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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001205-MR

BARBARA HOUSE,
ADMINISTRATRIX OF THE ESTATE
OF LAURA B. ALEXANDER, deceased;
and BARBARA HOUSE AND
DARRELL HOUSE, as CO-GUARDIANS
of KAYLEN ALEXANDER, a minor APPELLANTS

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 12-CI-01132

JEWISH HOSPITAL & ST. MARY'S
HEALTHCARE, INC d/b/a JEWISH
HOSPITAL MEDICAL CENTER SOUTH

APPELLEES

AND

NO. 2015-CA-001278-MR

JEWISH HOSPITAL & ST. MARY'S
HEALTHCARE, INC d/b/a JEWISH
HOSPITAL MEDICAL CENTER SOUTH CROSS-APPELLANTS

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ADMINISTRATRIX OF THE ESTATE
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OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND JOHNSON, JUDGES.

ACREE, JUDGE: This is a medical negligence case involving an "empty-chair" defendant,[1] shifting burdens of proof, and a partial directed verdict we conclude was prematurely granted. The case presents a new issue in our evolving jurisprudence of comparative fault and apportionment.[2] That issue is whether a trial court, at the close of the plaintiff's proof at trial, may grant a directed verdict

[1] *See* "*empty-chair defense* (1981) A trial tactic in a multiparty case whereby one defendant attempts to put all the fault on a defendant who plea-bargained or settled before trial or on a person who was neither charged nor named as a party." DEFENSE, Black's Law Dictionary (10th ed. 2014).

[2] *See, generally*, Nancy C. Marcus *Phantom Parties and Other Practical Problems with the Attempted Abolition of Joint and Several Liability*, 60 Ark. L. Rev. 437, 455-67 (2007) examining "[Kentucky]'s Response to the Phantom Party Problem[.]"

of negligence against the empty-chair defendant, *i.e.*, that the empty-chair defendant owed and breached a duty to the plaintiff. For the following reasons, we answer that question in the negative, reverse the judgment, and remand for a new trial.[3]

We find no merit in the cross-appeal and affirm the trial court as to the errors claimed therein.

FACTS AND PROCEDURE

In November 2011, Laura Alexander presented herself to the emergency room at Jewish Hospital Medical Center South complaining of dark urine, dehydration, and pain and weakness in her arms and legs. Her blood pressure was normal, but her pulse rate was elevated – tachycardic – at 148 beats per minute (bpm).[4]

Dr. Charles Sherrard, Jr., an emergency room (ER) physician, promptly evaluated Laura around 6:15 a.m. He obtained a medical history from Laura and ordered lab tests. Dr. Sherrard's medical impression was dehydration and myositis (muscle soreness). He ordered two liters of intravenous fluids for Laura. Nurse Charity Johnston administered the first liter of fluids at 6:30 a.m.

[3] Because we are reversing and remanding for a new trial, we will not address the Estate's arguments regarding improper jury instructions and improper closing argument by defense counsel.

[4] A normal value is under 100 bpm.

Dr. Sherrard re-evaluated Laura at 8:08 a.m. Her heart rate, while still elevated, had decreased to 114-118 bpm. At that point, Laura informed Dr. Sherrard that she had strenuously exercised a few days earlier. Considering this new information, Dr. Sherrard suspected the cause of Laura's symptoms was rhabdomyolysis (the breakdown of muscle fibers due to some physical damage). He diagnosed Laura with acute hypokalemia (deficiency of potassium in the bloodstream) with additional diagnoses of acute dehydration, exercised-induced myositis, and myofascial pain.

At 8:15 a.m., Dr. Sherrard ordered Laura's discharge conditioned upon her receiving the second liter of fluids which Nurse Johnston administered at 8:18 a.m. Laura's heart rate was 124 bpm.

Nurse Johnston discharged Laura at 9:47 a.m. Laura's heart rate had risen slightly to 132 bpm – a lower pulse rate than when she first presented in the ER, but higher than it was one and one-half hours earlier. Jewish Hospital's "reassessment and discharge criteria" provided, "[i]f the vital signs are outside [certain identified] parameters or normal for that patient . . . , the provider shall be notified."[5] Nurse Johnston did not notify Dr. Sherrard of Laura's heart rate prior to discharge. She testified at trial that she did not do so because, in her nursing judgment, Laura's heart rate was consistent with what it had been when Dr. Sherrard first ordered Laura's conditional discharge.

[5] Plaintiffs' Trial Exhibit No. 3, ALEX-00935.

Around 7:00 p.m. of that same day, Laura experienced sudden shortness of breath and was unable to move her arms and legs. EMS transported Laura to Jewish Hospital's downtown Louisville facility. She was in septic shock.

Despite an aggressive workup, and the administration of antibiotics, her sepsis was too advanced. Laura died shortly after midnight. Her cause of death was cardiac arrest secondary to a staph aureus infection in her blood. The origin of the sepsis was later identified when it was learned that, several weeks before presenting to Jewish Hospital, Laura had been treated by her family doctor and a surgeon for a boil on her buttocks. Despite aggressive treatment, the boil became septic and caused her death.

Barbara House, on behalf of the Estate of Laura B. Alexander, filed this medical negligence lawsuit[6] against Jewish Hospital, Dr. Sherrard, and Dr. Sherrard's professional group. The essence of the Estate's claim against the Hospital is that Nurse Johnston was negligent in failing to report Laura's elevated discharge heart rate to Dr. Sherrard, combined with speculation that Dr. Sherrard, so informed, would have kept Laura in the hospital long enough to lead to a life-saving diagnosis.

Following extensive discovery, Jewish Hospital moved for summary judgment on grounds that the Estate was unable to produce evidence establishing factual causation. The trial court denied the hospital's motion.

[6] In addition to claims for medical negligence and wrongful death, Laura's son, by and through his guardians, asserted a claim for loss of parental consortium.

Dr. Sherrard then settled with the Estate. The settlement was memorialized in a standard agreement in which Dr. Sherrard disclaimed liability. The Estate proceeded to trial against Jewish Hospital only.

We pause here to address a little of the law we must apply, and also the opportunities for trial strategy presented by our jurisprudence to date.

In a typical medical malpractice case, "[t]he burden of proof is upon the patient to prove the negligence of the physician or surgeon, and that such negligence was the proximate cause of his injury and damages." *Andrew v. Begley*, 203 S.W.3d 165, 170 (Ky. App. 2006) (citation and internal quotation marks omitted). In such a case, the plaintiff's strategy is to prove the physician's comparative fault for harm was great. The case before us is not that kind of case.

As noted, Dr. Sherrard settled with the Estate and did not physically participate in the trial. Yet his liability was still an issue for purposes of apportionment. As the case moved forward, as with any case involving an empty-chair defendant, things would become a bit topsy-turvy.[7] The plaintiff's strategy in such cases is turned on its head. In presenting his or her case-in-chief, the plaintiff

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[7] " 'Topsy-Turvy Land,' [is] a place described by Judge Jerome Frank in *Dincher v. Marlin Firearms Co.,* 198 F.2d 821, 823 (2d Cir.1952), where you 'die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a nonexistent railroad.' " *Tabler v. Wallace*, 704 S.W.2d 179, 184 (Ky. 1985). "Justice Leibson was fond of citing Judge Jerome Frank's reference . . . to an imaginary 'topsy-turvy land.' " *Young v. Hammond*, 139 S.W.3d 895, 905 (Ky. 2004). But heretofore it has always been "a statute [that] 'functions as a one-way ticket to "Topsy–Turvy Land[.]" ' " *Michels v. Sklavos*, 869 S.W.2d 728, 730-31 (Ky. 1994). This case shows that a Supreme Court ruling, *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64 (Ky. 2010), can punch the same ticket.

is no longer motivated to prove the phantom tortfeasor (in this case, Dr. Sherrard) was largely at fault. On the contrary, the plaintiff has the precise opposite motivation – *i.e.*, to minimize the comparative fault of the empty-chair defendant (perhaps even prove it did not exist at all), so as to maximize recovery from the remaining defendant, or defendants.

Notwithstanding any change in strategy, the Supreme Court tells us that "[e]mpty-chair defendants who have settled are to be treated no differently than participating defendants in regard to what must be proved to apportion fault against them [even t]hough the empty-chair defendant will not actually be held liable in the trial, since it is literally not on trial . . . ." *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64, 74 (Ky. 2010). *CertainTeed* awkwardly states the rule in terms of how phantom tort defendants "are to be treated" – *i.e.*, the same as always. That is to say, *the party who benefits* by the jury's belief in the fault of the empty-chair defendant bears the burden of proving by a preponderance of the evidence every element of the empty-chair defendant's liability, just as if he or she was still exposed to indeterminate liability and still had a presence in the courtroom. But there is a transpositional difference in the civil procedure; now the party who benefits by proof of the empty-chair defendant's liability is the remaining defendant or defendants and not the plaintiff.

> The burden of proof . . . [therefore,] is effectively shifted, since it is the participating defendant, not the plaintiff, who seeks to show that the empty-chair

> defendant is responsible. Rather than trying to show the actual liability of the empty-chair defendant, as a plaintiff might do, the participating defendant is merely seeking a reduction of its liability.

Id. at 73. "[A] participating defendant must still prove liability on the part of the [co-]tortfeasor onto whom it seeks to shift some of the blame." *Id.* at 74.

With the foregoing concepts in mind, we return to a recitation of the trial proof and procedure in this case.

At trial, Dr. Sherrard did not testify in person. Instead, the parties played the video deposition he gave prior to his settlement and dismissal from the case. Dr. Sherrard defended his diagnoses and medical decisions as appropriate under the circumstances. He emphasized that Laura displayed no SIRS[8] criteria and stated that the "picture completely fit[] an exercise-induced muscle injury or myositis or very mild" rhabdomyolysis with dehydration. Dr. Sherrard testified that Laura's sodium, potassium, chloride, CO2, and BUN creatinine lab results were consistent with such a diagnosis. He further opined that a sufficient explanation for the persistence of Laura's elevated heart rate could be the medication she was taking and the rhabdomyolysis. Under such circumstances, it was expected to take time for her elevated heart rate to improve even with administration of fluids.

However, Dr. Sherrard also said if he had been aware of Laura's persistent and worsening tachychardia, he would have investigated further. He

[8] Systemic inflammatory response syndrome (SIRS) is typical of blood stream infection.

said he would have re-examined Laura, gathering additional information from her, to "have a good hypothesis of why [the] heart rate [was] elevated." He also "probably would have wanted orthostatic blood pressures." Dr. Sherrard testified he would have taken "an inventory of what's going on around her and [made] a decision from there." Dr. Sherrard never expressly identified the applicable standard of care applicable to his conduct. Nor did he testify that he met, or failed to meet, such standard.

The Estate offered testimony of two physician experts – Dr. Norman Schneiderman and Dr. Angelo Canonico, focusing on the liability of the hospital's employee, Nurse Johnston, and the hospital itself.[9] However, on cross-examination of the doctors, Jewish Hospital shifted the focus to Dr. Sherrard's conduct. Both doctors expressed the opinion, consistent with the depositions they had given when Dr. Sherrard was still in the case, that Dr. Sherrard deviated from the standard of care in his treatment of Laura – notably, when he ordered Laura's discharge despite her persistent tachycardia.[10]

Dr. Schneiderman opined that, while dehydration/rhabdomyolysis was an acceptable initial diagnosis, Laura's laboratory values were not consistent with those conditions and, in light of her persistent tachycardia following the

[9] William Alt, an emergency room expert, also testified regarding the duty and breach by the hospital and Nurse Johnston. We refer to parts of Nurse Alt's testimony elsewhere in this opinion.

[10] Both experts agreed Dr. Sherrard did not deviate from the standard of care in failing to diagnose sepsis because the patient's presentation for infection was atypical.

administration of fluids, Dr. Sherrard should have re-evaluated Laura to ensure an accurate diagnosis. Dr. Schneiderman stressed that Dr. Sherrard had a shared, independent duty to monitor Laura's vital signs. Dr. Schneiderman testified unequivocally that Dr. Sherrard fell below the standard of care when he discharged Laura with an elevated heart rate.

Similarly, Dr. Canonico testified that Dr. Sherrard fell below the standard of care and did not act as a reasonably competent physician under similar circumstances because his diagnosis of dehydration and myositis were not explained by, and in fact were at odds with, Laura's lab results. Dr. Canonico stated Dr. Sherrard should have taken a more comprehensive history after he received her lab results and should not have ordered Laura's discharge.

At the close of the Estate's case-in-chief, Jewish Hospital asked the trial court to direct a verdict that Dr. Sherrard had breached the standard of care. It argued that both Dr. Schneiderman and Dr. Canonico testified that Dr. Sherrard deviated from the standard of care, and the Estate failed to produce any expert testimony contradicting those medical opinions. The trial court granted Jewish Hospital's motion.[11]

Jewish Hospital then presented its case-in-chief during which it called an infectious disease expert, Dr. Bryan Paul Simmons, to testify. As relates to this appeal, Dr. Simmons expressed his opinion that Dr. Sherrard indeed met the

[11] Jewish Hospital did not seek a complete directed verdict against Dr. Sherrard, but only as to his negligence, admitting there were fact issues regarding causation.

standard of care in his treatment of Laura. Obviously, this evidence was presented after the trial court had already granted the partial directed verdict that Dr. Sherrard was negligent.[12]

At the close of the evidence, the trial court instructed the jury and closing arguments were presented. On the strength of the partial directed verdict, the trial court peremptorily instructed the jury as follows:

> It was the duty of Dr. . . . Sherrard, . . . in treating and attending Laura Alexander to exercise the degree of care and skill expected of a reasonably competent physician acting under similar circumstances [and] Dr. Sherrard failed to comply with that duty.

(R. 1507). Nine of twelve jurors returned a verdict in favor of Jewish Hospital. The Estate moved to vacate the jury's verdict and for a new trial pursuant to CR[13] 59.01, 59.05, and 61.02. The trial court denied its motion. This appeal followed.

DIRECT APPEAL

The Estate argues that the hospital's strategy from the beginning was to place all blame on Dr. Sherrard. In furtherance of that strategy, says the Estate, Jewish Hospital moved for a partial directed verdict as to Dr. Sherrard's negligence which the trial court granted. The Estate believes the grant of this motion was

[12] It was possible, theoretically, that the Estate could have called Dr. Simmons during its case to establish that Dr. Sherrard met the standard of care; however, as noted above, it was the hospital's burden to prove a breach of the duty of care, not the Estate's burden to prove it was not breached. Furthermore, "[t]he party holding the affirmative of an issue must produce the evidence to prove it." CR 43.01(1). Jewish Hospital holds the affirmative of the issue – whether Dr. Sherrard breached his duty of care – and so must produce the evidence to support the contention.

[13] Kentucky Rules of Civil Procedure

error. We find no fault with Jewish Hospital's strategy; however, we agree with the Estate that the trial court granting directed verdict when it did was reversible error.

The Estate points out that before his dismissal, Dr. Sherrard was accepted as an expert by the trial court over the Estate's objection. He testified at length to his conviction that his diagnoses of rhabdomyolysis and dehydration were correct, and further that his decision to discharge Laura made sense to him under the circumstances existing when he made it. The Estate asserts this was sufficient expert testimony establishing Dr. Sherrard's compliance with the applicable standard of care, and contradicting the opinions offered by Dr. Schneiderman and Dr. Canonico. Alone, this should have prevented a partial directed verdict, argues the Estate.

Additionally, the Estate notes the trial court granted the directed verdict before hearing Dr. Simmons' testimony, given during presentation of the hospital's defense, that Dr. Sherrard did meet the standard of care. That testimony, says the Estate, should have prevented the partial directed verdict. For these reasons, the Estate argues the directed verdict was granted erroneously – there was conflicting trial evidence on this crucial issue and the peremptory instruction of Dr. Sherrard's negligence prejudiced the jury in favor of Jewish Hospital.

In response, Jewish Hospital argues we should limit our review of the evidence to the only expert medical evidence offered at trial – that of Dr.

Schneiderman and Dr. Canonico. Both experts testified that Dr. Sherrard deviated from the standard regarding aspects of his care of Laura. The hospital finds significance in Dr. Sherrard's failure to use specific words like "reasonable" or "appropriate" to describe his treatment of Laura and, so it argues, his testimony cannot be considered expert testimony. We do not agree.

"It is the quality and substance of a physician's testimony, not the use of particular 'magic words,' that determines whether it rises . . . to the level necessary to prove a particular medical fact" such as breach of the standard of care. *Brown-Forman Corp. v. Upchurch*, 127 S.W.3d 615, 621 (Ky. 2004) (citing *Turner v. Commonwealth,* Ky., 5 S.W.3d 119, 122-23 (1999)). The trial court should have allowed the jury to weigh that testimony as proof that Dr. Sherrard met the standard of care identified by other experts. This is all the more appropriate under the Kentucky Supreme Court's new approach that "places the reasonable-foreseeability analysis where it belongs—in the hands of the fact-finders, the jury." *Shelton v. Kentucky Easter Seals Soc'y, Inc.*, 413 S.W.3d 901, 904 (Ky. 2013); *but see A.A. By and Through Lewis v. Shutts*, 516 S.W.3d 343, 2016-CA-000365-MR, 2017 WL 655472, at *7 (Ky. App. Feb. 17, 2017) (finality May 16, 2017) (Acree, J., concurring (citing *Carney v. Galt*, 517 S.W.3d 507, No. 2014-CA-001124-MR, 2017 WL 383451 (Ky. App. January 27, 2017)).

Jewish Hospital also fails to mention the testimony of Dr. Simmons, presumably because, by the time he testified that Dr. Sherrard met the standard of

care, the partial directed verdict to the contrary had already been granted. That gives us pause because, looking back at the trial from our perspective on review, we readily see the clear conflict over the factual issue of whether Dr. Sherrard met the standard of review. And that makes affirming a partial directed verdict inappropriate under these facts.

The crux of the infirmity of this directed verdict is the trial court's failure to consider the effect of the shifting burden of proof in an empty-chair defendant tort case. As we previously noted, Jewish Hospital stood, in effect, in the shoes of the plaintiff to prove Dr. Sherrard's liability. *CertainTeed Corp.*, 330 S.W.3d at 73-74. If Dr. Sherrard had not settled, would we affirm a directed verdict that he was negligent, if it was granted at the close of plaintiff's case? Of course not. As our highest court said in a case coincidentally captioned *Sherrard v. Oakley*, "[c]learly the trial court had no power to cut off defendant's right to present his case, if he so desired, by sustaining a motion of the plaintiffs for a directed verdict at the close of their case." 413 S.W.2d 78, 78 (Ky. 1967). By direct analogy, we cannot affirm a directed verdict for Jewish Hospital granted at the close of plaintiff's case to establish Dr. Sherrard's negligence for apportionment purposes.[14]

[14] That "[e]mpty-chair defendants . . . are to be treated no differently than participating defendants" is easier said than done. Settlement with less than all of the defendants creates a dramatic shifting of alliances and disrupts the traditional rhyme and rhythm of trial advocacy for lawyers and judges alike. For example, when Dr. Sherrard gave his deposition before settling, the Estate's goal was to find him at fault; the hospital, if not overtly defensive of his actions, was at least ambivalent. When the Estate took the depositions of its experts to establish Dr. Sherrard's breach of the standard of care and causation, it probably did not anticipate that the

In sum, when the trial court granted the directed verdict, it "failed to consider all of the evidence in the light most favorable to [the Estate], the party opposing the directed verdict, and it failed to recognize the fair and reasonable inferences justified by that evidence." *Fleming v. EQT Gathering, LLC*, 509 S.W.3d 18, 22 (Ky. 2017). All of the evidence would have included Dr. Sherrard's testimony and, as it turns out, Dr. Simmons' testimony during Jewish Hospital's presentation of its defense. The trial court should have inferred from the Estate's evidence in its case-in-chief that, during the hospital's defense, the Estate would continue efforts to establish Dr. Sherrard was not negligent and that Laura's death was attributable only to the negligence of Jewish Hospital and its other agents.

We conclude that the directed verdict in this case was premature. "Empty-chair defendants who have settled are to be treated no differently than participating defendants in regard to what must be proved to apportion fault against them [even t]hough the empty-chair defendant will not actually be held liable in the trial, since it is literally not on trial . . . ." *CertainTeed*, 330 S.W.3d at 74.

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hospital would be using that same evidence to defend against its own liability (though this is now a lesson for future litigants). All that changed when Dr. Sherrard settled. Defending against the Estate's claim was no longer *his* concern. It was no longer the hospital's concern either. Even if Dr. Sherrard's alleged conduct might reflect negatively on Jewish Hospital's reputation for granting privileges to practice medicine there, it would not have been in the hospital's greater interest to defend Dr. Sherrard; on the contrary, if Dr. Sherrard were found 100% at fault, the hospital would have had no liability. The plaintiff, on the other hand, is placed in a predicament. Now, the plaintiff benefits by defending the empty-chair defendant, but what a mixed signal to the jury when, inevitably the finger of blame for the plaintiff's sufferings would naturally point to an empty chair. And what if circumstances were more complicated? What if the hospital's potential liability was derivative of Dr. Sherrard's? We have confidence in the trial judges of Kentucky to fashion protocols in the course of conducting trials that accommodate this changing litigation landscape.

Applying *Sherrard*, *supra*, we would never have permitted a directed verdict at the close of the plaintiff's case against Jewish Hospital – the "participating defendant[]" as *CertainTeed* would call it. We must apply that same rule to the empty-chair defendant as well. No directed verdict may be entered against an empty-chair defendant prior to the close of all evidence.

The Estate's remaining arguments on appeal for reversal are rendered moot by our decision.

For the foregoing reasons, we reverse the judgment and verdict in favor of Jewish Hospital and remand for a new trial.

CROSS APPEAL

Jewish Hospital brought a protective cross-appeal in the event this Court should find merit in the Estate's direct appeal. We have found such merit; therefore, we consider the cross-appeal.

The hospital makes three arguments which we quote from its Pre-Hearing Statement where it claims the trial court erred by:

> 1) refusing to grant the hospital's pre-trial motion for summary judgment due to lack of expert causation testimony connecting ER nurse's [Nurse Johnston's] alleged breach to the patient's death;
>
> 2) refusing to direct a verdict in favor of the hospital at trial on the same grounds identified in No. 1); and
>
> 3) admitting an undisclosed opinion from plaintiff's nurse expert that the hospital had a duty to ensure its

nurses were informed of and followed a discharge criteria policy.

We shall address these arguments in the sequence presented.

The first claim of error would require this Court to review the denial of a motion for summary judgment that was followed by a trial on the merits. We lack jurisdiction to undertake such a review.

Bell v. Harmon convincingly explains why an order denying a motion for summary judgment, an interlocutory order, is neither appealable nor reviewable. 284 S.W.2d 812, 814 (Ky. 1955). We recognize there is an exception to this rule. *Hazard Coal Corp. v. Knight*, 325 S.W.3d 290, 298 (Ky. 2010) (citations omitted). However, that exception does not apply when the case proceeds to trial.

"[O]nce the trial begins, the underlying purpose of the summary judgment expires and all matters of fact and law procedurally merge into the trial phase, subject to in-trial motions for directed verdict or dismissal and post-judgment motions for new trial. . . ." *Gersh v. Bowman*, 239 S.W.3d 567, 571 (Ky. App. 2007) (quoting *Transp. Cabinet, Bureau of Highways, Commonwealth of Ky. v. Leneave*, 751 S.W.2d 36, 38 (Ky. App. 1988)). When a summary judgment motion is denied and then followed by a trial, such denial "can in no sense prejudice the substantive rights of the party making the motion since he still has the right to establish the merits of his motion upon the trial of the cause." *Bell*, 284 S.W.2d at 814. In the case before us, just as in *Gersh* and *Bell*, "[t]he same

question presented on defendant's motion for summary judgment was again raised at the trial by a motion for a directed verdict at the conclusion of plaintiff's testimony and renewed when the plaintiff had closed his case." *Id.*

Therefore, we move on to Jewish Hospital's argument that it was entitled to a directed verdict.

Jewish Hospital argues that the trial court erred by failing to grant a directed verdict against the Estate when it failed to present expert causation testimony connecting Nurse Johnston's alleged negligence to the patient's death. Notwithstanding that we do not know how the proof might have been different if the trial court had not erred in prematurely granting directed verdict as to Dr. Sherrard's negligence, the hospital's argument does not persuade us.

Appellate review of the denial of a directed verdict motion "is independent of the grounds relied on or stated by the trial court . . . . Rather, we must make our own review of the entire record to determine whether the trial court's ruling was clearly erroneous." *Brooks v. Lexington-Fayette Urban County Housing Auth.*, 132 S.W.3d 790, 798 (Ky. 2004).[15] "[W]e must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party." *Toler v. Süd-Chemie, Inc.*, 458 S.W.3d 276, 285 (Ky. 2015) (citation and internal quotation marks omitted). After taking these steps, we can only reverse a

[15] Specific citation for this proposition in *Brooks* is to page 365 of *Roethke v. Sanger,* 68 S.W.3d 352 (Ky. 2001). This is an errant citation in that it refers to Justice Wintersheimer's dissent which begins on page 364 and continues uninterrupted to page 367.

trial court's denial of a directed verdict if "there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ." *Id.* (quoting *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998)).

Nurse William Alt testified both in deposition and at trial. His testimony was replete with examples of the standard of care and how Nurse Johnston breached the standard.[16] In summary, he stated Nurse Johnston, regardless of the conditional discharge order, should have resisted releasing Laura until a reasonable explanation could be reached regarding the source of the tachycardia. Furthermore, Dr. Schneiderman testified that Nurse Johnston's decision to discharge Laura with a heart rate of 132 bpm constituted a deviation from the standard of care. There being proof of negligence, the question is whether there was also evidence that such negligence was a substantial factor in causing Laura's death. *Sargent v. Shaffer*, 467 S.W.3d 198, 210 (Ky. 2015) ("jury to determine *if* the defendant failed to comply with the duty, *and if so,* whether the defendant's failure to comply with the duty was a substantial factor in causing damages to the plaintiff").

[16] Nurse Alt said Nurse Johnston breached the standard of care: by failing to obtain a sufficient history of Laura's condition; by failing to communicate to anyone that Laura's heart rate remained high upon discharge; by failing to measure Laura's blood pressure upon discharge; by discharging Laura when it was not safe to do so; and by failing to pass patient care concerns up the chain of command.

Although there was other evidence,[17] we note Dr. Canonico's testimony when he said:

> She continued to be tachycardic. Now she's going to become hypotensive, if you look at the EMS data. You have abnormal LFTs. Her renal function is worsening. Her CK is getting worse. You're now at a point where you have developing this multisystem thing. The young woman's multisystem organ failure, *whether you get the history of a buttocks abscess or not, you're going to cover her for antibiotics at this point*.

(emphasis added). Dr. Canonico also opined that Laura's infection/sepsis would have declared itself by noon, prompting antibiotic treatment that to a reasonable medical probability would have saved her life. Dr. Schneiderman also concluded that those antibiotics would have prevented Laura's death.

These experts testified to a reasonable degree of probability that, had Nurse Johnston acted within the standard of care, Laura would have received antibiotics and be alive today. Whether the jury would have believed that testimony is a separate question not relevant here.

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[17] For example, the Estate's experts testified in deposition to a reasonable degree of medical certainty that, had Nurse Johnston not discharged Laura, she would have received life-saving antibiotics. This is consistent with Dr. Canonico's testimony. Similarly, Dr. Schneiderman testified in deposition:

> Yeah. I'm not going to tell you whether it was 1:00, 12:00, 3:00. I'm just saying that I think that her deterioration was pretty rapid upon her discharge and that had she been in the hospital, the caregivers at that time would have seen a rapid deterioration, blood pressure hemodynamically, pulse not going down no matter what they do, and that they would have had a meeting of the minds and a high number of specialists convene, and I think they would have put sepsis high on the list as being in the differential, and I think a CBC would have helped them do that, and I think they would have started IV antibiotics by around maybe, let's say, noon, something like that, and that to a probability, that would have made a difference.

The hospital's argument that we do not know what Dr. Sherrard would have done is a red herring. The testimony we have reviewed was not dependent or conditioned upon Dr. Sherrard personally undertaking any particular course of action.

"[A] reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous." *Bierman,* 967 S.W.2d at 18. There was sufficient evidence that Nurse Johnston was negligent and that her negligence was a substantial factor in Laura's death such that we cannot say the trial court's denial of a directed verdict was clearly erroneous.

Finally, Jewish Hospital contends it was blindsided when the Estate asked Nurse Alt at trial whether every nurse at the hospital should have been made aware of Jewish Hospital's policy relating to discharge criteria. Jewish Hospital asserts now, as it did before the trial court, that Nurse Alt's opinion was not disclosed in his original expert disclosure, deposition, or supplemental disclosure in violation of CR 26.02. It further claims this constituted a fundamental change in the Estate's theory of its case, taking the hospital by surprise, and prejudicing its ability to respond.

The trial court overruled Jewish Hospital's objection on grounds that Nurse Alt's supplemental expert disclosure included the hospital's discharge policy in the list of documents he reviewed. We review that decision for abuse of discretion. *Pauly v. Chang*, 498 S.W.3d 394, 411 (Ky. App. 2015) (citation omitted; "trial

court is vested with wide discretion in determining [whether] to admit or exclude expert testimony"). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson,* 11 S.W.3d 575, 581 (Ky. 2000). We find no such abuse.

CR 26.02(4) requires parties to disclose, upon request before trial, "facts known and opinions held by experts," including "the subject matter on which the expert is expected to testify, and . . . the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." CR 26.02(4)(a)(i). The purpose of the rule is to allow the opposing party to adequately prepare for the substance of the expert's trial testimony.

The Estate filed a timely supplemental expert witness disclosure many weeks prior to trial. In that disclosure, the Estate revealed the fact that Nurse Alt reviewed Jewish Hospital's "policies and procedures regarding chain of command – escalation of patient care concerns and plan for the provision of patient care" as well as Jewish Hospital's "reassessment and discharge criteria, rhabdomyolysis discharge instructions, and daily assignment sheets." The disclosure further stated that these documents provided further support for Nurse Alt's opinions.

Nurse Alt testified at trial that the Hospital had a duty to ensure its employees were aware of its discharge criteria before they practiced in the emergency room. Jewish Hospital objected to this testimony. However, there was

an abundance of evidence deduced at trial regarding Jewish Hospital's policies and procedures to which Jewish Hospital did not object. It was well known that these policies would be discussed extensively at trial. We fail to see how this one statement – that the Hospital should have made its nurses aware of its policies – offered during a multi-day trial filled with numerous exhibits and hours of testimony so fundamentally resulted in a "surprise expert opinion" that injected "a totally new theory of liability into the case in the middle of trial." (Appellee's Brief, 14).

Ultimately, the trial court heard Nurse Alt's testimony, carefully reviewed the Estate's supplemental expert-witness disclosure, and found Nurse Alt's testimony within the scope of that disclosure. We cannot say the trial court abused its discretion in allowing this testimony.

CONCLUSION

In the Estate's direct appeal, No. 2015-CA-001205-MR, we reverse the judgment on grounds that the trial court erred in granting Jewish Hospital's motion for a directed verdict as to Dr. Sherrard's breach of the standard of care, and we remand this case for a new trial. The remaining arguments raised by the Estate are moot.

In Jewish Hospital's cross appeal, No. 2015-CA-001278-MR, we affirm in all respects.

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