted Pearce's motion to reconsider the rulings and held a second hearing on the evidentiary issues before it ultimately granted the motions in limine. It is unlikely that the trial court held two hearings on the evidentiary issues and yet deemed its rulings to be preliminary in nature. Second, even if the rulings in the February 27, 2021, order were preliminary, at the close of her case Pearce made an offer of proof concerning Day's medical records that the trial court had excluded. Those medical records make up the bulk of the evidence that Pearce asserts should not have been excluded.[10] Therefore, Pearce did preserve for appellate review the evidentiary issues she raises.

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[10]Pearce did not make an offer of proof with respect to evidence indicating that Enterprise drivers were asked to drive up to 14 hours per day. However, the undisputed evidence revealed that Day had driven, at most, only three total hours on the day of the accident -- including his breaks to pick up another car and to get gas. Thus, such evidence was irrelevant, and Pearce treats it as an afterthought in her briefs to this Court.

Pearce's arguments concerning Enterprise's motions in limine address four categories of evidence: (1) evidence that Day had told various doctors that sometimes he did not take his medications because he wanted to see if his failure to do so would kill him; (2) evidence of Day's general medical history -- including his COPD, sleep apnea, depression, and aortic-valve replacement; (3) evidence that Day had smoked marijuana within 24 to 48 hours of the accident; and (4) evidence of what Pearce calls Day's "pattern of reckless and wanton conduct." Although we will discuss the evidence that Pearce highlights for each of those categories, we note that there is an overarching theme to Pearce's arguments for each category. That is, Pearce argues that various elements of Day's past medical history demonstrate that Day knew or should have known that he was susceptible to losing consciousness and that, therefore, he should not have been driving on April 7, 2017. Enterprise's consistent response asserts that the excluded evidence Pearce highlights is not sufficiently relevant to the accident to outweigh the substantial unfair prejudice that would have resulted from admission of that evidence.

The trial court's stated basis for excluding Pearce's proffered evidence was Rule 403, Ala. R. Evid.,[11] i.e., that the unfair prejudice of the subject evidence substantially outweighed its probative value. Thus, it is worth keeping in mind what this Court has said pertaining to the standard for excluding evidence under Rule 403:

> "The proper test for determining whether relevant evidence has been properly excluded under Rule 403 is to determine whether 'its probative value is substantially outweighed by the danger of unfair prejudice.' (Emphasis added.) McElroy's Alabama Evidence clarifies the Rule 403 standard by stating: 'This principle does not empower the trial judge to exclude evidence simply because it is prejudicial or because its prejudice outweighs its probative value. Rather, exclusion is merited only when the prejudice substantially outweighs the probative value.' Charles W. Gamble, McElroy's Alabama Evidence, § 21.01(4) (5th ed. 1996) (footnotes omitted) (emphasis original).
>
> "'Unfair prejudice' under Rule 403 has been defined as something more than simple damage to an opponent's case. Dealto v. State, 677 So. 2d 1236 (Ala. Crim. App. 1995). A litigant's case is always damaged by evidence that is contrary to his or her contention, but damage caused in that manner does not rise to the level of 'unfair prejudice' and cannot alone be cause for exclusion. Jackson v. State, 674 So. 2d 1318 (Ala.

[11]Rule 403, Ala. R. Evid., provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

> Crim. App. 1993), reversed in part on other grounds, 674 So. 2d 1365 (Ala. 1994). 'Prejudice is "unfair" if [it] has "an undue tendency to suggest decision on an improper basis."' Gipson v. Younes, 724 So. 2d 530, 532 (Ala. Civ. App. 1998), quoting Fed. R. Evid. 403 (Advisory Committee Notes 1972). See, also, Rule 403, Ala. R. Evid."

Ex parte Vincent, 770 So. 2d 92, 95-96 (Ala. 1999) (final emphasis added).

With that standard in mind, we will examine each category of evidence Pearce believes the trial court erred in excluding.

1. Evidence of Suicidal Ideations

Pearce contends that the trial court should not have excluded evidence indicating that Day admitted to various doctors that he had not taken medications to see if it would kill him. In this regard, Pearce highlights two pieces of excluded evidence. The first is a May 5, 2014, letter written by Dr. George M. Handey for the purpose of helping Day receive Social Security disability benefits. The letter stated:

> "As per our conversation, you are 100% disabled due to multiple medical problems. You are status post aortic valve replacement and you are on chronic anticoagulation. You continue to have symptoms of shortness of breath and dyspnea on exertion. Furthermore, you have COPD and depend on inhalers. You have a history of sleep apnea and use [a] CPAP [machine]. You have [hypertension,] degenerative arthritis and joint disease, and obesity. As a result of these medical problems and the inability to work, you have developed major depression and suicidal ideation, which has

> resulted in your further neglecting your health and contributing to noncompliance with medication and treatment. You are in the trucking business and cannot drive because you cannot qualify for a [Department of Transportation] health card as you do not meet the physical and mental standards due to multiple medical problems. I recommend you apply for social security disability. Please consider putting in your application and requesting your medical records to support your claim."

(Emphasis added.) The second piece of evidence is a note from Dr. Cooper in the medical file for Day's visit to Montgomery Cardiovascular Associates on February 8, 2017:

> "[Day] is also somewhat depressed. He states he isn't suicidal, but doesn't want to live anymore. He reports medical noncomplian[ce] with medications to see if it would kill him. He denies a plan for suicide. I am concerned for his depression. He does take a medication for this. Again, he denies a plan or intent and states he is fine and will get passed [sic] it."

(Emphasis added.)

Pearce contends that the foregoing pieces of evidence were relevant because "[i]t is beyond dispute that a person cannot die without losing consciousness. Therefore, Mr. Day's admission is compelling evidence of not only Mr. Day's knowledge that he could suffer loss of consciousness, but evidence that he recklessly failed to prevent loss of consciousness."

Pearce's brief, p. 24. In other words, Pearce argues that Day's statements in medical records as to why he sometimes would not take his medications were relevant because they show that Day knew that not taking his medications could cause him to lose consciousness.

We first note what Pearce is not seeking to establish with this evidence: Pearce does not contend that the evidence was relevant because Day was attempting to commit suicide via the accident.[12] The jury heard testimony from Day's friend and coworker Sandra George and from Dr. Cooper that Day had a history of not taking his medications. Thus, the excluded evidence merely offered a reason why Day sometimes did not take his medications, i.e., suicidal thoughts, without directly connecting that reason to the accident. Absent a direct connection between suicidal thoughts and the accident itself, the relevance of the evidence is tenuous, while the potential for unfair prejudice is palpable. Suicide is an emotional topic that could mislead or confuse a jury about

[12]In her reply brief, Pearce stated: "[Enterprise] incorrectly states that [Pearce] sought to introduce evidence that Mr. Day committed suicide. The evidence and the record clearly indicate that Mr. Day's admissions were sought to be admitted into evidence to show Mr. Day's knowledge of his potential for loss of consciousness." Pearce's reply brief, p. 3.

the issues before it. See State v. Onorato, 171 Vt. 577, 579, 762 A.2d 858, 860 (2000) (noting that "[b]ecause it is highly equivocal and circumstantial, the admissibility of attempted suicide evidence may introduce remote, secondary concerns that might confuse a jury").

Pearce's argument is also based on speculation. At most, the excluded evidence shows that Day wondered whether not taking his medications could kill him, not that he knew what effect not taking his medications would have upon him. Moreover, as Enterprise observes, the letter from Dr. Handey was written three years before the accident, and the note from Dr. Cooper was written almost two months before the accident, so their probative value is diminished. There is no evidence indicating (1) that not taking the medications Day had been prescribed could cause immediate unconsciousness or (2) that Day had not taken his medications in the days or hours immediately preceding the accident. In fact, testimony from all of Day's coworkers indicated that Day was in an excellent mood on the morning of April 7, 2017, and that he had been feeling physically much better since he had received the stent on March 1, 2017. Again, absent a direct connection between the act of not

taking medications and the accident, the relevance of the evidence is weak, but its potential to create unfair prejudice is strong.[13]

Based on the foregoing, we conclude that the trial court did not exceed its discretion by excluding evidence of Day's suicidal ideations.

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[13]Moreover, even if it could be said that the prejudicial effect of broaching the topic of suicide would not outweigh the relevance of evidence indicating that Day, against medical advice, sometimes did not take his medications, as we discuss in more detail in Part B of this analysis, evidence pertaining to foreseeability should be directly linked to a condition that is likely to lead to sudden loss of consciousness. That is not the case with respect to this evidence.

> "With some diseases or impairments, the conditions that may otherwise cause sudden loss of consciousness are controllable, and a motorist who is suffering from one of these diseases or impairments may lose consciousness or conscious control of a vehicle while driving as a consequence of failing to follow a prescribed medical regimen that requires the taking of pills, injections, medicines, foods, and the like, at specified periods. For example, a diabetic who fails to eat the proper foods at the proper times or departs from the timetables and dosages of his or her insulin injection may go into insulin shock or experience diabetic acidosis, either of which can cause the diabetic to lose consciousness. The same thing can happen to an epileptic who does not take his or her antiseizure pills at the prescribed intervals."

Russell L. Wald, Liability for Sudden Loss of Consciousness While Driving, 17 Am. Jur. Proof of Facts 3d 1, 10 (1992).

2. Evidence of Day's Past Medical History

Pearce contends that the trial court erred in excluding evidence of Day's "serious medical issues, noncompliance with his doctors' instructions, multiple visits to the emergency room, etc." Pearce's brief, p. 30. Pearce contends that such history was relevant because, she asserts,

> "[i]f Mr. Day did, in fact, suffer a heart attack and lose consciousness on the day of the subject accident, his heart attack would have been years in the making. Any reasonable review of Mr. Day's medical history would indicate that Mr. Day would suffer another heart attack if he did not take steps to improve his health."

Id. at 31. Because the excluded evidence indicated that Day did not try to take steps to improve his health, Pearce contends that the evidence was relevant to show that Day knew he could have another heart attack.

There are multiple problems with Pearce's argument. First, as with evidence about Day's failure to take medications, Pearce never established a direct connection between Day's medical conditions -- his COPD, sleep apnea, and aortic-valve replacement -- and the accident. As Enterprise observed in its brief, "[t]here is a distinction between evidence suggesting Day had risk factors for a possible medical episode and

evidence Day knew he should not drive because he was likely to lose consciousness." Enterprise's brief, p. 46. The fact that Day knew he had medical conditions related to his heart does not establish that Day knew he could have a heart attack at any moment and that, therefore, he should not have been driving. In other words, Day's past medical history was not necessarily relevant to establishing Day's "'knowledge that [sudden loss of consciousness] would occur.'" Walker, 348 So. 2d at 1051.

This is a problem with Pearce's overarching argument with respect to all the categories of evidence she complains were excluded: Pearce assumes that the sudden-loss-of-consciousness defense must be referring to a person's generalized knowledge about his or her health, but cases and authorities on the subject focus on specific knowledge of a condition that renders someone subject to losing consciousness.

> "It is generally recognized that the driver of a motor vehicle has the duty to exercise ordinary, reasonable, or due care, and that this duty includes keeping his or her vehicle under control at all times so as to avoid collision or contact with vehicles, pedestrians, and other persons properly using the highway. In accord with this general principle, in jurisdictions where the courts have been confronted with the question of physical impairment, they have generally held that where a driver has knowledge that he or she is suffering from a disorder likely to interfere with his or her ability to drive safely, the driver also knows that his or her subsequent

> conduct in operating the vehicle endangers the lives of all people traveling on the highway. In particular, it is recognized that a breach of a driver's duty of care occurs where the driver knows that his or her condition is such that he or she is prone to suddenly 'black out,' faint, or suffer a sudden 'attack or stroke,' and the driver causes injury to others as a result of losing consciousness and control of his or her car due to this condition. Thus, the courts in a number of cases have stated the rule to be that if an operator of a motor vehicle knows that he or she is subject to attacks in the course of which he or she is likely to lose consciousness, the operator is or may be chargeable with negligence (or even a higher degree of misconduct, such as gross negligence or wanton misconduct) for an automobile accident that occurs when he or she is stricken by a loss of consciousness."

Russell L. Wald, Liability for Sudden Loss of Consciousness While Driving, 17 Am. Jur. Proof of Facts 3d 1, 6-7 (1992) (footnotes omitted and emphasis added). See also McCall v. Wilder, 913 S.W.2d 150, 154 (Tenn. 1995) (noting that "[t]he generally accepted approach is to accept as a defense the sudden loss of physical capacity or consciousness while driving provided that the loss of capacity or consciousness was unforeseeable" and citing cases from several jurisdictions, including Walker). Similarly, Pearce never demonstrated that the specific medical conditions highlighted in the excluded portions of Day's medical history were likely to render Day subject to a loss of consciousness, thus making them relevant to the affirmative defense.

The second problem with Pearce's argument is that the jury ultimately was informed about most of the medical history that Pearce complains was excluded. Friend and coworker Sandra George testified that Day had COPD and sleep apnea and that he often would not use his CPAP machine. Dr. Cooper testified that Day's sleep apnea could increase the risk of heart failure if it was left untreated, that Day's failure to use his CPAP machine could increase the strain on his heart, and that COPD can put strain on a person's heart. Dr. Cooper also testified that Day's morbid obesity "absolutely" could affect the condition of his heart. Additionally, Dr. Cooper, Dr. Rydzewski, and Day's friend and coworker David Montgomery all testified about Day's aortic-valve replacement. Consequently, the jury was given the opportunity to consider whether Day's cumulative medical history demonstrated Day's knowledge that sudden unconsciousness could occur. Thus, even if the trial court erred in excluding portions of Day's medical history -- and we do not believe that it did -- the error was remedied at trial. See, e.g., Untreinor v. State, 146 Ala. 26, 34, 41 So. 285, 288 (1906) (observing that, generally, "[i]f the evidence was erroneously excluded when first offered, its subsequent admission cured the error").

3. Evidence that Day had Used Marijuana within 24 to 48 Hours of the Accident

Pearce contends that the trial court erred in excluding evidence indicating that Day had THC in his body fluid the day of the accident. As we recounted in the rendition of the facts, Dr. Harper, a toxicologist, testified by deposition that Day had a small amount of THC in his body fluid at the time of the accident. Pearce argues that Day must have smoked the marijuana because David Montgomery had testified that he and Day had smoked marijuana together before. Pearce also notes that Dr. Cooper had told Day that smoking could increase his risk of having another heart attack. Based on all of that, Pearce contends that the trial court should have admitted the evidence about the presence of THC in Day's body fluid because it "show[s] Mr. Day's knowledge regarding the possibility that smoking could lead to another heart attack, which was directly related [to] the defense of sudden loss of consciousness and to show Mr. Day's wanton conduct and his reckless disregard for the safety of others." Pearce's brief, p. 36. In essence, Pearce wanted to introduce evidence of Day's marijuana use to show that he was smoking even though he had been told that smoking could increase his risk of having a second heart attack.

Once again, there are multiple problems with Pearce's argument. First, there is no actual evidence indicating that Day smoked marijuana within 24 to 48 hours of the accident. Dr. Harper testified that there was no way to know from the THC sample how the marijuana was consumed. Moreover, he also testified that there was no way to be certain when the consumption occurred but that, if he had to estimate, he would say that the consumption had occurred within 24 to 48 hours of the accident. Second, it is undisputed that Pearce did not seek to introduce the evidence to argue that Day was impaired by marijuana at the time of accident.[14] Pearce made this concession, no doubt, because: (1) the trial court had ruled that Pearce's drug expert could not testify; (2) Dr. Harper had testified that there was no scientific basis to conclude from the amount and type of THC in Day's system that he would have been impaired at the time of the accident; and (3) testimony from all of Day's coworkers describing Day's behavior on the day of the accident gave no indication that Day was impaired in any way. Because Pearce was not attempting to draw a direct connection between Day's marijuana use and

[14]"During the hearing on [Enterprise's] motions in limine, [Pearce] stated that she was willing to stipulate that Mr. Day was not impaired and his marijuana use did not cause the accident." Pearce's brief, p. 36.

the accident, the relevance of the evidence was remote, but such evidence clearly had the potential to be substantially prejudicial.

In Carter v. Haynes, 267 So. 3d 861 (Ala. Civ. App. 2018), the Court of Civil Appeals addressed "the question of the propriety of admitting evidence of use of a controlled substance to prove wrongful conduct when there has been no other evidence of impairment." Id. at 867. Unable to find an Alabama case on point, the Court of Civil Appeals quoted from a Pennsylvania court's opinion on the subject:

> "'Generally, the mere evidence of a party's consumption of alcohol or controlled substance is inadmissible to prove recklessness or carelessness of the party, unless it is established that the party was intoxicated and physically impaired at the time of the accident. Whyte v. Robinson, 421 Pa. Super. 33, 617 A.2d 380 (1992); Hawthorne v. Dravo Corp., Keystone Division, 352 Pa. Super. 359, 508 A.2d 298 (1986), appeal denied, 514 Pa. 617, 521 A.2d 932 (1987). Thus, any evidence tending to establish intoxication of a pedestrian is inadmissible, unless it is also proven that the pedestrian was unfit to cross the street due to physical impairment resulting from intoxication; the intoxication and physical impairment may be established by circumstantial evidence, such as "evidence that the injured party was staggering or had liquor on his breath." Kriner v. McDonald, 223 Pa. Super. 531, 302 A.2d 392, 394 (1973).'

> "Chicchi v. Southeastern Pennsylvania Transp. Auth., 727 A.2d 604, 607 (Pa. Commw. Ct. 1999).
>
> > "We agree with the reasoning of the Pennsylvania appellate court. There is no evidence of a causal relationship between the accident and Haynes's drug use at least six hours before the accident, nor is there any evidence tending to show that Haynes was impaired at the time of the accident. We disagree with Carter that the accident itself gives rise to an inference that Haynes was impaired at the time of the accident. Without evidence indicating that Haynes was impaired at or near the time of the accident, we cannot say that the trial court abused its discretion in excluding the evidence of Haynes's use of marijuana and methadone on the ground that it was unduly or unfairly prejudicial to Haynes."

267 So. 3d at 867.

Enterprise cites Carter in support of its position that there was no error by the trial court in concluding that the unfair prejudice that could result from introducing evidence of Day's marijuana use substantially outweighed its probative value. We agree with the logic in Carter: without evidence that Day's marijuana use impaired him, and therefore contributed in some way to the accident, admission of the evidence could lead to the jury's deciding the case on an improper basis. Therefore, the trial court did not exceed its discretion by excluding such evidence.

4. Evidence of Day's "Pattern of Reckless and Wanton Conduct"

Pearce argues that the trial court erred by excluding evidence that "clearly indicates a pattern of reckless and wanton conduct" by Day. Pearce's brief, p. 32. Pearce is vague as to whether she is referring to any evidence not included in the other categories of evidence she highlights. However, it appears that Pearce simply means that Day's previous medical history established reckless or wanton behavior and that, therefore, the trial court should have admitted the evidence.[15] Evidence of reckless or wanton conduct is relevant, Pearce argues, because that is the kind of "wrongful conduct for which the Alabama Wrongful Death Statute was designed to deter." Pearce's brief, p. 33.

It is difficult to perceive how Day's action of driving could be deemed reckless or wanton given that his cardiologist, Dr. Cooper, had cleared him to return to work following his heart attack of March 1, 2017. Indeed, Dr. Carter testified that she had "no reservations" about allowing Day to return to work. Moreover, none of Day's coworkers indicated that they noticed anything wrong with Day on the morning of April 7, 2017. Their

[15]In the portion of her brief addressing this category of excluded evidence, Pearce stated: "Cumulatively, Mr. Day's medical history shows a pattern of reckless disregard for his health." Pearce's brief, p. 33.

testimony sharply contrasts with David Montgomery's testimony concerning the morning of March 1, 2017 -- the date of Day's first heart attack -- when Montgomery had noticed that Day "was not feeling well that day" from the start, and yet Day initially had tried to push through the discomfort and keep driving.

In addition to the evidentiary problem with this argument, Pearce seems to be attempting to shoehorn a wantonness claim into her case even though, for all that appears in the record, no such claim was presented to the jury. In her response to the motions in limine, Pearce argued that evidence of Day's medical history and marijuana use "is relevant and necessary to show that Day engaged in wanton conduct by his conscious disregard for his health and his knowledge that such an event could occur." In its reply, Enterprise contended that Pearce had conceded her wantonness claim, citing to a colloquy during the summary-judgment hearing. That concession concerned only Count 6, Pearce's entrustment claim against Enterprise, not Count 1, Pearce's negligence claim against Day's estate. However, the trial court's final summary-judgment order specifically stated that "claims of negligence (Count One) and vicarious liability (Count Two) plead[ed] in [Pearce's] Second

Amended Complaint dated December 12, 2018, remain justiciable for subsequent resolution at trial, including as to [Enterprise's] defense of sudden loss of consciousness and all other adequately [pleaded] affirmative defenses." That order made no mention of a surviving wantonness claim. Moreover, no instruction on wantonness was given to the jury. Furthermore, Pearce does not argue on appeal that a wantonness claim was submitted to the jury. Therefore, we find no legal basis for Pearce's contention that medical records pertaining to Day's past medical history should have been admitted because the evidence established wanton conduct by Day.

B. Whether the Verdict Was Against the Great Weight of the Evidence

Pearce contends that, even without the excluded evidence, the jury's verdict was against the great weight of the evidence because, she asserts, the evidence established that

> "Mr. Day knew or should have known, that not following his doctors' instructions after having already suffered a heart attack increased the chances of him having another heart attack, which could result in a loss of consciousness. Not only did Mr. Day have knowledge he could suffer a heart attack, he had knowledge he could suffer a heart attack while driving for Enterprise."

Pearce's brief, p. 38.

But again, Day's having knowledge that he possessed certain risk factors that could lead to a heart attack is not the same as having knowledge of a condition that is likely to lead to a loss of consciousness. Several cases from other jurisdictions support this critical distinction. In Denson v. Estate of Dillard, 116 N.E.3d 535 (Ind. Ct. App. 2018), a case in which the defendant had similar health risks, the Indiana Court of Appeals observed:

> "While Denson designated evidence that shows that Dillard was prescribed medication for his heart, and that his prior heart attack would have put him on notice that he suffered from coronary artery disease, this evidence does not equate to knowledge of peril or create an inference that a reasonable man in Dillard's position would have altered his behavior regarding driving.[6] This is especially true in light of the undisputed lack of driving restrictions or warnings not to drive by trained medical personnel. Moreover, there is no evidence that Dillard suffered any symptoms prior to his decision to drive on November 20, which would have alerted him of the impending physical incapacity.
>
> "_____
>
> "[6]Denson submitted expert medical testimony which broadly stated that '[g]iven his medical history on November 20, 2016[,] before the incident in question, Delmer Dillard was at a significantly increased risk of future cardiac events.' Appellant's App. Vol. 2 at 231. This is a far cry from evidence that Dillard knew or had reason to believe that he

> was at imminent risk for an attack and should not have been driving."

Id. at 542 (emphasis added and footnote 7 omitted). Similarly, in McCoy v. Murray (No. 4-08-36, Apr. 6, 2009), ¶ 22 (Ohio Ct. App. 2009) (not published in North Eastern Reporter), the Ohio Court of Appeals reasoned:

> "Although one can look at Murray's history as a smoker with high blood pressure and cholesterol, and a family history of heart disease and determine that he was bound to suffer a heart condition, it would have been impossible to predict how and when such a condition might occur. Moreover, there was nothing in Murray's history that would lead a reasonable person to believe they were in danger of suffering a loss of consciousness. While the McCoys make much of Murray's history, nothing indicated a known risk of losing consciousness."

(Emphasis added.) In Roman v. Estate of Gobbo, 99 Ohio St. 3d 260, 791 N.E.2d 422 (2003), the Ohio Supreme Court addressed the implications of accepting an argument like the one presented by Pearce:

> "[A]ppellants argue that a driver who operates a vehicle with knowledge of any medical condition should bear the risk of injuries that result from loss of consciousness or incapacitation due to the condition. Appellants contend that assumption-of-the-risk principles should apply in a situation where a driver with a medical condition chooses to operate a vehicle.

> "If we accept this argument, then only those defendants who have never had any inkling of any medical condition would be able to assert and prevail on the sudden-medical-emergency defense, and all other drivers would be precluded from relying on the defense.
>
> "As it did in this case, the foreseeability inquiry in cases in which a defendant raises the defense of sudden medical emergency frequently amounts to a consideration by the factfinder of whether the defendant driver should have been driving at all. See 2 Restatement of the Law 2d, Torts (1965) 18, Section 283C, Comment c: '[A]n automobile driver who suddenly and quite unexpectedly suffers a heart attack does not become negligent when he loses control of his car and drives it in a manner which would otherwise be unreasonable; but one who knows that he is subject to such attacks may be negligent in driving at all.'
>
> "As urged by appellants, the foreseeability inquiry in cases such as these would be redefined to remove any consideration of the reasonableness of choosing to drive despite imperfect health and would essentially mean that all drivers with any history of illness are unable as a matter of law to prevail on a sudden-medical-emergency defense."

99 Ohio St. 3d at 271-72, 791 N.E.2d at 431-32 (emphasis added).

In short, if the type of "warning" Day had could constitute "'knowledge that [sudden loss of consciousness] would occur,'" Walker, 348 So. 2d at 1051, then it would not be reasonable for a significant segment of the population to be driving at all. That is not the type of "knowledge" that is referred to in the context of the defense of sudden

loss of consciousness. As stated in these opinions from other jurisdictions, this knowledge must involve a condition that makes it reasonably foreseeable that it was dangerous for the defendant to be driving at all.

Moreover, the question whether Day had sufficient knowledge that would lead to the conclusion that he should not have been driving is quintessentially one for the jury. The jury heard testimony about Day's other medical conditions, his aortic-valve replacement, and his heart attack of March 1, 2017, and yet the jury returned a verdict in favor of Day's estate and Enterprise. The fact that it did so does not mean that the verdict was against the weight of the evidence but, rather, that the jury believed Day's knowledge was not sufficient to put him on notice that he was likely to lose consciousness while driving. Given the evidence presented, the jury reached a reasonable conclusion, which we will not disturb.

As a final effort, Pearce argues:

> "The undisputed evidence was Mr. Day left the Enterprise Rental Car location in Dothan, Alabama alone, he stopped to fuel his vehicle and then traveled approximately thirty minutes alone, without any communication with anyone prior to the accident. There was no evidence admitted at trial which could lead a jury to determine whether Mr. Day

> was without warning symptoms that he was going to have a heart attack and lose consciousness."

Pearce's brief, p. 43.

That paragraph is not an accurate characterization of the evidence. David Montgomery testified that when Day had a heart attack on March 1, 2017, Day had noticeably not been feeling well all morning, and he also stated that Day was able to pull over to the side of the road when he was having symptoms of the heart attack. In contrast, several Enterprise coworkers testified that they saw Day the morning of the accident and that Day gave no indication that he was not feeling well. James Berry, who drove the "chase van" that followed Day from Dothan back to Montgomery, testified that he was with Day at a gas station approximately 30 minutes before the accident and that Day seemed perfectly fine at that time. Berry also testified that, just before the accident occurred, he observed Day's car "gradually" go off the road and into the grass median without it making any correction in steering and without the brakes being engaged. Dr. Rydzewski testified that "what I saw in [Day's] heart would be -- if someone was found dead and there was nothing else to suggest an alternative cause of death, I would call the cause death, you know, due to his heart." Taken together, that testimony

certainly constituted substantial evidence indicating that Day had experienced a sudden loss of consciousness due to a heart attack before the accident. Thus, Pearce is incorrect in asserting that "a reasonable jury could not have found for the defense on this issue based on the evidence." Pearce's brief, p. 43.

IV. Conclusion

The trial court did not exceed its discretion by granting Enterprise's motions in limine on the basis that the potential for unfair prejudice substantially outweighed the probative value of the subject evidence. Likewise, Pearce has not overcome the presumption of correctness we afford to the trial court's denial of Pearce's motion for new trial because the jury's verdict was reasonable based on the presented evidence. Accordingly, we affirm the judgment of the trial court.

AFFIRMED.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, Stewart, and Mitchell, JJ., concur.