COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
Appeal No. 2013-CA-552

COMMONWEALTH OF KENTUCKY, BOARD OF CHIROPRACTIC EXAMINERS — APPELLANT

v.

CHARLES BARLOW, ET AL. — APPELLEES

MOTION OF THE KENTUCKY MEDICAL ASSOCIATION AND THE AMERICAN MEDICAL ASSOCIATION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

Appeal from Franklin Circuit Court
Hon. Thomas D. Wingate
Nos. 12-CI-1486 and 12-CI-1489

THE KENTUCKY MEDICAL ASSOCIATION AND THE AMERICAN MEDICAL ASSOCIATION move the Court, pursuant to CR 76.12(7), for permission to file the *amicus curiae* brief that they are tendering with this motion.

As explained more fully below, movants offer the Court a unique perspective on the issues involved in this case, particularly the increasing efforts by other professional boards to improperly shield their licensees from competition by limiting the scope of medical practice. The movants' perspective is broader than that of the litigants and, thus, helps explain the potential impact of the Court's decision on the relationship between the practice of medicine by physicians and rules adopted by the boards regulating other health professionals.

Nature of Movants' Interest

The Kentucky Medical Association ("KMA") is a Kentucky, non-profit, non-stock, membership corporation organized under KRS Chapter 273. Initially organized in 1851, the KMA was first incorporated in 1929. The KMA currently has over 4000 practicing physicians as members. Among its purposes is the enforcement of just medical laws, the protection of its members against unjust encroachments on their professional care of patients, and the enlightenment of public opinion with regard to matters of great import to Kentucky physicians and their patients.

The American Medical Association ("AMA") is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups, seated in the AMA's House of Delegates, substantially all US physicians, residents, and medical students are represented in the AMA's policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. Its members practice in every state, including Kentucky, and in every specialty.[1]

Points to be Presented

The Franklin Circuit Court denied a request by the Kentucky Board of Chiropractic Examiners ("Chiropractic Board") for a permanent injunction

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[1] The AMA appears as *amicus curiae* in this case on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the state medical societies, with the purpose of advancing American Medical Association policies through the American legal system.

prohibiting Appellees, Charles Barlow, M.D., and Michael Best, M.D., from performing expert medical records reviews relating to chiropractic treatment on the grounds that such reviews violate KRS 312.200, which deals with chiropractic peer review. In this appeal, the Chiropractic Board asks this court to preclude licensed physicians from offering expert medical opinions for any patient care that might include chiropractic services. The Chiropractic Board's aggressive position is an improper attempt to shield its members from competition.

In the attached *amicus curiae* brief, the KMA and AMA urge this Court to uphold the decision of the Franklin Circuit Court because it is based on a proper interpretation of KRS Chapter 312. The distinction between expert review and peer review is significant. Blurring the lines between expert review and peer review would be a disservice both to litigants and to healthcare professionals. Each type of review serves different purposes and involves different processes, procedures, and results. The Franklin Circuit Court properly interpreted this distinction and the statutory framework when it found that the purpose behind the medical records reviews at issue was to determine if the medical care and expenses resulted entirely from automobile accidents, not to evaluate "the quality of care provided by the treating chiropractor." Franklin Circuit Court Opinion at p. 4. As the court properly determined, chiropractors and physicians are "most definitely not peers," and the expert medical records reviews performed by Drs. Barlow and Best are not "peer reviews." *Id.* at pp. 4-5.

Relevance to Disposition of Case

The KMA and AMA are uniquely situated to offer the Court, via the attached *amicus* brief, insight into the history and motivation behind the Chiropractic Board's aggressive attempt to shield its members from competition.

In addition, the perspective the KMA and AMA offer is broader than that offered by the litigants. Any decision which reserves exclusively to chiropractors, and thereby excludes medical doctors from, review of patient care involving chiropractors would have harmful implications in a number of other settings. Expanding the definition of "peer review" to encompass the type of review at issue here could have harmful implications for physicians, and those who call upon them for expert medical advice and opinions, throughout the Commonwealth. The KMA and AMA hope that this broader perspective will assist the Court in evaluating the potential implications of its decision beyond this particular case.

Accordingly, the KMA and the AMA respectfully ask this Court to accept and consider its *amicus curiae* brief attached hereto.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true copies of this Motion were served by United States Mail this 26th day of August, 2013, on:

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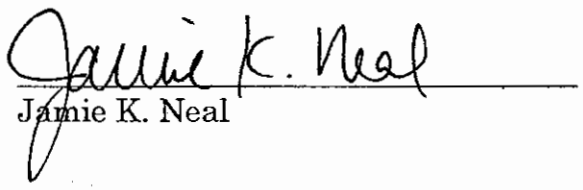

Jamie K. Neal

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Certificate of Service

I hereby certify that a copy of this brief has been served this 26th day of August, 2013, by mailing a copy to: Hon. Thomas D. Wingate, Franklin Circuit Court, 669 Chamberlin Avenue, Frankfort, KY 40601; William D. Kirkland, McBrayer, McGinnis, Leslie & Kirkland, P.O. Box 1100, Frankfort, KY 40601; Daniel Brown, Darby & Gazak, PSC, 3220 Office Pointe Place, Suite 200, Louisville, KY 40220; Edward H. Stopher, Boehl, Stopher & Graves, 400 West Market Street, Suite 2300, Louisville, KY 40202; J. William Graves, P.O. Box 993, Paducah, KY 42003; and Brian T. Judy, Assistant Attorney General, 700 Capital Avenue, Suite 118, Frankfort, KY 40601. The undersigned did not remove the record on appeal.

Jamie K. Neal

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

This statutory interpretation appeal presents an important public policy issue that could affect litigants throughout Kentucky: whether licensed physicians may offer expert opinions – and by extension expert testimony – regarding patient care that includes chiropractic services or whether such opinions are impermissible chiropractic "peer review." Appellant, the Kentucky Board of Chiropractic Examiners ("Chiropractic Board"), asks this court to preclude licensed physicians from offering expert medical opinions for any patient care that includes chiropractic services. Although the facts of this case relate to expert opinions arising from motor vehicle accidents, a decision limiting the availability of expert review of care involving chiropractors would have harmful implications in numerous other contexts. In addition, expanding the definition of "peer review" to encompass the type of review at issue here could have harmful implications for health professionals throughout the Commonwealth. Thus, the Kentucky Medical Association ("KMA") and the American Medical Association ("AMA") submit this Amicus Curiae Brief in support of the Appellees' request to uphold the decision of the Franklin Circuit Court.

This case arises from medical records reviews and expert medical opinions offered by Appellees, Charles Barlow, M.D., and Michael Best, M.D., at the request of Appellee Geico General Insurance Company. Franklin Circuit Court Opinion at 2. Geico asked Drs. Barlow and Best to conduct independent evaluations of the medical records – including, but not limited to, chiropractic care – of certain Geico insureds who made claims for reimbursement of medical expenses under the

Kentucky Motor Vehicle Reparations Act ("MVRA"). *Id.* Under the MVRA, insurance companies are required to provide reimbursement, without regard to fault, for limited amounts of medical care arising from motor vehicle accidents. Insurance companies, however, are required to pay only "reasonable charges" incurred for "reasonably needed services," including medical care, physical rehabilitation, rehabilitative occupational training, and other remedial treatment "arising out of" the accident. *Id.* Geico asked Drs. Barlow and Best to opine on whether the alleged injuries were caused by the accident and whether the treatment performed was reasonable and necessary. Appellant's Bf. at 1-4.

The Chiropractic Board filed suit in Franklin Circuit Court asking for an injunction prohibiting Drs. Barlow and Best from performing medical records reviews relating to chiropractic treatment on the grounds that such reviews violate KRS 312.200, which deals with chiropractic peer review. Franklin Circuit Court Opinion at 2. KRS 312.200 requires that the Chiropractic Board appoint a peer review committee to review any "inquiry about a treatment rendered to a patient by a chiropractor," if requested to do so by a "patient, the patient's representative, the patient's insurer, or [another] chiropractor." KRS 312.200(2). There are only approximately 50 chiropractors whom the Chiropractic Board has approved to perform peer review. *See* List of "Kentucky Chiropractors Registered to Perform Peer Review," maintained by the Chiropractic Board at http://kbce.ky.gov/NR/rdonlyres/4A062CDF-50D2-4AB0-B291-8D22093D3A9C/0/PRDCsasof72313.pdf. The statute provides that "other persons"

performing peer review of chiropractic "claims" must be licensed by and registered with the Chiropractic Board, complete an annual utilization review course, and pay an annual fee. KRS 312.200(4).

The Franklin Circuit Judge, Thomas D. Wingate, granted summary judgment to Drs. Barlow and Best and to Geico. Judge Wingate concluded that "it is clear that GEICO's purpose behind requesting medical records reviews is to determine if the claim consists of medical expenses resulting entirely from the automobile accident, not evaluating the quality of care provided by the treating chiropractor." Franklin Circuit Court Opinion at p. 4. Judge Wingate further noted that chiropractors and physicians are "most definitely not peers," and the expert medical records reviews performed by Barlow and Best are not "peer reviews." *Id.* at pp. 4-5.

ARGUMENT

I. Peer review and expert review are not equivalent.

A licensed physician's scope of practice is the most broad and complex of all the healthcare-related professions, due in large part to the highly competitive and extensive medical education and training required as a condition of licensure. Providing expert opinions and testimony is a facet of the practice of medicine for many physicians, and it is an important service to their patients and the community at large.

Peer review, in contrast, is more narrow. Generally speaking, peer review is the process by which healthcare organizations assess the actions or competence of their own members, with an ultimate goal of improving patient safety by licensing

only qualified professionals. *See, e.g.*, Medical Peer Review, http://www.ama-assn.org//ama/pub/physician-resources/legal-topics/medical-peer-review.page. Kentucky's chiropractic statutes and associated regulations reflect this concept. It is important and valuable to both litigants and healthcare professionals that expert review and peer review remain separate and distinct.

A. Expert review by a physician is the "practice of medicine," subject to regulation by the KBML, not the Chiropractic Board.

As Judge Posner of the Seventh Circuit Court of Appeals has noted, although expert testimony by a physician is not direct treatment of a patient, it is a "type of medical service." *Austin v. Am. Assoc. of Neurological Surgeons*, 253 F.3d 967, 974 (7th Cir. 2001). Consistent with this concept, the AMA recognizes that in "various legal and administrative proceedings, medical evidence is critical" and accordingly physicians often "have an obligation to assist in the administration of justice." AMA Council on Ethical and Judicial Affairs, Code of Medical Ethics, Opinion 9.07 – Medical Testimony, http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion907.page.

In Kentucky, the practice of medicine is exclusively regulated by the Kentucky Board of Medical Licensure ("KBML"), pursuant to the Medical Practice Act codified at KRS Chapter 311. As such, it is the KBML that has the right and authority to discipline Kentucky physicians for any inappropriate expert testimony. *See id.*; *Austin*, 253 F3d at 974 (noting that discipline of a physician for "irresponsible" expert testimony by his medical association served "an important public policy" of professional review).

The Chiropractic Board asserts that physicians are "incompetent" to testify against other healthcare professionals, citing an Alabama case and America Jurisprudence in support of the "widely-accepted rule that a physician of one school of medicine is incompetent to testify in a malpractice case against a physician of another school of medicine." Appellant's Bf. at p. 14. Here, Drs. Barlow and Best were not offering opinions "against" any chiropractors, they were opining as to causal relationship between a motor vehicle accident and the symptoms for which Geico's insureds were treated and incurred associated expenses. But even if Drs. Barlow and Best had been offering opinions "against" a chiropractor, the general rule cited in the Alabama case does not apply here. In Kentucky there is no statute that precludes physicians from testifying outside of their specialization. Rather, the law in Kentucky with regard to medical expert testimony is that "the lack of specialized training by a doctor goes only to weight and not to competency." *Arndell v. Martin,* 411 S.W.2d 473, 475 (Ky. 1967).

Under the rule the Chiropractic Board proposes, the only witnesses who could testify in any cases involving chiropractic care would be the Kentucky chiropractors specifically registered, at the Chiropractic Board's whim, for peer review – currently approximately 50 chiropractors. *See* List of "Kentucky Chiropractors Registered to Perform Peer Review," maintained by the Chiropractic Board at http://kbce.ky.gov/NR/rdonlyres/4A062CDF-50D2-4AB0-B291-8D22093D3A9C/0/PRDCsasof72313.pdf.

The Chiropractic Board should not be allowed to improperly limit competition by equating expert review with "peer review." As Judge Wingate properly determined, Drs. Barlow and Best performed expert medical review – not peer review – when they, at Geico's request, reviewed medical records "to determine which part of the insured's medical treatment corresponded with the automobile accident at issue." Franklin Circuit Court Opinion at p. 5.

B. Chiropractic peer review arises from a specific "inquiry" or "claim" regarding a chiropractor and is intended to allow chiropractors to self-regulate and appropriately license other chiropractors.

Pursuant to KRS 312.200(2), chiropractic peer review is triggered by a specific "inquiry" by a patient, insurer, or chiropractor regarding "a treatment rendered to a patient by a chiropractor." The resulting "peer review" is "an evaluation ... of the appropriateness, quality, utilization, and cost of chiropractic health care and health services provided to a patient." KRS 312.015(4). The peer review process follows a procedure set out in the administrative regulations involving review of the "claim" first by an individual member of the peer review committee, followed by review and vote by the committee as a whole. 201 KAR 21:075.

The intended use of the peer review results sheds light on the purpose of the process, namely to allow chiropractors to self-regulate and appropriately license other chiropractors. Pursuant to regulations, the peer review committee "shall recommend to the [Chiropractic Board] that a complaint be filed against any chiropractor if it appears from the review of any claim that reasonable cause exists to

believe that the chiropractor has violated any portion of KRS Chapter 312 or the administrative regulations adopted pursuant thereto for which a chiropractor may be disciplined." 201 KAR 21:075. The Chiropractic Board may then – after a hearing – revoke, suspend, or limit the license of the chiropractor or use several other remedies available to it. KRS 312.163. Thus, the chiropractic review process is intended to regulate and appropriately license chiropractors, not to, for example, offer opinions on the injuries suffered as a result of a motor vehicle accident or the necessary care for such injuries.

Unlike the processes and procedures outlined above, there does not appear to be any evidence that the reviews conducted by Drs. Barlow or Best were triggered by any specific "inquiry" regarding any chiropractic care, or that Drs. Barlow and Best recommended or attempted to take any administrative action against any chiropractor.

C. Kentucky courts have already recognized that expert review and peer review are distinct.

At least one Kentucky court has already noted that chiropractic peer review is distinct from expert medical review. A panel of this court held that a trial court properly admitted expert testimony from two witnesses regarding their review of chiropractic records, despite the fact that neither witness was qualified as a chiropractic peer reviewer. *Rodriguez v. Ky. Farm Bureau Mutual Ins. Co.*, 2003 Ky. App. Unpub. LEXIS 1157 at *7-*8 (Ky. App. Aug. 15, 2003) (attached). The court stated that "we are not persuaded that the witnesses' failure to be qualified as peer reviewers was relevant in any way to their qualifications as expert witnesses

or to the admissibility of their testimony at trial." *Id.*; *see also Sisters of Charity Health Sys. v. Raikes*, 984 S.W.2d 464, 467 (Ky. 1998) (noting that "peer review is not designed to serve any purpose of a malpractice claim").

Nothing in the Kentucky Chiropractic statutes or the nature of the expert review conducted by Drs. Barlow and Best dictates a different result here.

II. The Chiropractic Board's attempt to preclude expert review by physicians is an improper attempt to limit competition.

The purpose of peer review is, ultimately, to protect patient safety. The Chiropractic Board's actions here arise not from an attempt to protect patient safety but from an attempt to protect against competition. For example, the Chiropractic Board makes no bones about its interpretation of the term "other persons" in KRS 312.015(4) and KRS 312.200(3) as meaning all "members of other healing arts," and later the Chiropractic Board argues that the Franklin Circuit Court's opinion allows physicians to be "gatekeepers for chiropractors under the Motor Vehicle Reparations Act." Appellant's Bf. at I., p. 7; II, p. 12.

To the extent that the Chiropractic Board's case is an attempt to prevent competition, it is another in a series of recent attempts by the Chiropractic Board and the Kentucky Boards of other healthcare professionals to improperly shield their members from legitimate competition by physicians and others.

A. The Physical Therapy Board's attempt to prevent competition.

As one example, in a recent case ultimately decided by the Kentucky Supreme Court, the Kentucky Board of Physical Therapy sought an injunction to prevent an orthopedic surgeon from using the term "physical therapy" in billing for

any of the services he provided. *Dubin Orthopaedic Ctr. v. Commonwealth*, 294 S.W.3d 421, 422 (Ky. 2009). In attempting to limit physicians' scope of practice, the Physical Therapy Board argued that "Dubin is obliged to use some term other than 'physical therapy' when describing [his] services either to patients or to third-party payors," even though the Physical Therapy Board conceded that licensed Kentucky physicians are authorized to provide physical therapy services. *Id.* at 424. The Physical Therapy Board relied on a provision of the Kentucky physical therapy statutes that it is "unlawful" for any person or business to use the words "physical therapy" or to "bill for physical therapy" unless "such physical therapy is provided by or under the supervision of a physical therapist licensed and practicing in accordance with" Kentucky statute. *Id.* at 423; KRS 327.020(3).

The Supreme Court held that physicians are not precluded from using the term "physical therapy" to describe their services. *Dubin*, 294 S.W.3d at 425. The Court explained that the statute at issue is "clearly intended to protect the public against unqualified providers of physical therapy services, *not to protect physical therapists against competition from other qualified health care providers.*" *Id.* at 424 (emphasis added). Thus, Kentucky law permits licensed physicians "not only to provide physical therapy services, but also to refer to those services as such." *Id.* at 425.

B. The Psychology Board's attempt to prevent competition.

In an even more recent example, which has drawn embarrassing national attention, the Kentucky Board of Examiners of Psychology has sought to preclude an out-of-state psychologist from publishing his syndicated parenting advice column

in Kentucky newspapers. John Rosemond "is a North Carolina-licensed psychologist, the author of multiple bestselling books on parenting, and the author of an advice column on parenting that runs weekly in more than 200 newspapers across the country." Complaint ¶ 1, *Rosemond v. Conway,*[1] No. 13-CV-42 (E.D.Ky. filed July 16, 2013). In May 2013, the Psychology Board wrote a letter to Rosemond ordering him to "cease publishing his advice column in Kentucky on the premise that one-on-one advice about parenting is the practice of psychology and is therefore reserved exclusively for Kentucky-licensed psychologists." *Id.* The Psychology Board also ordered Rosemond "not to refer to himself as a psychologist in the tagline of his newspaper column because ... he is not a *Kentucky-licensed* psychologist." *Id.* Rosemond believes that the First Amendment protects his ability to offer his opinions and to truthfully represent that he is a psychologist. His case remains pending in the Eastern District of Kentucky.

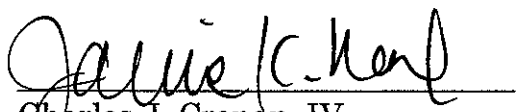
CONCLUSION

The Chiropractic Board is attempting to improperly limit competition by blurring the lines between expert review and peer review. But the distinction is significant, and allowing the Chiropractic Board to blur the lines between expert review and peer review would be a disservice both to litigants and to healthcare professionals. Each type of review serves different purposes and involves different

[1] Although Rosemond initially included Kentucky Attorney General Jack Conway as a defendant, the parties have agreed that Mr. Conway should be dismissed because the demand that Rosemond stop publishing his advice column in Kentucky "was sent by [Assistant Attorney General] Brian Judy in his capacity as counsel for the Kentucky Board of Examiners of Psychology, and was not sent in his capacity as a representative of the Office of the Attorney General or on behalf of the Attorney General." *See* Mot. to Dismiss at p. 2, *Rosemond v. Conway,* No. 13-CV-42 (E.D.Ky. filed July 25, 2013).

processes, procedures, and results. The two must remain distinct. Therefore, AMA and KMA ask this court to uphold the decision of the Franklin Circuit Court.

Respectfully submitted,



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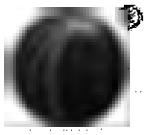

ARTURO RODRIGUEZ, APPELLANT/CROSS-APPELLEE v. KENTUCKY FARM BUREAU MUTUAL INSURANCE COMPANY, APPELLEES/CROSS-APPELLANTS

NO. 2002-CA-001191-MR AND NO. 2002-CA-001229-MR

COURT OF APPEALS OF KENTUCKY

2003 Ky. App. Unpub. LEXIS 1157

August 15, 2003, Rendered

PRIOR HISTORY: [*1]

APPEAL AND CROSS-APPEAL FROM HARDIN CIRCUIT COURT. HONORABLE JANET P. COLEMAN, JUDGE. ACTION NO. 98-CI-00870.

COUNSEL: BRIEF AND ORAL ARGUMENT FOR APPELLANT/CROSS-APPELLEE: Ronald E. Hines, Elizabethtown, Kentucky; Francis E. Bauman, Louisville, Kentucky.

BRIEF AND ORAL ARGUMENT FOR APPELLEE/CROSS-APPELLANT: Reford H. Coleman, Eric A. Hamilton, Elizabethtown, Kentucky.

JUDGES: BEFORE: BAKER, GUIDUGLI AND PAISLEY, JUDGES. All concur.

OPINION BY: PAISLEY

OPINION

AFFIRMING

PAISLEY, JUDGE. This is an appeal from a judgment entered by the Hardin Circuit Court after a jury found that appellant Arturo Rodriguez was not entitled to recover damages against appellee Kentucky Farm Bureau Mutual Insurance Company. For the reasons stated hereafter, we affirm.

This case arose out of a July 1996 motor vehicle accident involving appellant, who was insured under a policy issued by appellee. After the accident appellant was taken to a hospital, where he was examined and released. Evidently the bills for the medical services rendered on the date of the accident were promptly paid by appellee.

Subsequently, appellant sought chiropractic treatment from Dr. Carmen Alampi, D.C. Prior to receiving treatment, appellant was required to sign numerous documents [*2] provided by Alampi. Among other things, the documents purported to assign to Alampi the rights to appellant's medical benefits under his motor vehicle PIP coverage. Alampi thereafter billed appellee $9,010 for chiropractic treatment rendered between July 1996 and March 1997 but, based on an outside review of Alampi's records and billings, appellee paid Alampi only $3,110.

Appellant then filed this action seeking damages relating to appellee's alleged wrongful denial of PIP benefits, and a jury trial eventually was conducted. Among the issues before the jury were whether Alampi ever accepted the assignment of benefits and, if so, whether such acceptance was later rescinded. The jury returned a verdict in favor of appellee after finding that Alampi had accepted and had not rescinded appellant's assignment of his rights to receive payment from appellee, and the court overruled appellant's motion seeking judgment n.o.v. or a new trial. This appeal and protective cross-appeal followed.

Initially, we note that *CR 76.03(8)* limits appellant's discussion on appeal to those issues which were properly raised in the prehearing statement, unless this court permits other issues to be submitted after [*3] a timely motion shows the existence of good cause. No such motion was filed herein, and appellant's prehearing statement raised only the following two issues for consideration on appeal:

> 1. Did the trial court err by ignoring a pretrial order issued by a previous circuit judge (*res judicata*) and then submitting this question of law to the jury to resolve?
>
> 2. Did the trial court err in allowing testimony from Defendant's experts over objection of Plaintiff's counsel in violation of *KRS 312.200*, *KRS 312.175* and KAR 21.075 Section 2(1)?

Despite those limitations appellant raised numerous additional issues on appeal, including contentions that the trial court erred (1) by instructing the jury regarding the assignment of PIP benefits because that issue was one of law for the court's determination, (2) by failing to find that appellee lacked standing to contest the validity of the assignment, and (3) by failing to find that appellant's cause of action against appellee was nonassignable. Appellant also asserted that appellee waived any challenge to the issue of whether his cause of action was assigned to Alampi by failing to raise that issue by specific negative averment in its pleadings. However, [*4] because none of these issues were raised in appellant's prehearing statement pursuant to *CR 76.03*, and he did not show good cause or make a timely motion to submit them as additional issues, they are not properly before us on appeal.

Moreover, it appears that the issues raised by appellant regarding jury instructions and the assignability of his cause of action were not raised below so as to be preserved for appellate review. Although *CR 76.12(4)(c)(v)* requires any appellant's brief to contain at the beginning of each argument "a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner," appellant's direct brief contains no such references to the lengthy record in regard to these issues. Even after these serious preservation deficiencies were noted in appellee's brief, appellant failed to adequately address them in his reply brief or to otherwise indicate any way in which the issues may have been preserved, and we have found no other indicia of preservation. That being so, this court will not consider the merits of these issues on appeal. See *Sharp v. Sharp, Ky., 491 S.W.2d 639 (1973)*; *McGinnis v. McGinnis, Ky. App., 920 S.W.2d 68, 73, 43 5 Ky. L. Summary 2 (1995)*.

Appellant [*5] also is not entitled to relief regarding his claim that appellee waived any challenge to appellant's capacity to sue by failing to timely and specifically raise that challenge in his pleadings rather than in later motions. See *CR 9.01*. As there is nothing in appellant's briefs to indicate that he ever raised this issue in response to appellee's pleadings, we conclude that he waived any right to raise the matter on appeal. See *CR 15.02*. See, e.g., *Commonwealth v. Lavit, Ky., 882 S.W.2d 678 (1994)*; *Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225 (1989)*; *Abuzant v. Shelter Insurance Co., Ky. App., 977 S.W.2d 259, 45 11 Ky. L. Summary 6 (1998)*.

Appellant further alleges that the trial court erred by failing to find that appellee lacked standing to contest the validity of the assignment. Although it again appears that this issue was not raised below and is not preserved for

review, appellant contends that the issue of standing is a jurisdictional matter which may be raised for the first time at any point in the proceedings, including on appeal. However, the issue of standing in fact relates to a party's standing to sue, which is defined as a plaintiff's "real and substantial interest in the subject matter [*6] of the litigation." *Stevens v. Stevens, Ky., 798 S.W.2d 136, 139 (1990)*; *Rose v. Council for Better Education, Inc., Ky., 790 S.W.2d 186, 202 (1989)*. In other words, standing to sue is the right of a plaintiff, and not that of a defendant, "to take the initial step that frames legal issues for ultimate adjudication." *Kraus v. Kentucky State Senate, Ky., 872 S.W.2d 433, 439 (1993)*. Clearly, this unpreserved contention regarding standing does not present a jurisdictional issue which now may be raised on appeal by the former plaintiff against the former defendant.

Next, we are not persuaded by appellant's contention that the trial court erred by addressing the issue of his alleged assignment of benefits to Alampi because a previous order denying summary judgment was res judicata as to the assignment issue. *CR 54.02(1)* provides that unless the order includes specific finality language, a court order which adjudicates less than all of the outstanding claims in an action "is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." A subsequent judgment which adjudicates the remaining claims [*7] is "deemed to readjudicate finally as of that date and in the same terms all prior interlocutory orders and judgments determining claims which are not specifically disposed of in such final judgment." *CR 54.02(2)*. Here, it is clear that by its very nature, the December 1999 order denying summary judgment was an interlocutory order which was subject to readjudication and revision at any time. Hence, the trial court did not err by failing to treat that order as res judicata when it entered its final judgment.

Finally, appellant contends that the trial court erred by admitting the testimony of appellee's expert witnesses. We disagree.

Appellant asserts that Dr. Alan Bragman's testimony should not have been admitted because he does not qualify as a peer reviewer in Kentucky. Similarly, appellant asserts that Dr. L.B. Payne's testimony should not have been admitted because appellant never executed a release permitting a peer review of his records. However, since Bragman and Payne both testified as expert witnesses in regard to their review of appellant's records for purposes of litigation, rather than as peer reviewers of those records for the Kentucky Board of Chiropractors, we are not persuaded [*8] that the witnesses' failure to be qualified as peer reviewers was relevant in any way to their qualifications as expert witnesses or to the admissibility of their testimony at trial. Hence, the court did not err by admitting their testimony. Moreover, appellant's contentions regarding the propriety of permitting Dr. Broeg to testify at trial are rendered moot because he in fact evidently did not testify below.

Given our conclusions to this point, it is unnecessary to address the issues raised in appellee's protective cross-appeal.

The court's judgment is affirmed.

ALL CONCUR.