MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Theodore L. Stacy
Valparaiso, Indiana

ATTORNEYS FOR APPELLEE

David J. Beach
Julia M. Kwait
Eichhorn & Eichhorn, LLP
Hammond, Indiana

IN THE COURT OF APPEALS OF INDIANA

Sophia Myers, Mother and Personal Representative of the Estate of Gabriel Ryan Myers, a Deceased Minor,

Appellant-Plaintiff,

v.

Oren Conway, M.D.,

Appellee-Defendant.

February 11, 2021

Court of Appeals Case No. 20A-CT-572

Appeal from the Porter Superior Court

The Honorable Mary A. DeBoer, Judge

Trial Court Cause No. 64D05-1302-CT-1911

Bradford, Chief Judge.

Case Summary

[1] Gabriel Myers ("Gabriel") fell ill while playing basketball on March 1, 2011, and passed away a short time later. His mother, Sophia Myers ("Myers"), subsequently initiated proceedings in which she alleged that Gabriel's pediatrician, Dr. Oren Conway, had committed malpractice that contributed to Gabriel's death. A jury trial commenced after the Medical Review Panel unanimously opined that the evidence submitted did not support the conclusion that Dr. Conway had failed to meet the applicable standard of care. Following trial, the jury found in favor of Dr. Conway. Myers appeals, arguing that the trial court abused its discretion in admitting certain evidence and in instructing the jury. Upon review, we conclude that the trial court did not abuse its discretion in admitting the challenged evidence. We further conclude that while Myers was entitled to have the proffered loss-of-chance instruction given to the jury, the trial court's refusal to include the proffered instruction in its final jury instructions was harmless. As such, we affirm.

Facts and Procedural History

[2] Dr. Conway is a pediatrician who maintained a pediatric practice in Merrillville from 1983 until 2015. As part of his practice, Dr. Conway performed both well-child and sick visits. Well-child visits included annual physicals after the age of two. Dr. Conway and his office staff communicated to his patients, including Myers and Gabriel, the importance of annual checkups after age two. Myers regularly took Gabriel to Dr. Conway for checkups and vaccinations after he

was born in 1993 until September of 1999. After 2001, however, Gabriel only visited Dr. Conway's practice three times for "sick" visits; once in 2003, once in 2007, and once in 2010. Tr. Vol. III p. 216.

[3] Between 1999 and March of 2007, Myers took Gabriel to facilities in Portage for checkups and physicals, all of which included questions relating to heart health. At those checkups and physicals, Gabriel's vitals were good, and his heart was fine. Gabriel did not report suffering from any heart-related issues during these checkups or physicals.

[4] On March 4, 2007, Gabriel was playing basketball when he experienced a syncopal[1] episode. He was taken to Porter Memorial Hospital by ambulance. Gabriel reported to the EMT that "[h]e was playing basketball with friends, caught a cold breath of air, felt he couldn't breathe and thought he may pass out." Appellee's App. p. 31. He "also complained of tingling in his arms, [which was] attributed to hyperventilation as he became scared." Appellee's App. p. 31. "After a few minutes of oxygen [he] felt better [and had] no complaints." Appellee's App. p. 31.

[5] Upon arriving at the hospital, Gabriel reported that he was "playing basketball[,] felt like passing out[,] became clammy [and] weak[, and] had chest pain 'pressure' at time of incident." Appellee's App. Vol. II p. 21. In treating

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[1] Syncope "is the medical term for fainting or passing out." https://my.clevelandclinic.org/health/diseases/17536-syncope (last visited January 26, 2021).

Gabriel, the emergency room physician noted that Gabriel did not report having a headache; feeling dizzy; experiencing chest pains or palpitations; or experiencing nausea, vomiting, diarrhea, or abdominal pain. The physician further noted that Gabriel's heart sounds, rate, and rhythm were normal. Further, although Gabriel initially exhibited high blood pressure upon arriving at the hospital, his blood pressure had decreased to a normal range by the time he was discharged. Gabriel was diagnosed with having suffered a probable episode of vasovagal syncope.[2] Upon being discharged, Gabriel was given instructions to notify a doctor if he had any recurring symptoms or chest pain and to follow up with a family doctor in "1–2 days." Appellee's App. Vol. II p. 33.

[6] The next day, Gabriel was seen by Dr. Conway. Myers gave Dr. Conway a copy of Gabriel's hospital chart from the previous day and Dr. Conway reviewed the records and discussed them with Myers and Gabriel. Dr. Conway's staff took Gabriel's vital signs and blood pressure and Dr. Conway examined Gabriel. Gabriel, who was five feet, seven inches, tall, weighed in at 247 pounds, which put him in the range of being obese. Dr. Conway ordered various tests to assess Gabriel's overall wellbeing, since Gabriel was overweight and had not been to Dr. Conway's office in over three years, including a CBC,

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[2] Vasovagal syncope "occurs when you faint because your body overreacts to certain triggers[.]" https://www.mayoclinic.org/diseases-conditions/vasovagal-syncope/symptoms-causes/syc-20350527 (last visited January 26, 2021). "The vasovagal syncope trigger causes your heart rate and blood pressure to drop suddenly." *Id.* "That leads to reduced blood flow to your brain, causing you to briefly lose consciousness." *Id.* "Vasovagal syncope is usually harmless and requires no treatment." *Id.*

T4, TSH, chem profile, lipid profile and urinalysis. The urinalysis, chem profile and CBC were unremarkable. Gabriel's total cholesterol was normal and the total cholesterol/HDL ratio of 3.6 placed him in the low-average risk for atherosclerosis.

[7] Despite believing that Gabriel had experienced a vasovagal syncopal episode, Dr. Conway ordered an echocardiogram. The echocardiogram demonstrated normal cardiac structure and function. Given the normal results, Dr. Conway gave Gabriel the "okay" to exercise. Appellee's App. Vol. II p. 9. Dr. Conway did not treat Gabriel after this date.

[8] Gabriel returned to Dr. Conway's office only one time between March 5, 2007 and his death on March 1, 2011. On January 15, 2010, Gabriel was seen by Nurse Practitioner Cathy Pieroni after he complained of ear pain and a sore throat. Nurse Practitioner Pieroni diagnosed Gabriel as having tonsillitis and prescribed Amoxicillin. Gabriel never returned to Dr. Conway's office.

[9] On February 27, 2011, Gabriel was admitted to the Porter County Juvenile Detention Center ("PCJDC"). Upon his admission, Nurse Jo Ann Souders completed an intake examination, noting that Gabriel's heart and pulse sounded normal. Gabriel told Nurse Souders that he had not experienced any changes to his health since a prior admission to the PCJDC. During the intake examination, Nurse Souders reviewed an intake report that had been completed upon Gabriel's prior admission to the PCJDC, noting that at the time, Gabriel's heart rate and rhythm and pulse intensity were all normal. Gabriel reported

that he had smoked marijuana approximately two weeks prior to his admission to the PCJDC and had previously reported that he drank beer on the weekends. Nurse Souders noted that upon his admission to the PCJDC, Gabriel's blood pressure was slightly elevated at 120/90. However, when Nurse Marylee Pollaro rechecked his blood pressure two days later on March 1, 2011, it was "normal" at 120/80. Appellee's App. Vol. II p. 40.

[10] Later on March 1, 2011, Gabriel was playing basketball in the gym at the PCJDC when he started "having a hard time breathing." Appellee's App. Vol. II p. 38. Gabriel stated that he "needed water and felt dehydrated." Appellee's App. Vol. II p. 41. After getting a drink and splashing water on his face, Gabriel indicated that he "felt light headed, dizzy and short of breath." Appellee's App. Vol. II p. 41. A short time later, as he was being escorted out of the gym, Gabriel "collapsed in the hallway." Appellee's App. Vol. II p. 38. While some PCJDC staff members performed CPR, others heard a "gurgling" sound and observed that Gabriel "had urinated himself," "his color was bad," and "fluid was coming from his nose and mouth." Appellee's App. Vol. II p. 38. Gabriel's condition deteriorated, leaving him unresponsive and without a pulse. He remained unresponsive after PCJDC staff administered chest compressions. PCJDC staff called 911 and, upon responding, EMTs administered 25 g of dextrose, 2 mg of Narcan, and 50 mg of sodium bicarbonate; continued CPR; and reported that Gabriel's blood sugar was low at 59 mg/dl. Gabriel was transported to the hospital where attempts to resuscitate him were unsuccessful and he was pronounced dead.

[11] Dr. Jun Hu subsequently performed an autopsy on Gabriel. Dr. Hu did not review Gabriel's medical records before conducting the autopsy. Dr. Hu determined that the cause of Gabriel's death was "sudden cardiac death (also called sudden cardiac arrest) due to narrowing of the coronary arteries and cardiomegaly with concentric myocardial hypertrophy of the left ventricle and ventricular septum." Appellant's App. Vol. II p. 59. In reaching this determination, Dr. Hu noted the following:

> Heart
> A. Mild cardiomegaly (460 gm), with concentric myocardial hypertrophy of left ventricle and ventricular septum.
> B. Left anterlor descending coronary artery moderately narrowed (up to 50%) by atherosclerosis.
> C. Other major coronary arteries mildly narrowed (20–25) by atheroscierosis.

Appellant's App. Vol. II p. 59. In determining that Gabriel's heart was enlarged and that Gabriel's left ventricle or septum were thicker than normal, Dr. Hu did not consult with any cardiac pathology textbooks. Further, given his determination that Gabriel died as a result of sudden cardiac arrest, Dr. Hu decided not to test the vitreous.

[12] Following Gabriel's death, Myers filed a proposed medical-malpractice complaint against Dr. Conway, claiming that Dr. Conway had failed to meet the applicable standard of care in his prior treatment of Gabriel and that Gabriel's death had occurred as a result of the alleged malpractice. Myers's medical malpractice complaint against Dr. Conway came before the Medical

Review Panel on November 4, 2015. After considering the parties' contentions and evidence, the Medical Review Panel unanimously opined as follows:

> It is the opinion of the Medical Review Panel that the evidence submitted does not support the conclusion that [Dr. Conway] failed to meet the applicable standard of care as charged in the Proposed Complaint.
>
> It is further the opinion of the Medical Review Panel that the conduct complained of was not a factor of the resultant damages.

Appellee's App. Vol. II p. 2.

[13] On February 23, 2016, Myers filed suit, alleging that Dr. Conway had committed medical malpractice from March 5, 2007 through March 1, 2011, and was responsible for Gabriel's death. Myers's case centered on her claim that Dr. Conway had failed to adequately investigate the cause of Gabriel's exercise-related syncope in 2007, depriving her and Gabriel of the opportunity to seek any appropriate treatment. A jury trial commenced on February 10, 2020.

[14] At trial, Dr. Conway presented deposition testimony from Dr. Steven White, the lead forensic pathologist for the British Columbia Coroners Service. Dr. White is board certified in both anatomic and forensic pathology and holds an MD and a PhD in biochemistry, with a focus on heart development. Dr. White has a sub-specialty in cardiovascular pathology and had previously worked as the cardiovascular pathology consultant for Cook County Medical Examiner's office. In his work as a forensic pathologist, Dr. White typically performs forty

to fifty autopsies per month and has performed over 3000 autopsies in his career.

[15] Dr. White disagreed with Dr. Hu's determination that as to Gabriel's death was caused by sudden cardiac arrest due to narrowing of the coronary arteries and cardiomegaly.[3] Dr. White indicated that based on his review of Gabriel's medical records and the autopsy report, he could "rule that out as a cause of death" to a "degree of medical certainty." Appellee's App. Vol. II pp. 81, 82. Specifically, he disagreed with Dr. Hu's conclusion that Gabriel's heart, which weighed 460 grams, had been enlarged, noting that Gabriel's heart weight had been within the normal range for a 247–51 pound male. Dr. White testified that Gabriel had also had normal ventricular wall and septal thickness, and therefore had not had concentric myocardial hypertrophy. Dr. White also opined that Dr. Hu's finding of a moderate narrowing of the left anterior descending coronary artery would not cause cardiac arrest.

[16] Dr. White further indicated that he could not determine the cause of death with certainty because the autopsy was incomplete. Specifically, Dr. White noted that Dr. Hu had not completed studies to assess for electrolytes and dehydration or for blood sugar levels or blood glucose levels. In particular, Dr. Hu had not tested the vitreous humor, which is routinely done in autopsies "[a]ll of the time." Appellee's App. Vol. II p. 85. Based upon the reports of Gabriel's

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[3] Dr. White indicated that "cardiomegaly" means an "enlargement of the heart." Appellee's App. Vol. II p. 72.

symptoms when he collapsed and the findings of the EMT, Dr. White opined, to a reasonable degree of medical certainty, that "the top two reasons why he died would have been either dehydration with an electrolyte imbalance or low blood sugar, hypoglycemia." Appellee's App. Vol. II p. 85.

[17] The jury also heard testimony from two pediatric cardiologists, both of whom testified that Gabriel had not had an enlarged heart or a thickened left ventricle. Specifically, Dr. Eric Ebenroth testified that Gabriel had not had an enlarged heart or a thickened left ventricle and that he did not believe that anything relating to the condition of Gabriel's heart caused Gabriel's death. Dr. Ebenroth further opined that there was nothing in the medical records that would make him believe that Gabriel's death had been reasonably foreseeable in 2007 or that there were any other tests that could have been completed that would have predicted Gabriel's death. Dr. Stuart Berger, a pediatric cardiologist at Northwestern University and Lurie Children's Hospital, also testified that Gabriel had not had an enlarged heart or a thickened left ventricle and that he did not believe that anything relating to the condition of Gabriel's heart caused Gabriel's death. At the conclusion of trial, the jury found "in favor of [Dr. Conway], and against [Myers]." Appellant's App. Vol. II p. 33.

Discussion and Decision

[18] Myers contends that the trial court abused its discretion in admitting certain evidence at trial and in instructing the jury.

I. Admission of Evidence

[19] The admission and exclusion of evidence falls within the sound discretion of the trial court, and we review the admission of evidence only for an abuse of discretion. *Estate of Carter v. Szymczak*, 951 N.E.2d 1, 5 (Ind. Ct. App. 2011), *trans. denied*. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id.* This Court will not reverse the trial court's admission of evidence absent a showing of prejudice. *Id.*

Reed v. Bethel, 2 N.E.3d 98, 107 (Ind. Ct. App. 2014).

A. Dr. White's Testimony

[20] Myers argues that the trial court "abused its discretion and erred in allowing Dr. White to offer unreliable and speculative opinions on the cause of Gabriel's death." Appellant's Br. p. 23. With regard to expert testimony, Evidence Rule 702 provides as follows:

> (a) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.
>
> (b) Expert scientific testimony is admissible only if the court is satisfied that the expert testimony rests upon reliable scientific principles.

"The trial court is considered the gatekeeper for expert opinion evidence." *Clark v. Sporre*, 777 N.E.2d 1166, 1170 (Ind. Ct. App. 2002) (citing *Doe v. Shults-*

Lewis Child & Family Servs., Inc., 718 N.E.2d 738, 750 (Ind. 1999)). "To fulfill this function, it is entrusted with the discretion to rule on the admissibility of expert opinion evidence." *Id.* "The trial court's exclusion or admission of expert testimony will be reversed only for abuse of that discretion." *Id.* (citing *Cook v. State*, 734 N.E.2d 563, 570 (Ind. 2000)).

[21] > Where an expert's testimony is based upon the expert's skill or experience rather than on the application of scientific principles, the proponent of the testimony must only demonstrate that the subject matter is related to some field beyond the knowledge of lay persons and that the witness possesses sufficient skill, knowledge or experience in the field to assist the trier of fact to understand the evidence or to determine a fact in issue.

Norfolk S. Ry. Co. v. Estate of Wagers, 833 N.E.2d 93, 102 (Ind. Ct. App. 2005). "Speculation will not pass for an expert opinion under Rule 702." *Clark*, 777 N.E.2d at 1170. "To be admissible, an expert's opinion that an event caused a particular injury must be based on something more than coincidence." *Id.* at 1170–71. "An expert's opinion on causation in a medical malpractice case must rest on 'an application of particular scientific facts to particular data about the instant case.'" *Id.* at 1171 (quoting *Ind. Mich. Power Co. v. Runge*, 717 N.E.2d 216, 237 (Ind. Ct. App. 1999)). "An expert witness who lacks detailed knowledge of a plaintiff's current medical condition and past medical history has no basis to give an opinion on causation under Rule 702." *Id.* (internal quotation marks omitted).

[22] However, the Indiana Supreme Court has held that the lack of conclusiveness in an expert's testimony is "merely a matter which concerned the weight of the testimony, which was relevant in that it assisted the jury's ability to intelligently resolve a material factual question." *Noblesville Casting Div. of TRW, Inc. v. Prince*, 438 N.E.2d 722, 731 (Ind. 1982). In reaching this holding, the Court explained that "an expert's opinion that something is 'possible' or 'could have been' may be sufficient to sustain a verdict or award when it has been rendered in conjunction with other evidence concerning the material factual question to be proved." *Id.* The Court further reiterated that

> no threshold level of certainty or conclusiveness is required in an expert's opinion as a prerequisite to its admissibility. Assuming the subject matter is one which is appropriate for expert testimony and that a proper foundation has been laid, the expert's opinion or conclusion that, in the context of the facts before the witness, a particular proposition is 'possible, 'could have been,' 'probable,' or 'reasonably certain' all serve to assist the finder of fact in intelligently resolving the material factual questions. The degree of certainty in which an opinion or conclusion is expressed concerns the weight to be accorded the testimony, which is a matter for the jury to resolve.

Id.

[23] Myers asserts that Dr. White's causation opinions "were not supported by any scientific principle or competent evidence and should not have been admitted." Appellant's Br. p. 24. Specifically, she argues that "Dr. White speculated that Gabriel might have died from dehydration" or that "the post-mortem blood sugar level might be an indicator." Appellant's Br. p. 25 (emphasis omitted).

However, the evidence demonstrates that Dr. White did not merely speculate as to the cause of Gabriel's death.

[24] Dr. White is a board-certified forensic pathologist with a sub-specialty in cardiovascular pathology and extensive experience in completing and analyzing autopsies. Relying on his expertise and experience, he provided detailed testimony regarding what the autopsy results showed about the condition of Gabriel's heart and indicated that he could rule out sudden cardiac arrest as Gabriel's cause of death to a "degree of medical certainty." Appellee's App. Vol. II p. 82. While Dr. White acknowledged that he could not determine the cause of death with certainty because the autopsy conducted by Dr. Hu was incomplete, Dr. White, relying on the reports regarding Gabriel's medical history and condition at the time of his death together with the EMT's finding that Gabriel's blood sugar was only 59 mg/dl, opined, to a reasonable degree of medical certainty, that "the top two reasons why [Gabriel] died would have been either dehydration with an electrolyte imbalance or low blood sugar, hypoglycemia." Appellee's App. Vol. II p. 85.

[25] The evidence reveals that Dr. White did not merely speculate as to Gabriel's cause of death. His opinions were based upon both his training and experience and his review of Gabriel's medical records and the autopsy report. Through his review of these records, Dr. White was able to educate himself about Gabriel's medical history and condition at the time of his death. His opinion regarding the cause of Gabriel's death was based on more than coincidence and rested upon the particular scientific facts and data relating to Gabriel's

condition at the time of his death. As such, we conclude that the trial court did not abuse its discretion in admitting Dr. White's testimony regarding the cause of Gabriel's death at trial.

B. References to Drug and Alcohol Use on PCJDC Intake Forms

[26] Myers also argues that the trial court abused its discretion in admitting unredacted copies of the PCJDC intake forms, which included references to marijuana and alcohol use by Gabriel prior to his death. Myers acknowledges that the intake forms were relevant as to Gabriel's medical condition prior to his death but argues that the brief references to marijuana and beer should have been redacted because they were irrelevant and prejudicial. For his part, Dr. Conway argues that the references to marijuana and beer were relevant to Gabriel's medical assessment at the time of his admission to the PCJDC. In addition, Dr. Conway argues that the challenged references constituted permissible impeachment evidence.

[27] In objecting to the references to marijuana and alcohol, Myers argued that the references were not relevant to any issues at trial and were included "strictly for the purpose of character assassination." Tr. Vol. III p. 25. Dr. Conway countered by arguing that

> Again, your Honor, their case that this is a child if he had only been told to be healthy and lose weight he would have done exactly as he was told. This is evidence that, you know, he's a teenager doing things that teenagers do. They do break the rules. They're not complying. A child who's drinking and smoking

> marijuana is -- I think that's relevant evidence to whether or not Dr. Conway saying get fit seven -- or 4 years -- in 2007 whether he would have done that. We've also had Matthew Myers'[s] testimony that he was a good kid, that maybe he went to a party or two, but he didn't do anything that he illegal and didn't have any prior admissions or offenses. I think this contradicts the testimony. This was part of the discussion we've had at length about if they want to open the door then the full picture comes in.

Tr. Vol. III p. 26. In ordering that the reference to marijuana would not be redacted, the trial court stated that since the reference was made as "part of the intake and it has to do with his medical condition so I'm going to show that that's appropriate." Tr. Vol. III p. 27. The trial court further explained that

> if we're putting his medical condition at issue, which it is, which it was, then I think that if there is a medical intake and questions are being asked of Gabriel by a medical professional, and he indicates yes, I smoked marijuana two weeks ago, that that should be something that is fair game. I mean, it's about his medical condition. Who the heck knows what caused what at what point. And so I don't think that we cherry pick those things because it makes him look bad. It is what it is. Those are the cards that were there that day. He said to the nurse I did this, you know, two weeks ago, in all frankness I'm sure, because he could have fibbed about it and didn't, you know, to his credit.

Tr. Vol. III p. 26.

[28] With regard to the reference to drinking beer, Myers argued that the reference should have been redacted because it was irrelevant and prejudicial. Dr. Conway argued that the reference was relevant, stating:

> Well, again, we've been talking about his weight at length. He's drinking beer regularly. I think that's a part of the weight issue. You know, that goes well beyond simply are you eating a healthy diet and will you follow instructions to eat a healthy die[t]. I think that is evidence of what he's doing. And it relates to his weight and their case about whether he's going to follow instructions to live a, you know, healthy life and lose weight.

Tr. Vol. III pp. 29–30. In ruling that the reference to beer would not be redacted, trial court stated "I think, again, this seems to be a medical intake kind of situation so I think it's relevant. May be prejudicial, but the probative value outweighs the prejudicial component." Tr. Vol. III p. 30.

[29] "Indiana Evidence Rule 401 provides a liberal standard for relevancy." *Konopasek v. State*, 946 N.E.2d 23, 27 (Ind. 2011). Evidence Rule 401 provides that "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Generally, relevant evidence is admissible. Ind. Evidence Rule 402. However, the trial court may exclude relevant evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." Evid. R. 403.

[30] The trial court determined that it would not "cherry pick" information from the intake forms to admit at trial, finding that all information included in the medical intake forms was relevant to the perception of Gabriel's medical well-

being at the time he was admitted into the PCJDC. Gabriel's health prior to his death was at issue in Myers's malpractice claim. We cannot say that questions about choices and activities that could impact Gabriel's health were irrelevant. As such, the trial court's determination in this regard was not against the logic and effect of the facts and circumstances before the court.

[31] Further, Myers opened the door to such questions about Gabriel's choices and activities. In the context of criminal law, the Indiana Supreme Court has held that "'[w]hen the accused offers evidence of her own character, she opens the door to the subject of her character for the trait placed in issue.'" *Brown v. State*, 577 N.E.2d 221, 232 (Ind. 1991) (quoting *Berkley v. State*, 501 N.E.2d 399, 400 (Ind. 1986)). We believe that the same is true for the instant situation, *i.e.*, that by offering evidence of Gabriel's character, Myers opened the door to the subject of Gabriel's character for the trait placed at issue. "A party cannot invite error and then request relief on appeal based upon that ground." *Beeching v. Levee*, 764 N.E.2d 669, 674 (Ind. Ct. App. 2002). Stated differently, [a]n error invited by the complaining party is not subject to review by this court." *Id.*

[32] Myers introduced character evidence in an attempt to prove that Gabriel would have followed any instructions given to him by Dr. Conway, including instructions to live a healthy lifestyle and lose weight. Myers introduced the deposition testimony of her older son, and Gabriel's brother, Matthew who testified to Gabriel's interests and character. In doing so, he acknowledged that Gabriel had been in "a little bit of trouble." Matthew Myers Deposition p. 19. When asked about what kind of trouble, Matthew explained:

> Just doing basic high school things that you're not supposed to do. I don't know. Just staying out late or going to parties. I don't know. Whatever high school kids do. I don't have any specifics. I just know that, you know, maybe he did a few of those things. I'm not entirely sure. I just know — I mean, to sit here and say he was the perfect kid, that would be — that would be obviously wrong. I mean, every high school kid does a few things, but overall he had his head on his shoulders and he was really focusing on that broadcasting bit and really put a lot of time and dedication into that craft.

Matthew Myers Deposition p. 19. Matthew did not know why Gabriel was at the PCJDC on March 1, 2011.

[33] Myers also testified about Gabriel's character and interests. Like Matthew, she admitted that while generally a good young man, Gabriel had gotten himself into some trouble. Myers testified that Gabriel was in the PCJDC on February 27, 2011, because he had been "picked up" by the Portage Police. Tr. Vol. III p. 184. Myers explained,

> I was very upset. I was very mad at him. You know, I was really disappointed because he was doing really good in school.… And he's hanging out with the wrong kids doing not good things. And I just didn't understand why he was doing it. Just maybe being a teenager.… I was very disappointed in him. I was really hurt by that -- all that.

Tr. Vol. III p. 185.

[34] Myers acknowledges on appeal that Dr. Conway "did not reference [the reference to marijuana or beer] with any witness or argument." Appellant's Br.

pp. 21–22. In fact, the record demonstrates that Myers was the only party that chose to highlight the references by questioning Nurse Souders about the intake forms in detail, including the reference to beer. Because Myers invited testimony regarding Gabriel's admission that he drank beer into the record during trial, she cannot now claim that the trial court abused its discretion in refusing to redact the single reference to beer on the PCJDC intake form. *See Beeching*, 764 N.E.2d at 674. Likewise, evidence of Gabriel's choices and activities that potentially have a negative impact on his health and weight, was relevant to rebut Myers's claim that Gabriel would have followed any instructions given to him by Dr. Conway to live a healthy lifestyle and lose weight.

[35] Furthermore, Myers claims that the unredacted copies were offered by Dr. Conway "for the sole purpose of inciting bias against" her claim. Appellant's Br. p. 22. However, in this day and age, it would not be shocking for members of the jury to hear that a teenager had tried marijuana or drank beer. As such, we do not believe that a brief reference on the intake forms to using marijuana once and drinking beer on the weekend was any more prejudicial to Myers than Matthew's and Myers's testimony regarding Gabriel getting into a "little bit of trouble" and getting "picked up" by police. Matthew Myers Deposition p. 19; Tr. Vol. III p. 184. For the foregoing reasons, we conclude that the trial court did not abuse its discretion in admitting the unredacted PCJDC intake forms.

II. Jury Instructions

[36] "The purpose of jury instructions is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair and correct verdict." *Dawson v. Thornton's Inc.*, 19 N.E.3d 337, 339 (Ind. Ct. App. 2014) (citing *Blocher v. DeBartolo Props. Mgmt., Inc.*, 760 N.E.2d 229, 235 (Ind. Ct. App. 2001), *trans. denied*). "In reviewing a trial court's decision to give or refuse a tendered instruction, it must be determined whether the instruction: (1) correctly states the law; (2) is supported by the evidence in the record; and (3) is covered in substance by other instructions." *Id.* (citing *Wal-Mart Stores, Inc. v. Wright*, 774 N.E.2d 891, 893 (Ind. 2002)). "'The trial court has broad discretion as to how to instruct the jury, and we generally review that discretion only for abuse.'" *McCowan v. State*, 27 N.E.3d 760, 763 (Ind. 2015) (quoting *Kane v. State*, 976 N.E.2d 1228, 1231 (Ind. 2012)). In reviewing jury instructions, "we consider the instructions 'as a whole and in reference to each other' and do not reverse the trial court 'for an abuse of that discretion unless the instructions as a whole mislead the jury as to the law in the case.'" *Helsley v. State*, 809 N.E.2d 292, 303 (Ind. 2004) (quoting *Carter v. State*, 766 N.E.2d 377, 382 (Ind. 2002)).

A. The Loss-of-Chance Doctrine

[37] Pursuant to the loss-of-chance doctrine, the "compensable injury is not the result, which is usually death, but the reduction in the probability that the patient would recover or obtain better results if the defendant had not been negligent." *Mayhue v. Sparkman*, 653 N.E.2d 1384, 1387 (Ind. 1995). In

adopting the loss-of-chance doctrine, the Indiana Supreme Court relied on section 323 of the Second Restatement of Torts, which provides as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

In *Mayhue*, the Indiana Supreme Court noted that the approach set forth in section 323 establishes "a more procedurally-oriented response to such claims." 653 N.E.2d at 1387. "Specifically, courts have established the rule that once the plaintiff proves negligence and an increase in the risk of harm, the jury is permitted to decide whether the medical malpractice was a substantial factor in causing the harm suffered by the plaintiff." *Id.*

[38] In adopting the loss-of-chance doctrine, the Indiana Supreme Court stated that

> once a plaintiff has introduced evidence that a defendant's negligent act or omission increased the risk of harm to a person in plaintiff's position, and the harm was in fact sustained, it becomes a question for the jury as to whether or not that increased risk was a substantial factor in producing the harm.

Id. at 1388 (citing *Herskovits v. Group Health Co-op of Puget Sound*, 664 P.2d 474, 477 (Wash. 1983) (internal brackets and quotation marks omitted)). However, the Court noted that "[t]he plaintiff must still prove by a preponderance of the

evidence that the defendant's negligence was a substantial factor in causing the plaintiff's harm." *Id.*

[39] In *Cahoon v. Cummings*, 734 N.E.2d 535, 539 (Ind. 2000), the Indiana Supreme Court again discussed the loss-of-chance doctrine, stating that the doctrine "permits recovery from a defendant whose negligence significantly increases the probability of the ultimate harm, even if the likelihood of incurring that injury was greater than fifty percent in the absence of the defendant's negligence." The court further explained that "upon a showing of causation under *Mayhue*, damages are proportional to the increased risk attributable to the defendant's negligent act or omission." *Cahoon*, 734 N.E.2d at 541.

B. Whether the Trial Court Abused its Discretion in Refusing to Give Myers's Tendered Loss-of-Chance Instruction to the Jury

[40] Myers argues that the trial court abused its discretion in refusing to give her tendered loss-of-chance instruction to the jury. At trial, Myers argued that Dr. Conway's actions deprived her and Gabriel of the chance to try to treat Gabriel's medical condition prior to Gabriel's death. Myers presented evidence to support her argument and requested that the trial court give the following instruction to the jury:

> 1555 Loss of Chance-Elimination of a Probability of Recovery
>
> A pediatrician may be liable to a patient for a loss of chance of survival resulting from the pediatrician's failure to exercise reasonable case.

To recover damages from Dr. Oren Conway, Sophia Myers must prove by the greater weight of the evidence that:

1. Dr. Conway's care and treatment fell below the appropriate standard of care;

2. If Dr. Oren Conway had met the appropriate standard of care, Gabriel Myers would have had a chance of survival;

3. Dr. Oren Conway's failure to meet the appropriate standard of care decreased Gabriel Myers' chance of survival; and

4. Dr. Oren Conway's failure to meet the appropriate standard of care was a substantial factor in causing the harm to Gabriel Myers.

In determining the amount of damages for a lost chance of survival, if any, first decide the percentage value of the lost chance of survival to Gabriel Myers.

To make this determination, consider the evidence presented about:

5. Gabriel Myers'[s] chance of survival before Dr. Oren Conway's alleged negligent acts or omissions, and

6. Gabriel Myers'[s] percentage chance of survival after Dr. Oren Conway's alleged negligent acts or omissions.

The difference between these percentages is the percentage value of Gabriel Myers'[s] lost chance of survival.

After determining the percentage value of Gabriel Myers'[s] lost chance of survival, determine the value of the total damages based on the evidence presented.

> Multiply this dollar amount by the percentage value of Gabriel Myers'[s] lost chance of survival. I will give you a verdict form that will help guide you through this process.

Appellant's App. Vol. II p. 92.[4] The trial court refused to give this proffered instruction to the jury, stating "I removed the loss of chance from the Plaintiff's side of things." Tr. Vol. IV p. 105.

[41] In order to support giving the loss-of-chance instruction to the jury, there must have been evidence that Dr. Conway had failed to exercise reasonable care in treating Gabriel. In support of her claim that such evidence existed in the record, Myers points to the testimony of Dr. Marcus DeGraw who testified that there had been "red flag issues" in Gabriel's medical history regarding his heart health that warranted additional attention from Dr. Conway. Tr. Vol. II p. 110. He further testified as follows:

> Q. If Dr. Conway, again, had sent Gabriel out for the testing, had had him back in the office on multiple occasions monitoring all these red flags, is there at least the possibility that Dr. Hu wouldn't have been writing a pathology report and doing an autopsy?
>
> A. Absolutely. And, in particular, again, it's not even just related to syncope, it's those chronic problems that were left unaddressed forever, high blood pressure and obesity. Both of which contribute to an enlargement of the heart muscle and atherosclerosis or plaque's forming inside your artery, which is

[4] The instruction proffered by Myers was a reproduction of Model Civil Jury Instruction 1555, modified to reflect the parties' information.

unusual in teenagers, both of which existed in this case. And the enlargement of the heart muscle wasn't on the first echo so between 2007 and 2010 we continued to progress and get worse and progress and get worse. And by not following up addressing those chronic issues routinely and regularly until they're fixed we have eliminated the possibility of helping or intervening.

****

Q. [D]o you think that Dr. Conway is responsible in some part for Gabriel Myers' death?

A. Yes.

Q. And what would that be?

A. For failing to fully explore and identify the reasoning behind his symptoms and continuing to fail to look into his ongoing chronic problems and how it might contribute to a downgrade in his health in the future.

Q. And would the reason for that be that Dr. Conway did not do what a reasonably competent pediatrician would have done based on these red flags and chronic issues?

A. Absolutely.

Tr. Vol. II pp. 110–12.

[42] The record reveal that Myers argued and presented evidence suggesting that she should recover under the loss-of-chance doctrine. Once Myers argued and introduced evidence indicating that Dr. Conway's act or omission had increased the risk of harm to Gabriel, and harm was in fact sustained, it became a question for the jury as to whether Dr. Conway's actions or lack of action had amounted to negligence and, if so, whether said negligence had been a

substantial factor in causing the harm suffered by Gabriel. *See Mayhue*, 653 N.E.2d at 1388. Further, the substance of the tendered loss-of-chance instruction was not covered by any of the trial court's other instructions to the jury. As such, we conclude that the trial court abused its discretion in refusing to give Myers's proffered loss-of-chance instruction to the jury.

[43] However, we further conclude that the trial court's refusal to give the proffered instruction was harmless as the jury considered conflicting evidence, including the testimony of various doctors and the opinion of the Medical Review Panel, regarding whether Dr. Conway had been negligent in his treatment of Gabriel and ultimately determined that he had not been negligent. In order to recover under the loss-of-chance doctrine, *Mayhue* provides that "[t]he plaintiff must still prove by a preponderance of the evidence that the defendant's negligence was a substantial factor in causing the plaintiff's harm." 653 N.E.2d at 1388. Given that the jury found that Dr. Conway had not been negligent in his treatment of Gabriel, Myers was precluded from recovering under the loss-of-chance doctrine. The trial court's refusal to give the proffered loss-of-chance instruction was therefore harmless. *See Elmer Buchta Trucking, Inc. v. Stanley*, 744 N.E.2d 939, 944 (Ind. 2001) (providing that one seeking a new trial on the basis of an improper jury instruction, including the failure to give a proffered instruction, must show a reasonable probability that substantial rights of the complaining party have been adversely affected).

Conclusion

[44] In sum, we conclude that the trial court did not abuse its discretion in admitting either Dr. White's testimony or the unredacted PCJDC intake forms into evidence. We further conclude that while the trial court abused its discretion in refusing to give Myers's tendered loss-of-chance instruction to the jury, the trial court's refusal to give the proffered instruction was harmless as the jury, after considering conflicting evidence, found that Dr. Conway had not been negligent in his treatment of Gabriel.

[45] The judgment of the trial court is affirmed.

Kirsch, J., and May, J., concur.