

NICKELL, JUDGE: Patricia Marlow, on behalf of the estate and minor children of Doveanna Marlow, deceased, (collectively “Marlow”) has appealed from the December 22, 2011, denial of her motion for a judgment notwithstanding the verdict (“JNOV”) following a jury verdict and subsequent judgment entered by the Fayette Circuit Court on December 2, 2011, in favor of James Buck, M.D. Dr. Buck has filed a protective cross-appeal. After a careful review of the record, the briefs and the law, we affirm.

The facts of this case are relatively simple and generally uncontroverted. Marlow, a single mother of two minor children, was involved in a minor traffic collision in August of 2007. While being treated at the University of Kentucky Medical Center for her injuries, a chest x-ray was performed which revealed a small mass located beneath her sternum. She chose not to have a biopsy performed on the mass at that time.

Approximately two months later, in October of 2007, Marlow presented to the UK Pulmonology Clinic complaining of chest pains. Subsequent CT scans were unable to determine the nature of the mass, prompting a referral to Dr. Buck for evaluation and treatment. Dr. Buck recommended Marlow undergo a fine needle aspiration biopsy under CT-guided fluoroscopy (“CT-guided FNA biopsy”). Dr. Buck indicated Marlow could wait six to twelve months to undergo the procedure. Marlow decided to have the procedure and scheduled it for November 12, 2007.

A CT-guided FNA biopsy is generally performed on an outpatient basis by an interventional radiologist. In the procedure, the patient is placed in a CT machine and the physician advances a guide needle into the patient's tissue. Between the advances, the radiologist observes a real-time CT image of the needle's position within the patient's body to determine the length of the following advance. The ultimate goal is to position the tip of the guide needle near the outer edge of the suspected mass. Once the guide needle is in position, a longer, thinner needle is inserted through the guide needle and into the mass. A small tissue sample is then aspirated into the needle. The tissue samples are sent to a pathologist to determine the nature of the mass.

On the date of her procedure, Marlow met with Dr. Jimmy Lee, who explained the procedure and accompanying risks. Marlow consented to the procedure and was placed under conscious sedation for the procedure. Dr. Buck reviewed the CT images from October to determine the correct length of guide needle to utilize. Based on the substantial distance between the surface of Marlow's skin and the edge of the mass, Dr. Buck determined to use an 11-centimeter guide needle.¹

Dr. Buck advanced the guide needle multiple times, pausing after each advance to determine the location of the tip in relation to the mass and any surrounding body structures. Immediately before his final push, Dr. Buck

¹ At the time of Marlow's procedure, UK Hospital carried guide needles in two lengths, 5 centimeters and 11 centimeters.

determined the tip was two centimeters away from the edge of the mass and intended to advance the needle that amount. Following the push, Dr. Buck observed the CT image and discovered the tip of the needle had, in fact, advanced 3.6 to 3.8 centimeters rather than the intended two centimeters, passing through the mass and piercing Marlow's aorta.

Dr. Buck immediately withdrew the guide needle and requested a consult from Dr. Timothy Mullett, a cardiothoracic surgeon. Dr. Mullett found blood beginning to fill Marlow's pericardium, the sac surrounding the heart, and ordered emergency surgery to repair the damage. Marlow suffered cardiac and respiratory arrest before the surgery could begin but Dr. Mullett was able to revive her. Dr. Mullett evacuated the blood surrounding her heart in an attempt to allow her to regain normal heart function. However, Marlow did not recover and suffered an anoxic brain injury. She was declared brain dead two days later and was removed from life support on November 19, 2007, one week after the failed biopsy procedure.

Marlow's executrix brought this action against Dr. Buck on December 31, 2008, and the case proceeded to a jury trial on November 14-17, 2011. The jury was presented evidence and testimony on three general issues: whether Dr. Buck breached the standard of care; whether such breach was a substantial factor in causing Marlow's death; and damages. Of importance to this appeal, Dr. Buck admitted he had been the only person pushing the needle that pierced Marlow's aorta and took responsibility for causing her death. He could only speculate as to

why the guide needle was inadvertently advanced too far, but vehemently denied that he breached any standard of care. He stated he had performed thousands of CT-guided procedures without incident and confirmed he had acted in “the same careful and deliberate way” during Marlow’s procedure. Experts called by both sides universally agreed that bad results could occur absent medical malpractice in biopsy procedures.

At the close of Marlow’s case-in-chief, and again at the close of all the proof, Marlow moved the trial court to direct a verdict in her favor. She argued Dr. Buck and his retained causation expert made judicial admissions that removed the issue of causation from the jury. Dr. Buck opposed the motions and contended that although he had admitted he caused the guide needle to puncture Marlow’s aorta, there had been no admission he violated the standard of care or that he was legally responsible for Marlow’s death based on such breach. The trial court denied the motions and reasoned sufficient evidence existed to send the matter to the jury.

Marlow further objected to the proposed jury instructions, again alleging causation was not in issue as Dr. Buck and his experts agreed it was the incorrect placement of the guide needle that caused the unfortunate outcome of the procedure. Marlow tendered instructions which omitted the causation question and asked only whether Dr. Buck had breached the applicable standard of care in his treatment of Marlow. Dr Buck’s tendered instructions included inquiries as to standard of care and causation. He argued the instruction was based closely on the

sample instructions set forth in Palmore's *Kentucky Instructions to Juries* and accurately set forth the questions to be determined by the jury. Ultimately, the trial court formulated its own instruction which generally conformed to Dr. Buck's tendered instructions.

Following deliberations, the jury returned a verdict in favor of Dr. Buck. A judgment reflecting the jury's decision was entered on December 2, 2011. Marlow timely moved for JNOV, again arguing the issue of causation should not have been put to the jury based on Dr. Buck's alleged judicial admissions. In the alternative, Marlow requested a new trial limited to the issues of liability and damages. The trial court denied the motions by order entered on December 22, 2011. This appeal and cross-appeal followed.

As an initial matter, we must address a procedural issue which bears on our review. Marlow's notice of appeal lists the order being appealed from as having been entered on December 22, 2011. That order denied her motion for a JNOV or, alternatively, a new trial. No appeal was taken from the trial judgment and order entered on December 2, 2011. CR² 73.03 specifies that the notice of appeal "shall identify the judgment, order or part thereof appealed from."

Although her prehearing statement and brief before this Court argue trial errors, we do not believe those issues—as framed by Marlow—are properly before us based on the notice of appeal filed. Rather, only the issues encompassed by the trial court's December 22, 2011, order are properly before us for review. However, to

² Kentucky Rules of Civil Procedure.

the extent the errors raised on appeal were argued before the trial court on Marlow's motion for JNOV or a new trial, we shall address them.

When asked to review a trial court's denial of JNOV, "we are to affirm . . . 'unless there is a *complete absence of proof* on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.'" *Fister v. Commonwealth*, 133 S.W.3d 480, 487 (Ky. App. 2003) (quoting *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky. App. 1985)) (emphasis added). Further, "[t]he trial court is vested with a broad discretion in granting or refusing a new trial, and this Court will not interfere unless it appears that there has been an abuse of discretion." *Id.* (quoting *Whelan v. Memory–Swift Homes, Inc.*, 315 S.W.2d 593, 594 (Ky. 1958)). "The reason appellate courts defer to the trial court's decision to grant a new trial is because the decision may depend on factors that do not readily appear in the appellate record, such as witness demeanor and observations of the jury." *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64, 74 (Ky. 2010).

In reviewing a denial of a motion for a directed verdict or for JNOV, an appellate court must reverse if it is shown that the verdict was either flagrantly or palpably contradictory to the evidence since such would indicate the jury reached the verdict through passion or prejudice. *Lewis v. Bledsoe Surface Min. Co.*, 798 S.W.2d 459, 461 (Ky. 1990) (citing *NCAA v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988)). Evidence in support of the prevailing party must be considered to be true. The reviewing court may not make determinations regarding credibility

nor the weight of the evidence, as such is within the purview of the jury. *Kentucky & Indiana Terminal R. Co. v. Cantrell*, 298 Ky. 743, 184 S.W.2d 111 (Ky. 1944), and *Cochran v. Downing*, 247 S.W.2d 228 (Ky. 1952). With these standards in mind, we now consider the issues presented for our review.

Marlow first argues Dr. Buck's judicial admissions entitled her to judgment as a matter of law on the question of causation and the trial court erred in denying her motion for a directed verdict and subsequently for JNOV on this issue. She contends Dr. Buck "judicially admitted that he caused Doveanna Marlow's death through both his own testimony and that of his retained expert." We disagree.

"A judicial admission . . . is a formal act of a party (committed during the course of a judicial proceeding) that has the effect of removing a fact or issue from the field of dispute; it is conclusive against the party and may be the underlying basis for a summary judgment, directed verdict, or judgment notwithstanding the verdict." Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 8.15[4], at 590 (4th ed. LexisNexis 2003) (emphasis omitted). Testimony of a party may constitute a judicial admission if "deliberate and unequivocal and unexplained or uncontradicted." *Bell v. Harmon*, 284 S.W.2d 812, 815 (Ky. 1955). However, judicial admissions should be "narrowly construed." *Lewis v. Kenady*, 894 S.W.2d 619, 622 (Ky. 1994). Whether a statement is a judicial admission is a question of law that we review de novo. *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 448 (Ky. App. 2006).

Witten v. Pack, 237 S.W.3d 133, 136 (Ky. 2007).

In medical malpractice cases, the injured party must prove the given treatment fell below the degree of care and skill expected of a reasonably

competent practitioner and that the negligence proximately caused the plaintiff's injury or death. *See Reams v. Stutler*, 642 S.W.2d 586, 588 (Ky. 1982). A physician has the duty to use the degree of care and skill expected of a competent practitioner of the same class and under similar circumstances. *Grubbs ex rel. Grubbs v. Barbourville Family Health Ctr., P.S.C.*, 120 S.W.3d 682, 687 (Ky. 2003); *Mitchell v. Hadl*, 816 S.W.2d 183, 185 (Ky. 1991); *Cordle v. Merck & Co., Inc.*, 405 F.Supp.2d 800 (E.D. Ky. 2005). As in any negligence case, there are three essential elements that must be proved: duty, breach and consequent injury. *Grubbs*, 120 S.W.3d at 687.

Clearly, Dr. Buck admitted he inadvertently advanced the guide needle beyond the mass and into Marlow's aorta, thereby inflicting an injury upon her. On cross-examination, Dr. Buck conceded this action caused Marlow's untimely death. This testimony was uncontroverted. However, throughout the course of the trial, Dr. Buck vehemently denied he breached the standard of care during Marlow's procedure. He indicated he could not state with specificity or certainty what had caused the needle to advance further than he intended, but proffered several plausible medical suggestions of what precipitated the unfortunate result. Marlow presented contrary testimony through Dr. Shawn Teague who indicated Dr. Buck did, in fact, breach the standard of care and gave numerous reasons for his conclusion. The experts and Dr. Buck all agreed, however, that inadvertent injuries can occur in complicated medical procedures absent any negligence whatsoever, and such injuries are known and recognized

risks in biopsy procedures. Drs. Teague and Jeremy Simon further agreed that if a person moves or breathes differently during a needle biopsy procedure, such movement can cause the needle to change course and potentially cause an inadvertent advancement of the guide needle further than anticipated or desired.

Taking all the testimony in the light most favorable to Dr. Buck—as we must under our standard of review—we do not find Dr. Buck’s testimony constituted a judicial admission on the issue of causation. Although he testified he was the only person pushing the guide needle that pierced Marlow’s aorta, and this injury precipitated Marlow’s death, he obviously never admitted a breach of the standard of care or his legal duty. The mere fact that Dr. Buck stated he “felt responsible” for Marlow’s death is not equivalent to an admission of a breach of the applicable standard of care. Thus, his testimony could not constitute a judicial admission of causation or liability as it could not reasonably be concluded the testimony was “deliberate and unequivocal, and unexplained or uncontroverted.” *Witten*, 237 S.W.3d at 136. Without a clear and unequivocal admission of a breach of the standard of care, we believe reasonable jurors could disagree as to whether Dr. Buck’s actions constituted a breach and whether such breach was a substantial factor in causing Marlow’s death. Marlow’s citation to, and reliance on, foreign and factually dissimilar cases is unpersuasive. We are likewise unpersuaded by her reliance on negligence cases from automobile accidents.³

³ “There is a vast difference between automobile accident cases and medical negligence cases.” *Hamby v. University of Kentucky Medical Center*, 844 S.W.2d 431, 434 (Ky. App. 1992).

It is plain that the issue of causation was in dispute and reasonable minds might decide the matter differently based on the testimony presented. The trial court concluded likewise and we cannot condemn that decision nor conclude it constituted an abuse of the trial court's considerable discretion. Thus, we are required to affirm the trial court's denial of Marlow's motions for directed verdict and JNOV. *Fister*, 133 S.W.3d at 487. The issue of causation was properly put to the jury.

In harmony with her first argument, Marlow next contends the trial court erred in instructing the jury on the issue of causation. Further, Marlow contends the instructions as given rendered the jury's verdict ambiguous. Again, we disagree.

Marlow tendered proposed instructions that intentionally omitted a causation interrogatory based on her belief that she was entitled to a directed verdict on that issue. This omission was not cured following the trial court's denial of her directed verdict motion. Dr. Buck's tendered instructions included separate inquiries on both breach of standard of care and causation. The trial court ultimately gave the jury the following instruction without objection:

QUESTION NO. 1: Do you believe from the evidence presented that the Defendant, James L. Buck, M.D., failed to comply with the duty described in Instruction No. 1, and that such failure was a substantial factor in causing the death of Doveanna Marlow?

As we have previously stated, the issue of causation was properly put to the jury. Thus, the sole remaining issue is whether the trial court's combination instruction

was proper. However, we do not believe Marlow has properly preserved this question for our review.

Although Marlow generally objected during the trial to the giving of any instruction as to causation, she first questioned the use of the combined instruction in her motion for JNOV. This objection was too late to preserve the matter for appellate review. *Scudamore v. Horton*, 426 S.W.2d 142, 146 (Ky. 1968) (citing *Young v. DeBord*, 351 S.W.2d 502 (Ky. 1961)). CR 51(3) states:

No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

The requirements set forth in CR 51(3) mandate:

before a party may complain of error in the instructions, the party must accompany the objection with a fully correct instruction, or, at the least, must advise the court sufficiently so that the court can understand both the nature of the objection and what needs to be done to correct it.

Meyers v. Chapman Printing Co., Inc., 840 S.W.2d 814, 823-24 (Ky. 1992). The underlying purpose of the rule “is to obtain the best possible trial at the trial court level by giv[ing] the trial judge an opportunity to correct any errors before instructing the jury.” *Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153, 162 (Ky. 2004) (internal citations and quotation marks omitted).

Here, Marlow’s general attack on the giving of a causation instruction during the trial was supplanted in her motion for JNOV with a new, specific

challenge to the instruction actually given. She has continued this course before this Court. “Obviously, CR 51 condemns such a practice and, in consequence, we must hold they cannot now be heard on these matters.” *Young*, 351 S.W.2d at 503.⁴

Finally, based on our resolution of the direct appeal, the issues raised by Dr. Buck on cross-appeal are rendered moot. Therefore, no further discussion is required.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

MOORE, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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⁴ Nevertheless, even were the matter properly before us, we believe the instruction given was proper and consistent with *Palmore’s Kentucky Instructions to Juries*.