IN THE SUPREME COURT OF MISSISSIPPI

CHARLES BURNWATT and DEBRA BURNWATT,
As Parents and Wrongful Death Beneficiaries of WILLIAM
ALEXANDER BURNWATT, Deceased — APPELLANTS

VERSUS — CAUSE NO. 2008-IA-01563 -SCT

EAR, NOSE & THROAT CONSULTANTS OF NORTH
MISSISSIPPI, PLLC, and JOHN F. LAURENZO, M.D. — APPELLEES

ON APPEAL FROM THE CIRCUIT COURT OF LAFAYETTE COUNTY,
MISSISSIPPI
CAUSE NO. L-02-186

BRIEF OF APPELLANTS

ORAL ARGUMENT IS REQUESTED

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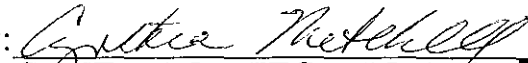
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Charles Burnwatt, Plaintiff/Appellant
2. Debra Burnwatt, Plaintiff/Appellant
3. John H. Cocke, Esq., Attorney for Plaintiffs/Appellants
4. Charles M. Merkel, Esq., Attorney for Plaintiffs/Appellants
5. Cynthia I. Mitchell, Esq., Attorney for Plaintiffs/Appellants
6. Ear, Nose & Throat Consultants of North Mississippi, PLLC, Defendant/Appellee
7. John F. Laurenzo, M.D., Defendant/Appellee
8. Shelby Duke Goza, Esq., Attorney for Defendants/Appellees
9. Dion J. Shanley, Esq., Attorney for Defendants/Appellees
10. Kirk Milam, Esq., Attorney for Defendants/Appellees

11. Honorable Robert Elliott, Circuit Court Judge.

Respectfully Submitted,

By: 
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STATEMENT OF THE ISSUES

1. Whether the defendants, having stipulated and consented to entry of a final judgment that the former defendant hospital and its employees "were not in any manner negligent .... [nor] committed any acts of omissions/commission which caused or contributed to cause the plaintiffs' alleged damages,"[1] may now take an inconsistent position and introduce evidence that hospital employees caused the decedent's death.

2. Whether, after summary judgment for the former defendant hospital and summary judgment dismissing all claims by defendant doctor attempting to place blame for the death on the hospital, evidence offered to prove that hospital employees' resuscitation efforts caused the child's death is admissible.

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[1]R.179-180, R.E.20-21.

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Court Below

This action arises from the death of Alex Burnwatt, the nine year old son of the plaintiffs Charles and Debra Burnwatt. Alex died on August 2, 2001, following a tonsillectomy on July 28, 2001, performed by the defendant John F. Laurenzo. The lawsuit was initially filed against Dr. Laurenzo and his clinic Ear, Nose & Throat Consultants of North Mississippi, and against Baptist Memorial Hospital-North Mississippi ["BMH-NM"]. Record at page 1 [hereinafter "R.1"]. The complaint alleged generally that in performing the tonsillectomy, Dr. Laurenzo was negligent, more particularly in cutting too deeply into the tonsillar bed, and that this negligence led to Alex's death. The complaint also alleged that when Alex began bleeding as a result of the defendant Laurenzo's negligence, the hospital was negligent in failing to stop the bleeding. Alex died shortly after being re-admitted to his hospital room at BMH-NM, and efforts to resuscitate, which went on for over an hour, were unsuccessful. Complaint, R. 2-3.

The defendants Laurenzo and his clinic[2] answered and denied liability; they further asserted an affirmative defense to the effect that the plaintiff's injuries were caused and/or contributed to by persons other than the defendants. R.79. The defendant hospital also denied liability and claimed that the plaintiff's damages "may be the direct and proximate result of acts or omissions of other persons or entities for whom BMH-NM is not legally responsible." R.86.

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[2] Inasmuch as the interests of the defendants Laurenzo and his clinic are identical for purposes of this appeal, the two may be referred to collectively as "the defendant" or "Laurenzo."

After discovery, the defendant hospital moved for summary judgment, claiming that the "material facts as to which there is no genuine issue establish that the requisite elements of a *prima facie* case of medical negligence against this Defendant are absent, i.e. duty, breach of duty, causation, damages." R.152. The Burnwatts had propounded interrogatories to the co-defendant Laurenzo requesting the identity of each and every person Dr. Laurenzo intended to call as an expert, together with the subject matter of the expert's expected testimony, the substance of the facts and opinions to which that expert was expected to testify, and a summary of the grounds for such opinion. As noted in the trial court's opinion on the motion, the defendant Laurenzo identified no expert critical of the care rendered by BMH-NM. R.177-178; R.E.18-19.

At the hearing on the hospital's motion for summary judgment, counsel for both the Burnwatts and the defendant Laurenzo declared that no expert testimony was anticipated from either the plaintiff or the defendants critical of BMH-NM or of the care rendered by the hospital's staff or that any actions of BMH employees caused the death of Alex Burnwatt. Further, the parties noted that Dr. Laurenzo had been deposed and had testified that everything was done appropriately during the resuscitation efforts by the hospital. Order on Summary Judgment, R.178; R.E.19.

The trial court's order on the summary judgment motion recited the fact that plaintiffs' counsel had advised the court that unless "Dr. Laurenzo intends to 'point the finger' at Baptist Memorial Hospital-North Mississippi personnel in any respect," the plaintiffs would confess the motion for summary judgment as to the hospital. R.179; R.E.20. Dr. Laurenzo professed that he would not "point the

finger" at the hospital. R. 179; R.E.20. Accordingly, the Court granted the hospital's motion for summary judgment and entered a final judgment of dismissal as to the defendant hospital, expressly finding that there was no just reason for delay and that final judgment should be entered. R.179-180, R.E.20-21. That order was entered, with approval of the defendant Laurenzo, on June 6, 2005. R.180, R.E.21.

The Order on the hospital's motion for summary judgment states as follows:

> At the hearing on this matter, both counsel for the Plaintiff and counsel for the co-Defendants, John Laurenzo, M.D. and the Mississippi Ear, Nose & Throat Consultants of North Mississippi, P.L.L.C., declared that no expert testimony is anticipated from either of these parties, which testimony is critical of Baptist Memorial Hospital-North Mississippi or of the care rendered by the Hospital's nursing staff and/or employees.
>
> . . .
>
> The Court having taken Dr. Laurenzo's testimony [disclaiming any negligence by the hospital] as true, therefore, finds that there exists no genuine issue as to any material fact that **neither Baptist Memorial Hospital-North Mississippi nor its employees were in any manner negligent and/or committed any acts of omission/commission which caused or contributed to cause the Plaintiffs' alleged damages.**

Court Opinion on Baptist Motion for Summary Judgment, R. 178-79, R.E.19-20.

Subsequently, on July 11, 2005, only a month after the defendants' profession that he would have no expert testimony critical of the defendant hospital, Dr. Laurenzo filed a "Designation of Expert Witness," for the first time indicating his intention to call Dr. Keith Mansel as a trial witness. R. 193-94. The Designation further stated that Dr. Mansel would express the opinion that Alex's death was "due to the resuscitation attempts [of BMH employees]." Designation of Expert Witnesses, R.193. As a result of Dr. Laurenzo's designation of an

expert against the defendant hospital, one month after stating that there was no evidence that the defendant hospital was negligent, the plaintiffs filed a motion for relief from the summary judgment order. R.181.

The Court continued the trial of the case, then set for August 15, 2005, but refused to set aside the order of dismissal as to the defendant hospital. R. 452-53; R.E.50-51.

The Burnwatts also moved for partial summary judgment on the defendant Laurenzo's claim for apportionment of damages as to the hospital. R. 373-403; R.E.22-43. The trial court granted that motion, finding, consistently with its previous order dismissing the hospital, that there was no evidence that any act or omission by the defendant hospital had proximately caused or contributed to the death of Alex Burnwatt. R.446-51, R.E.44-49. The Court's order is as follows:

> The Court has previously adjudicated that BMH-NM, a non-settling defendant, was guilty of no negligence which contributed to the death of William Alexander Burnwatt. It follows that the co-defendants Dr. Laurenzo and ENT Consultants should not now be permitted to place blame or apportion fault on a co-defendant which the Court had previously adjudicated not to be at fault and accordingly dismissed with prejudice from this law suit.
>
> . . .
>
> [Further], [t[here is no genuine issue of material fact that the dismissed Defendant BMH-NM or its employees were negligent or that their actions proximately caused or contributed to the Plaintiffs' damages and that the Defendants Laurenzo and ENT Consultants should not be permitted to place blame or allocate fault to BMH-NM or its employees.

Order on Plaintiffs' Motion for Partial Summary Judgment, R. 449-50, R.E.47-48.

However, the trial court nevertheless overruled the plaintiffs' motion in limine seeking to exclude the proposed testimony of Dr. Mansel blaming the hospital for Alex Burnwatt's death. *See* Plaintiffs' motion in limine, R. 196-202.

The case then proceeded to trial, during which the court allowed testimony by Dr. Keith Mansel placing blame on the defendant hospital employees for causing Alex's death. Dr. Mansel was allowed to testify for approximately two hours regarding his opinion that Alex Burnwatt died as a result of actions of the hospital employees during resuscitation efforts. Transcript 312-326 [hereinafter "T.312-326, 300-365"]. Although the jury was instructed that no acts or omission of the hospital "before, during, or after the code caused or contributed in any way to the death of Alex Burnwatt,"[3] defense counsel for Dr. Laurenzo spent most of his closing argument putting the blame on Alex's death on the hospital's puncture of Alex's lungs during resuscitation and other events during the resuscitation. T. 441-456.

After introduction of this irrelevant but confusing and prejudicial testimony, the jury was unable to reach a verdict, and a mistrial was declared. R.518.

This matter was again set for trial on September 2, 2008. R.521. Prior to the new trial date, the plaintiffs renewed their motion in limine to exclude the testimony of Dr. Keith Mansel. R.732-737; R.E.52-57. By order dated August 29, 2008, the trial court denied the plaintiffs' renewed motion to exclude the testimony of Dr. Keith Mansel but granted a continuance of the trial to allow the matter to proceed to an interlocutory appeal before this Honorable Court. R. 900-903, R.E.7-10. This Honorable Court granted interlocutory appeal on the issue presented by the plaintiff's motion to exclude the testimony of Dr. Keith Mansel. R.908, 911-912; R.E.11-13.

[3]T. 418.

Statement of Facts

On July 28, 2001, nine year old Alex Burnwatt underwent a tonsillectomy performed by Dr. John Laurenzo at BMH-NM. R. 75-76 [Amended Complaint], R.81 [Answer]. The surgery took about forty-five minutes, twice as long as the surgery on the Burnwatts' younger son on whom Dr. Laurenzo had operated some months previously. R. 33. Alex was discharged from the hospital on the same day as the surgery, despite the fact that he was vomiting. T. 34-35. He continued to vomit when he attempted to take in food or water. T. 35. Mrs. Burnwatt called the doctor's office on Monday or Tuesday after the Saturday surgery and reported Alex's condition and that Alex would not eat. The doctor's office called in a prescription for Phenergan to attempt to control the nausea and vomiting. T. 35.

Alex continued to vomit and was unable to take food or liquids. Accordingly, on August 2, 2001, Debra Burnwatt called Dr. Laurenzo's office and talked to his nurse, inasmuch as Dr. Laurenzo was out of town. T. 36-7. The nurse recommended that Mrs. Burnwatt return Alex to the hospital, without any indications that this was an emergency situation. Mrs. Burnwatt loaded her son into the car and drove him from Clarksdale back to Oxford, where he was taken to a hospital room at 11:50 a.m. T. 37, 312.

There was a nurse present in the room and, as they were trying to get him into bed in preparation for hydrating him, Alex began to cough about 11:55. T. 312. He began spitting up blood. He coughed again, ran from the hospital room towards the bathroom area to a trash can and vomited bright red blood. He came back towards the bed, becoming panicked and still coughing and began projectile vomiting bright red blood. T. 312-13. The walls of the room were spattered with

blood; the floor, sink, toilet, trash can, all had large amounts of blood. T. 37. Alex collapsed on the bed and a nurse called a crash cart to try to revive him, some five minutes after Alex started coughing. T. 313. Despite the best efforts of hospital personnel, Alex Burnwatt could not be revived.

The nurse testified that hospital personnel never obtained a heart rate after starting chest compressions, which they performed, alternating, for over an hour. She said they obtained a sinus rhythm for "probably less than 30 seconds" at one point. T. 350. Alex Burnwatt simply could not be resuscitated.

Plaintiffs' expert witness testified that Dr. Laurenzo's surgical technique cut too deeply into the tonsillar tissue, causing a larger surgical wound than normal, all below the standard of care. When Alex became dehydrated and began coughing, the scab was dislodged, and Alex bled significantly. The testimony of witnesses described projectile vomiting of blood, with Alex vomiting blood into the trash can, over the walls, and into the sink. T. 66. The plaintiffs' expert opined that in a small percentage of cases, bleeding does occur post-tonsillectomy, but that the normal post-tonsillectomy bleed is superficial and can be treated easily for hours with ice packs or gargles to attempt to stop the bleed. Then, if the bleeding continues, surgery may be necessary to stop the bleed.

The plaintiffs' expert, Dr. Burton, testified that the bleeding described by witnesses to Alex's death was not this type of slow bleed. The bleeding suffered by Alex was the result of a too deep dissection of the right tonsil and injury to the deeper blood vessels. T. 67-68. The autopsy report confirmed this opinion, reporting injury erosion and lacerations of a branch of the carotid artery. T. 69-70.

A complicating factor is that there is no accurate report of Dr. Laurenzo's surgery on Alex Burnwatt. Dr. Laurenzo testified that the operative report does not accurately describe the surgery he performed. Dr. Laurenzo testified that he had a standard "operative note" that he directed the personnel typing his operative reports to always use. The operative report on Alex states that Dr. Laurenzo used a blade or a knife on the right tonsil. Dr. Laurenzo now contends that he did not in fact use a blade; that this was taken from his standard operative report, and that that report is mistaken in referring to the use of a knife. Dr. Laurenzo says that he never uses a blade in performing tonsillectomies, although virtually all of his operative reports state that he did so. Thus, there is no actual record of what was done during Alex's surgery. T. 26, T. 64.

The defendants propose to use Dr. Mansel's testimony to argue that it was the resuscitation efforts of the hospital personnel that led to Alex's death. Defense counsel admitted in his opening statement on the first trial that Alex did cough a "scab" off of his right tonsillar bed, causing him to bleed. T. 28, 313. Dr. Mansel contends that Alex vomited, threw up blood, and then sucked the blood into his lungs. He testified that Alex got nervous and was running around the room after he aspirated blood and finally collapsed on the bed at 12:00 noon. T. 315. The nurse began bagging him, providing oxygen. Dr. Mansel testified that Dr. Lamb (the Hospital ER doctor), who arrived later, used a laryngoscope to look in the throat and removed a large clot, which Dr. Mansel opined had obstructed Alex's breathing. T. 28, 315.

Dr. Mansel further would be expected to testify, as he did in the first trial, that hospital personnel then intubated Alex and began to put oxygen into the wind

pipe. He claimed that they obtained a slight pulse at that time, but the pulse was lost again. They began chest compressions and attempted to get an IV going. It is then, according to Dr. Mansel, that at about 12:10 p.m. the hospital ER doctor had difficulty getting a central line going and tore the internal jugular vein, causing swelling in the neck. T. 316-17. He further opined that Dr. Lamb also punctured the right lung in attempting to get the central line started. Dr. Mansel was further of the opinion that after the right lung was punctured, the bagging efforts of the hospital personnel caused the left lung to also "pop" a leak, resulting in a bilateral pneumothorax, or collapse of both lungs. T. 321-322.

After receiving an x-ray report of the bilateral lung collapse, Dr. Lamb inserted chest tubes to drain the air out. This worked to some extent on the right, but on the left, more air was shown on a later x-ray, a tension pneumothorax. Dr. Mansel testified that this meant that the lung had collapsed enough that it was causing the heart and major vessels to "collapse down" because "you have all this air squeezing down and so they are trying to do CPR . . . but the blood can't get back to the heart because of these tension pneumothoraces." T. 322-23. Dr. Mansel puts Alex's death on a "series of things [that] happened" after Alex's coughing spell and initial collapse on the bed without a pulse. T. 323.

Dr. Mansel, however, has himself admitted that although he thinks the pneumothoraces "strongly contributed to his death," Alex may well have died even without the collapsed lung:

> It could be that he occluded his airway, his oxygen level dropped and even though we regained a pulse that without the pneumothoraces that the end process of his demise would have been the same.

Dr. Mansel testimony, Transcript 356.

On deposition, Dr. Mansel could not say to a reasonable degree of medical certainty that without the pneumothoraces, Alex could have survived. T. 357-58.

Although the jury was twice instructed at the first trial that no acts or omission of the hospital "before, during, or after the code caused or contributed in any way to the death of Alex Burnwatt,"[4] the Court allowed Dr. Mansel to testify for hours as to his opinion that it was the puncture of the lung by the hospital ER doctor that caused the pneumothoraces that, in his opinion, significantly contributed to Alex's death. R. 356.

The trial court recognized that any events occurring during medical treatment necessitated by the defendants' actions are as a matter of law not superseding events, and that the defendants are responsible even for subsequent medical malpractice during treatment necessitated by their negligence. Given this, the testimony of Dr. Mansel is not only irrelevant but also overly prejudicial and confusing to a jury.

[4]Jury Instructions, T. 418 paragraphs 1 and 2.

SUMMARY OF THE ARGUMENT

The defendants' previous stipulation that no acts or omissions of the hospital caused or contributed to the death of Alex Burnwatt bars the defendants from making the argument they now attempt to make. The plaintiffs relied on the defendants' stipulation and consent to the judgment dismissing the hospital, and the lower court entered partial summary judgment dismissing any claim by the defendant doctor that any actions of the hospital contributed to Alex's death. The defendants are therefore estopped from attempting to attribute Alex's death to anything that occurred during the resuscitation efforts.

The judgment dismissing the hospital was certified as a Rule 54(b) final judgment, as to which no appeal was taken. It is therefore final and binding and is the law of this case. The defendants' attempts now to assess responsibility to the hospital are improper as contrary to the established law of this case.

Dr. Mansel's proffered expert opinion that the death was caused by events occurring during the resuscitation are irrelevant, extremely confusing to the jury, and prejudicial to the plaintiffs. This evidence is an attempt to backdoor in a theory of causation that has already been ruled out of the case.

Moreover, the law has long been clear that a tortfeasor is liable for all reasonably foreseeable consequences of his actions, including the negligence of individuals attempting to assist the plaintiff. Untoward events occurring during medical rescue attempts are not as a matter of law superseding acts that relieve the defendant of responsibility. In Mississippi, it is well-settled that even subsequent medical malpractice occurring during treatment necessitated by the defendants'

actions is not a superseding intervening cause of an injured party's damages. *Medlin v. Hazelhurst Emergency Physicians*, 889 So.2d 496, 499 (Miss. 2004).

The plaintiffs' claims in this case are based on Dr. Laurenzo's negligent surgical technique, which caused Alex to bleed excessively. The plaintiffs' expert testified that the bleeding described by the witnesses and the autopsy report led to the conclusion that the tonsillar bed had been cut too deeply, causing the overwhelming bleeding episode that led to the code and to Alex's death. Whatever the precise mechanism of Alex Burnwatt's death in his room at Baptist Hospital on August 2, 2001, the cause of his condition necessitating treatment that day was Dr. Laurenzo's negligent surgical technique. Alex died as a result of the coughing episode, whether by exsanguination or pulmonary arrest, and the hospital then attempted to revive him. No one, even Dr. Mansel, claims that the hospital employees acted negligently or inappropriately. T. 418. Whatever happened during the resuscitation efforts did not cause Alex's death. It was Dr. Laurenzo's surgical technique that brought Alex to the point of needing the code and, as a matter of law, the tortfeasor is liable for any events occurring during this medical treatment.

Even had the hospital personnel been negligent, negligence of a third party attempting to provide medical assistance to one injured by the defendant is not a superseding or intervening cause which would avoid liability. Accordingly, the alleged puncture of the lungs by Dr. Lamb and resulting pneumothorax have no relevance whatsoever to the issues in this case. The jury was not instructed as to any apportionment of liability to the hospital, and the expert evidence by Dr. Mansel claiming that it was the resuscitation which killed Alex Burnwatt is

therefore clearly irrelevant, prejudicial, and confusing. Such evidence should therefore be excluded on the retrial of this action.

ARGUMENT

I. The Defendants' Stipulation that No Act or Omission of Hospital Personnel Caused or Contributed to Alex Burnwatt's Death, and the Trial Court's Order so Holding, Preclude the Defendants from Introducing Opinion Evidence that Alex's Death was Caused by Resuscitation Efforts.

A. Law of the Case

The defendants' presentation of the expert opinion of Dr. Keith Mansel directly contradicts the previous stipulation that no acts or omissions of hospital personnel caused or contributed to Alex Burnwatt's death. This stipulation, which was incorporated into the trial court's order granting summary judgment to the hospital, was entered only weeks before the defendants presented their Designation of Experts, which reversed position 180 degrees and attempted to put Alex's death at the door of the hospital personnel who tried to save Alex's life.

Not only does this proffer contradict the defendants' prior stipulation, it also flies in the face of the trial court's order granting summary judgment as to any affirmative defense that the hospital's resuscitation efforts caused or contributed to Alex's death. R.446-51, R.E.44-49. The trial court held that there was "no genuine issue as to any material fact which would place blame or apportion fault to BMH-NM." Order on Summary Judgment, R.449, R.E.47. The court further reaffirmed its previous adjudication that the hospital "was guilty of no negligence which contributed to the death of William Alexander Burnwatt," and that Dr. Laurenzo "should not now be permitted to place blame or apportion fault on a co-defendant which the Court had previously adjudicated not to be at fault and accordingly dismissed with prejudice from this law suit." Order/Opinion on

Plaintiff's Motion for Partial Summary Judgment, R.449, R.E.47. The trial court further concluded:

> [t]here is no genuine issue of material fact that the dismissed defendant BMH-NM or its employees were negligent or that their actions proximately caused or contributed to the Plaintiffs' damages and that the Defendants Laurenzo and ENT Consultants should not be permitted to place blame or allocate fault to BMH-NM or its employees.

R.450, R.E.48.

These rulings as to BMH's lack of responsibility in this matter have not been set aside nor modified. In view of these rulings, the admission of testimony by Dr. Mansel that Alex Burnwatt's death was caused or contributed to by the resuscitation efforts of the hospital is clearly erroneous and prejudicial.

The ruling that no actions of the hospital caused or contributed to Alex's death is the law of the case and precludes the defendants from taking a contrary position at trial. While the "law of the case" normally arises after an appeal, this doctrine provides that once a judgment is final for purposes of appeal, it cannot be set aside by a later decision in the same case. *See, e.g., Trilogy Communications, Inc. v. Thomas Truck Lease, Inc.,* 790 So.2d 881, 885-86 (Miss. App. 2001); *Holland v. Peoples Bank & Trust Co.,* 3 So.2d 94, 103-105 (Miss. 2008). The *Holland* Court explained the application of the law of the case: only at the point of a final decision does the law of the case bind the court or parties from changing or correcting a previous decision in the case. Thus, a *denial* of a motion for summary judgment or denial of an interlocutory appeal is not a final judgment and the decision underlying such orders can therefore be reconsidered.

By contrast, a final judgment, such as the Rule 54(b) final judgment in this case adjudicating that the hospital's acts and/or omissions did not cause or

contribute to Alex's death, **does** represent the law of the case and cannot be modified. *Holland, supra.*

The defendants' current argument is that Alex died as a result of a puncture of his lung during resuscitation efforts. This argument directly contravenes the trial court's prior order, which is the law of the case, holding that no acts or omissions of the hospital caused or contributed to Alex's death. Order on summary judgment, R. 179, R.E.20.

The defendants' excuse as to why this testimony should be admitted is that the defendants are simply presenting "their theory" to the jury. With all due respect to the defendants, "their theory" involves putting blame on the resuscitation efforts, as became even more transparent during the defendants' closing argument:

> Now Mr. Merkel would have you believe that what Dr. Mansel testified too [sic]and all those issues are not relevant. Well, use your common sense. That is one of the things that jurors that is the best thing about the jury system the common sense of juries usually brings you to the right spot [sic]. If it wasn't something that was relevant you would never have heard that. It would have been excluded from you. But you heard every word of it.
>
> . . .
>
> First of all the business about the jugular vein being punctured, certainly was likely punctured then. . . . But at the same time very likely the lung was punctured. . . . But at some point in time prior to this [x-ray] Alex's left lung, right lung collapsed and his left lung collapsed. And all the bagging in the world is not getting air into his lungs because they are flat. They are not working and if you are not getting air into your lungs, what does that mean you are not oxygenating your blood. . . . They [the organs] are not being oxygenated and they don't work when they are not being oxygenated. And Alex couldn't maintain the heart beat. It just wouldn't stay and it went away. ....

T. 450-53.

It is clear that the entire purpose of Dr. Mansel's testimony is to convince the jury that it was the resuscitation efforts of hospital staff which killed Alex Burnwatt. As such, this testimony is improper and must be excluded under the law of this case.

B. Estoppel

1. Equitable Estoppel

The defendants' complete reversal of positions as to the responsibility of the hospital is also barred on the basis of estoppel. The chronology in this case shows that the defendants consented to an order dismissing BMH-NM, representing that they anticipated no expert testimony that the hospital or its employees were negligent and that they would not attempt to assign any responsibility for Alex's death to any acts or omissions of the hospital staff. Dr. Laurenzo testified, as quoted in the lower court's order dismissing the hospital, that he had no criticism of the hospital employees' efforts:

> Q. Do you have any criticism of the resuscitation efforts of the Hospital?
>
> A. [Dr. Laurenzo] Not at all.
>
> Q. Do you think everything was done appropriately?
>
> A. As best as I can tell, it certainly was.
>
> Q. Everything was done that could be possibly to save him?
>
> A. Yes.
>
> Q. If you had been there, would anything have been done any differently?
>
> A. No.

Deposition of Dr. John Laurenzo, quoted by Court's Opinion on Summary Judgment, R. 178, R.E.19.

The plaintiffs expressly relied on these representations, advising the Court that they would have no objection to the defendant hospital's motion for summary judgment unless Dr. Laurenzo "intends to 'point the finger' at Baptist Memorial Hospital-North Mississippi personnel" in any respect. The defendants denied any such intention, and the Court incorporated this statement of the plaintiffs' reliance on the defendants' representations into its order on summary judgment. Order on Summary Judgment, R. 179; R.E.20.

Within a matter of weeks of the order dismissing Baptist, the defendants then proffered the expert testimony of Dr. Keith Mansel, who opined that the hospital caused Alex Burnwatt's death during resuscitation efforts. The defendants, having consented and stipulated that no acts or omissions of the hospital caused or contributed to Alex's death, are attempting to engage in an game of semantics about "their theory" of the case, which should not be tolerated by this Court. The defendants stipulated that no actions of the hospital caused or contributed to Alex's death, and they should be held to that stipulation.

The defendants made a representation, allowing their stipulation to be entered into a Rule 54(b) consent order of dismissal with prejudice, and then weeks later, sought to reverse positions and "point the finger" at the hospital, offering the testimony of Dr. Keith Mansel. Equitable estoppel bars the defendants from presenting this testimony.

The doctrine of equitable estoppel "is based upon fundamental notions of justice and fair dealing." *Estate of Richardson v. Cornes,* 903 So.2d 51, 55 (Miss. 2005), *quoting O'Neill v. O'Neill*, 551 So.2d 228, 232 (Miss. 1989). The requisite elements are that (1) a party must have changed his position in reliance on the

conduct of another; and (2) he must have suffered detriment caused by the change of position in reliance on the other's conduct. *Richardson, supra,* 903 So.2d at 55; *PMZ Oil Co. V. Lucroy,* 449 So.2d 201, 206 (Miss. 1984).

In the *Richardson* case, the administratrix of an estate had previously made numerous sworn statements that the respondents were the heirs at law and wrongful death beneficiaries of the decedent, the daughter of the administratrix. The administratrix had listed the respondents, the father and his kindred, as heirs and wrongful death beneficiaries of the daughter; and the attorney for the administratrix had assisted the father and his kindred in filing joinders and waivers of process to the petition for authority to settle the wrongful death claim. The order approving the settlement directed the administratrix to distribute the settlement funds equally among Richardson, her children, the respondent father, and his children. Later, when the administratrix attempted to disinherit the respondents, this Honorable Court held that the administratrix was barred from so doing by the doctrines of judicial estoppel and equitable estoppel. *Richardson, supra,* 903 So.2d at 55-56.

As stated above, nothing could be more clear but that the plaintiffs relied on the defendants' representations that the hospital did nothing to cause or contribute to the death of Alex Burnwatt, and the representations that the defendants would have no expert testimony to put any blame on the hospital. John Cocke, attorney for the plaintiffs, specifically advised the Court that the plaintiffs would not object to the hospital's motion so long as Dr. Laurenzo did not "point the finger" at the hospital, and the Court incorporated this fact into its order. Order, R. 179; R.E.20.

If this situation does not call for the operation of equitable estoppel, nothing does. The plaintiffs relied on the defendants' representations to their detriment, and the defendants are equitably estopped from now making this argument and proffering testimony by Dr. Mansel that the pnemothoraces caused by the hospital's resuscitation efforts significantly contributed to Alex's death. *See, e.g., Richardson, supra.*

2. Judicial Estoppel

Likewise, judicial estoppel "precludes a party from asserting a position, benefitting from that position, and then, when it becomes more convenient or profitable, retreating from that position later in the litigation." *Richardson, supra,* 903 So.2d at 56; *Dockins v. Allred*, 849 So.2d 151, 155 (Miss. 2003). The doctrine of judicial estoppel differs from equitable estoppel in that "it does not require the element of reliance and injury." Instead, "it is based on the principle that orderliness, regularity and expedition of litigation are essential....." *Great Southern Box Co. v. Barrett,* 94 So.2d 912, 916 (Miss. 1957).

While the defendants may maintain that judicial estoppel does not apply because they have not benefitted from their previous assertion that no acts or omissions on the part of the hospital caused or contributed to Alex's death, in practical terms, the defendants have benefitted. Their representation resulted in one party's being dismissed from the case, creating an empty chair at trial and removing any possibility that the hospital staff might assign blame to the defendants or might defend themselves from Dr. Laurenzo's new allegations against them.

As for the principles undergirding judicial estoppel, certainly orderliness, regularity and expedition of litigation are dis-served by allowing the defendant to maintain one position at the hearing on the hospital's motion for summary judgment, consenting to the dismissal of the hospital, and then reversing positions to now assign causation to actions of hospital staff. This is the sort of gamesmanship that delays lawsuits for years, as in this case, leaving parents without closure eight years after a nine year old boy's death. It disrupts the entire litigation process, and makes a mockery of a system which purports to honor trust and civility.

Having stipulated to facts on which the plaintiffs relied, the defendants are estopped from presenting a contrary argument. Had they wished to avoid the effect of their stipulation and representations, they should have moved to set aside the summary judgment order, bring Baptist Memorial Hospital back into the case, and proceed from there. Instead, they attempt to stipulate to a fact, then in effect withdraw that stipulation, while holding the plaintiffs to the consequences thereof, i.e., the dismissal with prejudice of the defendant hospital.

The defendants represented to the Court and to the plaintiffs that no acts or omissions by the hospital contributed to Alex's death; their argument above clearly and directly contradicts that representation, a representation upon which the Burnwatts relied. The defendants should not be allowed to so cavalierly avoid the effect of their representations. They are barred by the doctrines of law of the case, equitable estoppel and judicial estoppel from taking a contrary position via the evidence of Dr. Mansel.

II. Untoward Events Occurring During Medical Treatment for an Injury Caused by the Defendants' Negligence do not Relieve the Defendant of Liability; Evidence of any Such Untoward Medical Events is Therefore Irrelevant to any Issue in the Case, and Admission of Such Evidence is Inherently Prejudicial and Confusing to the Jury.

It is hornbook torts law that a tortfeasor is liable for additional bodily injury which occurs during efforts at rescue or medical treatment for injuries caused by the tortfeasor. The Restatement of Torts states this simple rule as follows:

> If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or negligent manner.

RESTATEMENT OF TORTS (SECOND), § 457 (1965), *quoted with approval* by *Medlin v. Hazelhurst Emergency Physicians*, 899 So.2d 496, 499 (Miss. 2004).

The defendants attempt to walk a tightrope, trying to avoid the conclusion that the defendant hospital was negligent while at the same time arguing that resuscitation efforts killed Alex Burnwatt. Disregarding the defendants' disingenuous attempt to avoid their previous stipulation, at the end of the day it makes no difference whether the hospital was negligent, or whether the hospital's actions contributed to Alex Burnwatt's death. Under Mississippi law, even if the hospital were negligent or even if the hospital's actions during resuscitation caused Alex's death, Dr. Laurenzo is still responsible for those consequences of his actions. *See* RESTATEMENT OF TORTS (SECOND), §457, *supra*; *Medlin v. Hazelhurst Emergency Physicians, supra*, 899 So.2d at 499.

Alex Burnwatt was a typical nine year old child undergoing what was supposed to be a routine tonsillectomy. The surgeon Laurenzo cut too deeply, causing Alex to have a much larger scab than normal. After Alex was admitted to the hospital and began coughing, this large scab was dislodged. Without dispute,

under anyone's theory of the case, Alex died as a result of the events following his coughing and the resultant bleeding. Alex either bled to death, aspirated blood and choked to death, or the bleeding caused him to go into a code and the resultant medical treatment contributed to his death. Whether or not the code was performed correctly or whether the code contributed to his death is simply irrelevant under the law regarding liability for untoward events occurring during medical treatment.

Alex coded because of the bleeding episode, which then precipitated the remaining events leading to his death. But for the bleeding, these events would never have occurred; and the bleeding was caused by Dr. Laurenzo's negligence. It follows as a matter of law that Dr. Laurenzo is liable for Alex's death regardless of whether any action by the hospital aggravated Alex's condition so as to contribute to his death. RESTATEMENT OF TORTS (SECOND), § 457.

Under the Restatement, when "the negligent actor [Dr. Laurenzo] is liable for another's bodily injury [Alex Burnwatt's bleeding], he is also subject to liability for any additional bodily harm [Alex's death] resulting from the normal efforts of third persons [the code team] in rendering aide [the code] which the other's injury reasonably requires . . . ." This rule has been recently quoted with approval by this Honorable Court in the *Medlin* case, as was the following pertinent Comment which deals explicitly with harm resulting from medical treatment:

> a. Additional harm from hospital or medical treatment. The situation to which the rule stated in this Section is usually applicable is whether the actor's negligence is the legal cause of bodily harm for which, even if nothing more were suffered, the other could recover damages. These injuries require the other to submit to medical, surgical, and hospital services. The services are so rendered as to increase the harm or even to

> cause harm which is entirely different from that which the other had previously sustained. In such a case, **the damages assessable against the actor include not only the injury originally caused by the actor's negligence but also the harm resulting from the manner in which the medical, surgical, or hospital services are rendered, irrespective of whether they are rendered in a mistaken or negligent manner**, so long as the mistake or negligence is of the sort which is recognized as one of the risks which is inherent in the human fallibility of those who rendered such services.
>
> . . .
>
> c. If the actor's negligence results in harm to another which requires him to submit to hospital treatment, the actor is responsible for injuries resulting from the improper manner in which any member of the staff does his part in the normal treatment of his injuries. He is therefore as fully responsible for the negligent manner in which the nurses or clerical staff perform their part as he is for the negligent manner in which a physician or surgeon treats the case or diagnoses the injuries or performs an operation.

RESTATEMENT OF TORTS (SECOND) § 457, *Comment, quoted with approval* in *Medlin, supra*, 899 So.2d at 499-500.

The law on this issue is well-settled: "the damages assessable against the actor [Laurenzo] include not only the injury originally caused by the actor's negligence [the bleeding] but also the harm resulting from the manner in which the medical, surgical or hospital services are rendered [the death- under the defendants' theory]." *See also* 22 Am. Jur.2d Damages §246; 25 C.J.S. 2d Damages §26; *Lance v. U.S.*, 70 F.3d 1093 (9th Cir. 2005); *Coleman v. Atlanta Obstetrics & Gynecology Group, P.A.*, 390 S.E.2d 856 (Ga. App. 1990); *Bach v. Dicenzo, D.O.*, 2005 WL 1245641 (No. 84396) (Ohio App. 2005).

Thus, even in cases where subsequent medical treatment necessitated as a result of the original tortfeasor's actions was negligently rendered, such negligence does not cut off the original tortfeasor's liability. *See, e.g., Lance v. U.S., supra; Bach v. Dicenzo, supra.* In the *Lance* case, following this rule, the Court held that the federal employee's medical malpractice claim was barred by

the exclusivity provision of the FECA, because the malpractice occurred during treatment for an on-the-job injury, and the employee would recover for the negligent medical treatment in his worker's compensation action. The malpractice claim was encompassed in the worker's compensation claim and was therefore barred. *Lance, supra,* 70 F.3d at 1095.

The rule is no different when the original negligence is also medical malpractice: the original tortfeasor is responsible for any subsequent negligent medical treatment rendered as a result of the original tortfeasor's malpractice. negligence. Thus, in the *Bach*[5] case, the parents of a premature infant brought a medical malpractice claim against the doctor who directed the mother to a Level I hospital not equipped to handle premature infants and who then failed to wait for a specialty team to be present in the delivery room prior to the child's birth. The plaintiffs presented evidence that the doctor was negligent in directing the mother to this hospital and that he should have sent her to a Level III hospital. Rejecting the argument that the child's injuries were in actuality caused by the "inadequate resuscitative care performed prior to the arrival of the MetroHealth team," the Court held that "Dr. Dicenzo's actions **set the stage for the injury to occur** based on her [the doctor's] knowledge of [the hospital's] inability to care for a seriously premature infant." *Bach, supra, ¶13(*emphasis added). The Court therefore affirmed a verdict against the obstetrician who delivered the child at the Level I hospital, despite the fact that the child's injuries were more directly caused by inadequate resuscitation. *Id.*

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[5]*Bach v. Dicenzo, supra,* 2005 WL 1245641.

The present case is even stronger than those cited above, for the defendants have stipulated that no act or omission of the hospital staff caused or contributed to Alex Burnwatt's death and that there was no negligence on the part of the hospital or its staff (including Dr. Lamb). The only issue in this case therefore is whether Dr. Laurenzo was negligent and whether such negligence proximately resulted in Alex Burnwatt's bleeding episode. The exact mechanism which caused Alex's death, as debated by Dr. Mansel, is of no legal consequence. The question boils down to whether it was Dr. Laurenzo's negligence that brought Alex to the hospital and precipitated his coughing and resultant bleeding episode. It is undisputed that it is that episode which, regardless of the mechanism, caused his death. Clearly, even under the defendants' theory, Dr. Laurenzo's negligent surgery "set the stage for the injury to occur" during the resuscitation efforts, just as the doctor's negligence in the *Bach* case set the stage for the injury to occur due to inadequate resuscitative efforts.

Even the defendants' own expert concedes that the bleeding caused the code which, under his theory, caused Alex's death:

> It takes a lot of blood to exsanguinate, to bleed out, but **it doesn't take much blood or a clot to obstruct all this airway and keep you from getting oxygen.** That is what we always worry about blood in the airway. So we know he [Alex Burnwatt] had some clot [sic]. We know he had some bleeding. And he gets very nervous and is running around the room. Now, if he had exsanguinated, people who exsanguinate are lifeless and listless and lethargic. You can't get enough oxygen, anybody when you are a kid if a bully pushed or hit under the water and wouldn't let you up for a while it's very, very panicky when you can't get oxygen. **So at that time, he collapses at 12:00 and this code is called** ... what Dr. Lamb does is he takes an instrument called a laryngoscope so that he can look in the back of the throat back there and he can see up here the larynx. What he says ["sees", sic] is a large clot that has obstructed his [Alex's] airway, back here above his voice box and that is exactly what is described is he is panicky and I think as I remember his lips turn blue and he is not getting enough oxygen. So Dr. Lamb physically with some gauze takes that clot out of there

> to open up the airway because he was not able to get any oxygen. Even though they were putting oxygen into him was all occluded and again it doesn't take much.

Trial testimony of Dr. Keith Mansel, T.315-16.

The evidence clearly shows that Alex Burnwatt died before resuscitation efforts began. His heart stopped beating and he quit breathing. No pulse was palpable and, according to nurse DePriest, a rhythm was obtained only once for about 30 seconds. Beyond that, no pulse was obtained during the entire heroic resuscitation effort. T. 349-50. While it was theoretically possible that Alex might have been resuscitated, no one will ever know. As far as this case is concerned, it does not matter. The bleeding which led to this episode, to the code, was caused by the defendant Laurenzo's negligence in cutting too deeply during the initial operation. This "set the stage" for everything else that happened and, because Dr. Laurenzo's negligence led to the code, the treatment during the code was a consequence for which Dr. Laurenzo is liable. *See, e.g.,* RESTATEMENT OF TORTS 2D, §457; *Medlin v. Hazelhurst Emergency Physicians, supra.*

It must be remembered that the trial court had already twice concluded prior to trial that no acts or omissions by hospital staff had caused or contributed in any way to Alex Burnwatt's death. The defendants had stipulated at a hearing and consented to a final judgment to such effect dismissing the hospital,[6] and the Court had granted the plaintiffs' motion for partial summary judgment on any claim or defense by Dr. Laurenzo placing any apportionment for Alex's death on the hospital.[7]

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[6]R. 179-80; R.E.20-21.

[7]R.446-51, R.E.44-49.

The lower court further instructed the jury twice that no acts or omissions of the hospital contributed to Alex's death:

> The Court instructs the jury that despite the fact that you have heard testimony regarding the events of the code, **the parties have stipulated and the court has ordered that no actions of commission or omission by any employee of the hospital during after – before during or after the code caused or contributed in any way to the death of Alex Burnwatt.**
>
> The Courts [sic] instructs the jury that none of the employees of the hospital BMH North Mississippi caused or contributed in any way to the damages of the plaintiffs.

Jury Instructions, Transcript 417-18 (emphasis added).

Yet the jury was also instructed that Dr. Laurenzo contends that "the treatment Dr. Laurenzo rendered in no way contributed to [Alex's] death" and that "William Alexander Burnwatt's death occurred during resuscitation attempts." T. 422-23.

The stipulation and the Court's rulings, as set forth further in the jury instructions quoted above, that the acts of the hospital in no way contributed to Alex's death, render wholly irrelevant the opinion of Dr. Mansel.

Rule 401 of the Mississippi Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MISSISSIPPI RULES OF EVIDENCE, Rule 401.

On re-trial, the jury will not be asked whether the resuscitation efforts contributed to Alex's death. The jury will not be asked any questions with regard to any aspect of the resuscitation or whether or not the hospital personnel correctly handled the resuscitation. Accordingly, evidence regarding the alleged untoward

events occurring during the resuscitation, particularly the opinion that the pneumothorax caused Alex's death, is not only irrelevant, but is also unduly prejudicial, confusing, and a waste of time.

Rule 403 of the Rules of Evidence is particularly applicable to this situation; it allows the exclusion even of relevant evidence if overly prejudicial. The rule states as follows:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

MISSISSIPPI RULES OF EVIDENCE, Rule 403.

At the first trial, the jury was allowed to hear the expert testimony of Dr. Keith Mansel found at pages 300-366 of the transcript herein. Defense counsel spent far more time arguing to the jury regarding what had happened during the resuscitation than about Dr. Laurenzo's alleged negligence. *See* Closing Argument, T.450-457. He argued that Dr. Lamb punctured the jugular vein during an effort to insert the central line; that the lung was punctured at that same time; that Alex sustained a bilateral pneumothorax; that the lungs collapsed, and that because the lungs could not work, there was no oxygen to the blood, and the heart beat could not be sustained. Clearly, the argument by defense counsel was that the code caused Alex Burnwatt's death. T. 450-57.

The jury was presented with expert testimony that the code caused Alex Burnwatt's death and with impassioned argument by defense counsel that the code caused the death. All of this was completely irrelevant and prejudicial. Faced

with this evidence, the jury could not reach a verdict, and the case was mistried. R.518.

If the same testimony from Dr. Mansel is again allowed at the second trial, there is no reason to think that the next jury will be any less confused or less prejudiced by such evidence. The only issue regarding the code at Baptist is whether or not Dr. Laurenzo's actions had anything to do with precipitating Alex Burnwatt's coughing and bleeding episode which led to the code. This is the only issue that has any relevance herein, and the evidence regarding the alleged untoward events occurring during the code is as a matter of law irrelevant and should be excluded. Alternatively, even if relevant, any remotely probative value is significantly outweighed by the dangers of unfair prejudice, confusion, and misleading the jury.

CONCLUSION

For the above and foregoing reasons, the Burnwatts respectfully submit that the testimony of Dr. Keith Mansel should be excluded from the trial of this action. The defendants are barred by the doctrine of the law of the case and are judicially and equitably estopped from offering evidence that acts or omissions of BMH-NM during resuscitation either caused or contributed to Alex Burnwatt's death.

Moreover, whether or not any events occurring during the code caused or contributed to Alex Burnwatt's death is simply irrelevant to the only question in this case: whether Dr. Laurenzo's alleged negligence caused Alex's coughing spell which led to his bleeding, which eventually led to his death, regardless of the mechanism of death. If Dr. Laurenzo's negligence was the precipitating cause of Alex's coughing and bleeding, anything that happened during the code is also the

responsibility of Dr. Laurenzo. Admission of opinion testimony about how the code injured Alex or that the code caused Alex's death is therefore not only irrelevant but irreparably prejudicial and confusing to the jury.

WHEREFORE, PREMISES CONSIDERED, the plaintiffs respectfully request that this Honorable Court reverse the trial court's order denying the plaintiff's motion to exclude the testimony of Dr. Keith Mansel.

Respectfully submitted, this, the 15 day of September, 2009.

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing document to:

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Attorneys for John F. Laurenzo, M.D. and Ear, Nose & Throat Consultants

Honorable Robert W. Elliott, Judge
102 North Main Street, Suite F
Ripley, MS 38663

This, the 15 day of September, 2009.

Cynthia Mitchell
CYNTHIA I. MITCHELL (MSB [redacted]

CERTIFICATE OF FILING

I, Cynthia Mitchell, certify that I have ~~mailed, postage prepa~~hand-delivered id, the original and ~~four~~ 3 copies of the Appellants' Brief and an electronic disk containing the same on the 16th day of September, 2009, addressed to Ms. Kathy Gillis, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.

Cynthia Mitchell
CYNTHIA I. MITCHELL, (MSB [redacted]

Restatement of the Law — Torts
Restatement (Second) of Torts
Current through April 2009

Division 2. Negligence
Chapter 16. The Causal Relation Necessary To Responsibility For Negligence
Topic 2. Causal Relation Affecting The Extent Of Liability But Not Its Existence

§ 457. Additional Harm Resulting From Efforts To Mitigate Harm Caused By Negligence

If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner.

See Reporter's Notes.

Comment:

a. Additional harm from hospital or medical treatment. The situation to which the rule stated in this Section is usually applicable is where the actor's negligence is the legal cause of bodily harm for which, even if nothing more were suffered, the other could recover damages. These injuries require the other to submit to medical, surgical, and hospital services. The services are so rendered as to increase the harm or even to cause harm which is entirely different from that which the other had previously sustained. In such a case, the damages assessable against the actor include not only the injury originally caused by the actor's negligence but also the harm resulting from the manner in which the medical, surgical, or hospital services are rendered, irrespective of whether they are rendered in a mistaken or negligent manner, so long as the mistake or negligence is of the sort which is recognized as one of the risks which is inherent in the human fallibility of those who render such

services.

b. Risks incident to medical treatment. It would be stretching the idea of probability too far to regard it as within the foresight of a negligent actor that his negligence might result in harm so severe as to require such services and therefore that he should foresee that such services might be improperly rendered. However, there is a risk involved in the human fallibility of physicians, surgeons, nurses, and hospital staffs which is inherent in the necessity of seeking their services. If the actor knows that his negligence may result in harm sufficiently severe to require such services, he should also recognize this as a risk involved in the other's forced submission to such services, and having put the other in a position to require them, the actor is responsible for any additional injury resulting from the other's exposure to this risk.

c. If the actor's negligence results in harm to another which requires him to submit to hospital treatment, the actor is responsible for injuries resulting from the improper manner in which any member of the staff does his part in the normal treatment of his injuries. He is therefore as fully responsible for the negligent manner in which the nurses or clerical staff perform their part as he is for the negligent manner in which a physician or surgeon treats the case or diagnoses the injuries or performs an operation.

Illustrations:

1. A's negligence causes B serious harm. B is taken to a hospital. The surgeon improperly diagnoses his case and performs an unnecessary operation, or, after proper diagnosis, performs a necessary operation carelessly. A's negligence is a legal cause of the additional harm which B sustains.2. Under facts similar to those stated in Illustration 1, except that a nurse scalds B by putting an improperly stoppered hot water bottle in his bed, A's negligence is a legal cause of the scalding of B.3. Under facts similar to those stated in Illustration 1, except that the chart of C is negligently substituted by one of the clerical staff for that of B, thereby leading the surgeon to believe that an operation not called for by B's injuries is necessary, A's negligence is a legal cause of the harm sustained by B in consequence of the performance of the wrong operation.

d Under the rule stated in this Section, the actor is answerable only for injuries which result from the risks normally recognized as inherent in the necessity of submitting to medical, surgical, or hospital treatment. He is not answerable for harm caused by misconduct which is extraordinary and therefore outside of such risks.

Illustration:

4. A negligently inflicts serious harm on B. While B is in a hospital under treatment, his nurse, unable to bear the sight of his intense suffering, gives him a hypodermic injection of morphine in

disobedience of the surgeon's instructions and so excessive that she knows it may be lethal. B dies as a result of the injection. A's negligence is not a legal cause of B's death.

e. Harm outside risks incident to medical treatment. The fact that the actor's conduct has placed another in a position where he requires medical or other assistance, does not make the actor liable for any injury which those in whose charge he is forced to put himself may inflict upon him. The actor is responsible only for such additional harm or such aggravation of the original injury as may be due to the efforts which third persons reasonably make for the purpose of curing him of the injuries inflicted by A. The actor is not liable if such persons take advantage of the other's helpless condition to inflict injury upon him by an act which is not intended to aid him. Nor is he liable for harm resulting from negligent treatment of a disease or injury which is not due to the actor's negligence, even though the other takes advantage of his being in the hospital to secure treatment for it.

Illustrations:

5. A negligently injures B so severely as to require him to go to a hospital for treatment. While he is there, his manners annoy C, one of the male nurses, who, in revenge, attacks B. A is not liable for the harm inflicted by C.6. A negligently breaks B's leg, forcing B to go to a hospital for treatment. While he is in the hospital, an examination shows that he is suffering from a hernia. B decides to take advantage of his being in the hospital to have a hernia operation performed, which the surgeon performs unsuccessfully. A is not liable for the harm done by the hernia operation.

Case Citations

— December 1975

— June 1984

— June 1994

— June 2007

Not Reported in N.E.2d, 2005 WL 1245641 (Ohio App. 8 Dist.), 2005 -Ohio- 2611
(Cite as: 2005 WL 1245641 (Ohio App. 8 Dist.))

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District, Cuyahoga County.
Sharon L. BACH, et al.
Plaintiffs-Appellees/Cross-Appellants
v.
Dina A. DICENZO, D.O., et al.
Defendants-Appellants/Cross-Appellees
No. 84396.

May 26, 2005.

Background: Parents of a premature infant brought a medical malpractice claim against doctor and doctor's employer. Following a jury trial, the Court of Common Pleas, Cuyahoga County, No. CV-470041, entered judgment for parents. Doctor's employer appealed.

Holdings: The Court of Appeals, , P.J., held that:
proximate link existed between premature infant's injury and doctor's actions;
doctor would not have been entitled to indemnification from hospital under theory of active and passive negligence;
trial court did not abuse its discretion when it limited cross-examination of witness by doctor's employer by precluding employer from asking witness questions that would require expert opinion testimony;
trial court's exclusion of video deposition testimony of infant's treating neurologist as to infant's life expectancy was not unreasonable, arbitrary or unconscionable;
total damages award of $15.4 million was not against manifest weight of evidence;
verdict against doctor's employer was not against manifest weight of evidence; and
trial court did not abuse its discretion in awarding prejudgment interest.

Affirmed.

, J., concurred in part, dissented in part, and filed an opinion.

West Headnotes

Health 198H ⇐684

Health
Malpractice, Negligence, or Breach of Duty
Particular Procedures
Obstetrics, Gynecology, and Reproductive Health
k. In General.

Proximate link was established between premature infant's **injury** and doctor's actions, in medical **malpractice** action brought by parents

of premature infant for **injuries** infant received as result of oxygen deficiency following birth; although direct cause of infant's **injuries** may have been inadequate resuscitative care performed prior to arrival of neonatal emergency team from hospital equipped to handle premature births, doctor **set stage** for **injury** to occur by directing mother to hospital that was not prepared to handle premature births, and by failing to wait for arrival of neonatal emergency team before delivering infant.

Appeal and Error 30 ⇨221

Appeal and Error
Presentation and Reservation in Lower Court of Grounds of Review
Objections and Motions, and Rulings Thereon
k. Amount of Recovery or Extent of Relief.

Contention of doctor's employer that doctor could not be held liable for negligence of others, and that doctor might have right to indemnification from hospital due to negligence of hospital's employees was waived for appellate review of medical malpractice judgment for parents of premature infant that was injured as result of oxygen deficiency following birth, where doctor's employer had opportunity to join hospital as party to suit and chose not to.

Indemnity 208 ⇨65

Indemnity
Indemnification by Operation of Law
Particular Cases and Issues
k. Torts, in General.

Even if hospital had been made party to medical malpractice action brought by parents of premature infant against doctor and doctor's employer, doctor would not have been entitled to indemnification from hospital under theory of active and passive negligence, where parents alleged, and jury found, that doctor and hospital were joint tortfeasors, so indemnification would not lie because doctor and hospital would be jointly chargeable with actual negligence.

Evidence 157 ⇨535

Evidence
Opinion Evidence
Competency of Experts
k. Necessity of Qualification.

Trial court did not abuse its discretion in medical malpractice action when it limited cross-examination of witness by doctor's employer by precluding employer from asking witness questions that would require expert opinion testimony; witness was not qualified as expert, and witness had not submitted expert's report.

Pretrial Procedure 307A ⇨202

Pretrial Procedure
Depositions and Discovery
Discovery Depositions
Use and Effect
Use
k. Admissibility in

General.
Trial court's exclusion of video deposition testimony of infant's treating neurologist as to infant's life expectancy was not unreasonable, arbitrary or unconscionable, in medical malpractice action brought by parents of premature infant against doctor and doctor's employer for injuries infant received as result of oxygen deficiency following birth; neurologist's statement that infant's afflictions were "likely to result in problems" was not definitive comment on infant's life expectancy, life care plan submitted to trial court reflected assumption of normal life expectancy for infant, and doctor's employer failed to challenge assumption by providing alternate expert opinion.

Health 198H ⇐832

Health
Malpractice, Negligence, or Breach of Duty
Actions and Proceedings
Damages
k. Amount.

Total damages award of $15.4 million was not against manifest weight of evidence in medical malpractice action brought by parents of premature infant against doctor and doctor's employer for injuries to infant that resulted from oxygen deficiency following birth; testimony at damages haring indicated that infant would have earned over $2.6 million during course of his lifetime, life care plan indicated that it would cost $6.2 million for home medical care, or $5.4 million for institutional medical care over infant's lifetime, infant's economic losses were estimated at approximately $7.6 million, and deductions were made from life plan for infant's problems that were unrelated to medical malpractice.

Health 198H ⇐823(9)

Health
Malpractice, Negligence, or Breach of Duty
Actions and Proceedings
Evidence
Weight and Sufficiency, Particular Cases
k. Obstetrics, Gynecology, and Reproductive Health.

Verdict against doctor's employer in medical malpractice action brought by parents of premature child for injuries child received as result of oxygen deprivation at birth was not against manifest weight of evidence; doctor directed mother to hospital that was not equipped to handle premature births, and doctor delivered baby without waiting for arrival of emergency neonatal team from hospital equipped to handle premature births.

Interest 219 ⇐39(2.50)

Interest
Time and Computation
Time from Which Interest Runs in General
Prejudgment Interest in General
k. Torts; Wrongful

Not Reported in N.E.2d, 2005 WL 1245641 (Ohio App. 8 Dist.), 2005 -Ohio- 2611
(Cite as: 2005 WL 1245641 (Ohio App. 8 Dist.))

Death.
Doctor's employer failed to make good faith effort to settle, and thus trial court did not abuse its discretion in awarding prejudgment interest on judgment against doctor's employer in medical malpractice action brought by parents of premature infant for injuries infant received as result of oxygen deprivation following birth; doctor's employer offered $100,000 to settle case before trial, parents requested $15 million to settle, doctor's employer made no counteroffer and never moved off initial $100,000 offer, parents made it clear they would settle for policy limits any time, and jury awarded total damages of $15.4 million.

Civil appeal from Common Pleas Court Case No. CV-470041, Affirmed.

, King & Associates, Cleveland, Ohio, , Murman & Associates Lakewood, Ohio, for plaintiffs-appellees/Cross-appellants, Sharon L. Bach, et al.

, Reminger & Reminger Co., L.P.A., Cleveland, Ohio, , Cleveland, Ohio, for Defendants-Appellants/Cross-appellees, Powers Professional Corp.

, Baker & Hostetler, L.L.P., Cleveland, Ohio, , Columbus, Ohio, for Defendant, The MIIX Group of Companies.

, Behrend & Ernsberger, P.C., Pittsburgh, Pennsylvania, , Rocky River, Ohio, for defendant, Dina DiCenzo, D.O., et al.

Dina Dicenzo, D.O., Pittsburgh, Pennsylvania, defendant, pro se.

, Gallagher, Sharp, Fulton & Norman, Cleveland, Ohio, for St. Paul Insurance Co.

, Weston, Hurd, Fallon, Paisley & Howle, Cleveland, Ohio, for Parma Community Hospital.

JOURNAL ENTRY AND OPINION

, Presiding J.

***1** {¶ 1} The appellant, Powers Professional Corporation ("Powers"), challenges various rulings made by the trial court as well as the jury's verdict and the subsequent award of monetary damages rendered in favor of the plaintiffs/appellees, Sharon, Christopher, and Garrett Bach, regarding a medical malpractice claim. Powers also appeals from the trial court's award of prejudgment interest. After reviewing the arguments of the parties and the applicable law, we affirm the decisions rendered below.

{¶ 2} On May 7, 1998, Sharon Bach ("Sharon") gave birth at 24 weeks gestation to a premature baby, Garrett, who was improperly cared for during the first 16 minutes of his life. During

this time, the baby suffered [illegible], which caused permanent brain damage, [illegible], and other medical complications. Sharon gave birth to the baby at Parma Hospital, which does not generally deliver babies before 35 weeks.

> [illegible] Hypoxia: 1, An oxygen deficiency. 2. A decreased concentration of oxygen in the inspired air (Tabers Cyclopedic Medical Dictionary).

{¶ 3} Sharon's care was managed by Dr. Dina DiCenzo, an employee of Powers Professional Corporation, also known as "Women and Wellness." Dr. DiCenzo directed Sharon to Parma Hospital upon the onset of her symptoms on May 7, instead of to MetroHealth Medical Center, which has the capability of caring for extremely [illegible]. During Sharon's labor, a team of doctors and nurses specializing in neonatal care at MetroHealth was dispatched via "Life Flight" to Parma Hospital. When it became clear that Sharon was in labor that could not be reversed, Dr. DiCenzo made the decision to deliver Garrett by [illegible] before the MetroHealth emergency team could arrive at Parma Hospital. The "Code Pink" team at Parma Hospital was unable to ventilate Garrett after he was born, causing [illegible]. Garrett was eventually ventilated by the MetroHealth team, but there was a delay of approximately ten minutes in getting that team into the delivery room.

{¶ 4} Sharon, Christopher and Garrett Bach filed suit alleging medical malpractice against Dr. DiCenzo, Powers, Dr. Barich, a respiratory doctor at Parma, and Parma Hospital. Parma Hospital and Dr. Barich settled the case with the Bachs for approximately 2.5 million dollars.

{¶ 5} Trial was held as to Bach's case against Powers and Dr. DiCenzo on November 17, 2003. At trial, Powers stipulated that it was vicariously liable for all acts and/or omissions of Dr. DiCenzo. The jury found in favor of the plaintiffs and awarded Garrett 9.4 million dollars and each of Garrett's parents 3 million dollars, for a total damages award of approximately 15.4 million dollars. Appellants filed motions for a new trial and for judgment notwithstanding the verdict, which were overruled. The trial court granted the Bachs' motion for prejudgment interest on February 26, 2004, and the Bachs were awarded another 8.5 million dollars. The total award is nearly 24 million dollars.

{¶ 6} On April 5, 2005, the insurer [illegible] of both defendants deposited with the court the sum of $3,965,176.22; the trial court set the amount of supersedeas bond to stay execution of the judgment at 27 million dollars. Neither Powers nor Dr. DiCenzo posted the bond, and the funds were distributed to the Bachs on August 4, 2004. Further payments to the Bachs were made on behalf of Dr. DiCenzo and Powers by the excess insurance carrier, St. Paul Fire and Marine Insurance Co., in the sum of 2 million dollars.

> [illegible] The insurer, MIIX Group Companies, appealed the jury award in two separate appeals, Case Nos. 84940 and 85048. Both appeals were dismissed as moot.

*2 {¶ 7} Powers now appeals the decision of the trial court. Dr. DiCenzo voluntarily dismissed her appeal on April 20, 2004, and is no longer a party to this appeal. Powers presents six assignments of error for our review.

{¶ 8} "I. THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT POWERS PROFESSIONAL CORPORATIONS'S [SIC] MOTION FOR A DIRECTED VERDICT FOR WANT OF COMPETENT, CREDIBLE EVIDENCE WHICH COULD LEAD A REASONABLE JURY TO CONCLUDE THAT THERE WAS [SIC] PROXIMATE CAUSE NEXUS BETWEEN ANY ALLEGED NEGLIGENCE OF DR. DICENZO AND THE HYPOXIC INJURY SUSTAINED BY GARRETT BACH WHILE UNDER THE CARE AND TREATMENT OF THE PARMA HOSPITAL 'CODE PINK' TEAM."

{¶ 9} states in pertinent part: "When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue." Upon a motion for JNOV (judgment notwithstanding the verdict), the court may not weigh the evidence or test the credibility of witnesses, but will construe the evidence most strongly in favor of the party against whom the motion is made and determine whether, as a matter of law, the moving party would have been entitled to a directed verdict.

Whether the denial of a motion for directed verdict or JNOV has been made in error is an issue which should be reviewed de novo.

{¶ 10} Appellant claims that there was insufficient evidence to find that Dr. DiCenzo committed medical malpractice because she had no control over the actions of the Parma Hospital team that attempted, and failed, to resuscitate Garrett after his birth. The evidence shows, however, that Dr. DiCenzo was in charge of Sharon's delivery and made the choice to send Sharon to Parma instead of to MetroHealth when she was experiencing the signs of early labor. Then Dr. DiCenzo ordered and subsequently cancelled Sharon's transfer to MetroHealth after she examined Sharon and confirmed that Sharon was in .

{¶ 11} Dr. DiCenzo admitted that she delivered Garrett in a hospital that cannot care for a seriously premature baby. She also testified that she knew Parma was not equipped or staffed to care for an infant of less than 35 weeks' gestation on the date of Garrett's delivery. Further, she admitted that she requested the team from MetroHealth to be present at the child's delivery because of the inexperience of the Parma neonatal team. She failed, however, to wait for the MetroHealth team to be present in the delivery room prior to the child's birth.

*3 {¶ 12} Medical experts Dr. Russel Jelsema and Dr. Paul Gatewood explained why these actions on the part of Dr. DiCenzo violated the applicable standard of care. Dr. Gatewood stated that a woman in Sharon Bach's stage of [illegible] should be seen by a Level III hospital if at all possible, a hospital equipped to adequately care for a very premature baby. Parma Hospital is a Level I hospital, meaning that it is generally equipped to treat only uncomplicated newborn deliveries. Dr. Jelsema echoed this sentiment and stated that Garrett should not have been delivered until the proper neonatal resuscitation team was in place. Finally, Dr. Prabhu Parimi, the attending neonatologist from MetroHealth indicated that babies delivered at 24 weeks must have a skilled neonatal team present to deal with complications immediately following birth.

{¶ 13} Based on this testimony, even when construed in the light most favorable to appellant, a reasonable jury could find a proximate link between Garrett's injury and Dr. DiCenzo's actions. While the direct cause of Garrett's injuries may have been the inadequate resuscitative care performed prior to the arrival of the MetroHealth team, Dr. DiCenzo's actions set the stage for the injury to occur based on her knowledge of Parma's inability to care for a seriously premature infant. Therefore, we cannot find that the trial court erred in denying the motion for directed verdict, and the first assignment of error is overruled.

{¶ 14} "II. ASSUMING ARGUENDO THAT THIS COURT FINDS A GENUINE ISSUE OF MATERIAL FACT ON THE ISSUE OF PROXIMATE CAUSE RELATIVE TO THE CARE AND TREATMENT OF DR. DICENZO AND GARRETT BACH'S HYPOXIC INJURY, ANY NEGLIGENCE OF DR. DICENZO AND DEFENDANT-APPELLANT POWERS PROFESSIONAL CORPORATION MUST BE DEEMED PASSIVE IN NATURE VERSUS THE ACTIVE NEGLIGENCE OF THE PARMA HOSPITAL 'CODE PINK' TEAM."

{¶ 15} Appellant next argues that Dr. DiCenzo cannot be held liable for the negligence of others and that she may have a right of indemnification from Parma Hospital due to the negligence of the "Code Pink" team. However, Parma Hospital is not a party to this action, and appellant did not move to join Parma to the suit. The failure to raise an issue in the trial court results in a waiver of the issue for purposes of appeal, and may only be addressed where there is plain error. *See* [illegible]

The plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself. [illegible]

Such is not the case here. Powers had the opportunity to join Parma and chose not to. Therefore, the issue is waived for purposes of appeal.

*4 {¶ 16} Moreover, "active negligence" requires the breach of an affirmative

duty-whether through act or omission-by a person who has the power to prevent the injury. See Black's Law Dictionary (5 Ed.1979) 31; see, generally,

"Passive negligence" is a failure to fulfill some obligation imposed by law, and the obligation is imposed because of a relationship between the actual wrongdoer and the other party. Black's Law Dictionary (5 Ed.1979) 31;

Finally, "active" and "passive," as applied to negligence, do not connote a greater or lesser degree of negligence; indemnification does not lie where parties are jointly chargeable with actual negligence.

Even if Parma had been a party to the case, plaintiff alleged and the jury found that Dr. DiCenzo and Parma were joint tortfeasors, not that Dr. DiCenzo was liable for the actions of the Parma staff merely because she was the attending physician at the birth. *See*

Therefore, appellant's second assignment of error lacks merit and is overruled.

{¶ 17} "III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN RESTRICTING THE SCOPE OF DEFENDANT-APPELLANT POWERS PROFESSIONAL CORPORATION'S PERMISSIBLE CROSS-EXAMINATION OF A PARMA HOSPITAL 'CODE PINK' TEAM MEMBER AND A TREATING NEUROLOGIST."

{¶ 18} Appellant next argues that the trial court erred in limiting the testimony of Dr. Barich, a pediatrician, and Dr. Friedman, Garrett's treating neurologist. "The scope of cross-examination and the admissibility of evidence during cross-examination are matters which rest in the sound discretion of the trial judge. Thus, when the trial court determines that certain evidence will be admitted or excluded from trial, it is well established that the order or ruling of the court will not be reversed unless there has been a clear and prejudicial abuse of discretion."

quoting

To constitute an abuse of discretion, the ruling must be more than legal error; it must be unreasonable, arbitrary, or unconscionable.

In order to find an abuse of discretion, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias.

{¶ 19} In this case, the trial court ordered that no expert testimony would be permitted from a witness who had not submitted an expert report. Further, expert testimony would be limited to the contents of any report submitted. Appellees called Dr. Barich as a witness to the events which occurred at Parma Hospital on the night of Garrett's birth. He was not qualified as an expert and did not submit an expert's report. During cross examination, the following exchange occurred:

*5 {¶ 20} "Q. Was there any reason even though Metro was on its way over for anybody to tell Dr. DiCenzo don't deliver this infant?

{¶ 21} "A. No.

{¶ 22} "Q. Would that have been the proper thing to do?

{¶ 23} "MR KING: Objection, your Honor. That's for an expert opinion. He is not identified as an expert.

{¶ 24} " * * *

{¶ 25} "THE COURT: I am of the opinion we should hear what Dr. Barich has to say."

{¶ 26} Thereupon, appellant's counsel was permitted to cross examine Dr. Barich extensively regarding the proper care of an infant delivered at 24 weeks. Later in the cross examination, counsel for the Bachs again objected to appellant's questioning as calling for an expert opinion from a witness not called as an expert. After hearing arguments from counsel at sidebar, the court sustained the objection and instructed counsel for appellant to refrain from asking questions of Dr. Barich calling for an expert opinion. On recross, however, appellee's counsel objected on the same grounds, which was overruled by the judge.

{¶ 27} After a review of Dr. Barich's testimony in its entirety, we cannot say that the trial court abused its discretion in handling objections from counsel and imposing limitations on the scope of the testimony. The trial court did not act unreasonably, unconscionably or arbitrarily, and its actions did not run afoul of substantial justice.

{¶ 28} Appellant also argues that the video deposition testimony of Dr. Friedman was impermissibly limited by the trial court. Testimony as to the life expectancy of Garrett was limited by the trial court as a result of a successful motion filed by the appellees because no party produced an expert or report to address the issue of whether Garrett would have a shortened life expectancy. Dr. Friedman's testimony on the subject was as follows:

{¶ 29} "A. So the fact that he has severe , the fact that he does have seizure disorder places him at higher risk of dying at a younger age.

{¶ 30} "Q. Okay. And it's based upon the neurologic complications resulting from that will play a direct role in his life expectance?

{¶ 31} "A. I can't comment with respect to Garrett on that-

{¶ 32} "Q. Okay.

{¶ 33} "A. As to what caused what.

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{¶ 34} "Q. Okay.

{¶ 35} "A. But the fact that he has -

{¶ 36} "Q. Okay.

{¶ 37} "A. Is likely to result in problems."

{¶ 38} This testimony does not indicate that Dr. Friedman rendered an expert opinion as to the life expectancy with any degree of medical certainty. We cannot say that Dr. Friedman's statement that Garrett's afflictions are "likely to result in problems" constitutes a definitive comment on his life expectancy. Further, the life care plan submitted to the trial court reflected a normal life expectancy for Garrett. Appellant had the opportunity to challenge this assumption by providing an alternative expert opinion, but failed to do so. We cannot find that the exclusion of Dr. Friedman's testimony on the subject was unreasonable, arbitrary or unconscionable. Therefore, appellant's third assignment of error is overruled.

*6 {¶ 39} "IV. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN DENYING DEFENDANT-APPELLANT POWERS PROFESSIONAL CORPORATION'S MOTION FOR A NEW TRIAL WHERE THE DAMAGES AWARDED WERE EXCESSIVE AND GIVEN UNDER THE INFLUENCE OF PASSION AND PREJUDICE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 40} provides that a trial court may order a new trial if it is apparent that the verdict is not sustained by the manifest weight of the evidence. A reviewing court may reverse the trial court's order if the trial court abused its discretion in failing to order a new trial. The high abuse of discretion standard defers to the trial court order because the trial court's ruling may require an evaluation of witness credibility which is not apparent from the trial transcript and record. Therefore, as long as the evidence is supported by substantial competent, credible evidence, the jury verdict is presumed to be correct and the trial court must refrain from granting a new trial. Id.

{¶ 41} The damages award in this case was supported by competent, credible evidence. Testimony was produced at the damages hearing that Garrett would have earned over 2.6 million dollars over the course of his lifetime. A life care plan was also produced and indicated that it would cost 6.2 million dollars for home medical care or 5.4 million dollars for institutional medical care of Garrett over his lifetime. Garrett's total economic losses were estimated at approximately 7.6 million dollars.

{¶ 42} The record also indicates that deductions were made from the life plan because Garrett has problems with his eyes and gastrointestinal system, which are unrelated to the medical

malpractice of the appellant. Appellant had ample opportunity to cross examine the witnesses called by appellee relative to the damages calculations. Where the economic damages total almost eight million dollars, we cannot find that an award of non-economic damages of approximately seven million dollars is unreasonable. The damages verdict is not unreasonable given the evidence produced at trial; therefore, appellant's fourth assignment of error is overruled.

{¶ 43} "V. THE UNDERLYING VERDICT AGAINST DEFENDANT-APPELLANT POWERS PROFESSIONAL CORPORATION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 44} We overrule this assignment of error for the reasons discussed above. There was sufficient evidence produced by the appellees to defeat a directed verdict and to justify a large monetary award. Based on that same evidence, we cannot find that the jury lost its way in finding that Dr. DiCenzo committed medical malpractice.

{¶ 45} "VI. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN AWARDING PREJUDGMENT INTEREST TO APPELLEES AFTER THE JURY VERDICT."

{¶ 46} Prejudgment interest is authorized pursuant to which states in pertinent part:

*7 {¶ 47} "(C) Interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause of action accrued to the date on which the money is paid, if, upon motion of any party to the action, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case, and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case."

{¶ 48} The seminal decision setting forth the guidelines for Ohio courts determining the question of prejudgment interest is

at the syllabus, where the court held:

{¶ 49} "A party has not 'failed to make a good faith effort to settle' under if he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer."

{¶ 50} The *Kalain* court also noted that the statute requires all parties to make an honest effort to settle a case. A party may have "failed to make a good faith effort to settle," even when

he has not acted in bad faith. The decision as to whether a party's settlement efforts indicate good faith is generally within the sound discretion of the trial court. Id., citing to

The party seeking prejudgment interest bears the burden of demonstrating that the other party failed to make a good faith effort to settle the case.

.

{¶ 51} Likewise this court has held that an allegation that the trial court abused its discretion in awarding prejudgment interest is tantamount to alleging that the trial court acted unreasonably, arbitrarily, or unconscionably.

Such judgments, which rely so heavily on findings of fact, will not be disturbed on appeal as being unreasonable or arbitrary if supported by some competent, credible evidence. Id.

{¶ 52} In determining whether these efforts were reasonable, the trial court is not limited to the evidence presented at the prejudgment interest hearing. The court may also review the evidence presented at trial, as well as its prior rulings and jury instructions, especially when considering such factors as the type of case, the injuries involved, applicable law, and the available defenses. Otherwise, "the hearing required under may amount to nothing less than a retrial of the entire case."

citing to

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***8** {¶ 53} Finally, when considering a trial court's decision on a motion for prejudgment interest, this court's duty is to determine whether the trial court abused its discretion. *Kalain*, supra. If there is evidence in the record which supports the trial court's decision, it should be affirmed.

{¶ 54} The appellant contends that it made a good faith effort to settle the instant matter. The record indicates that the appellant offered $100,000 to settle the case before trial, although it had settlement authority up to $500,000. The appellee requested 15 million dollars to settle the case at the beginning of trial. No counteroffer was ever made; the appellant never moved off the initial $100,000 offer. The appellant and its counsel testified that their assessment of the case left Powers with a 50-60 percent chance of obtaining a defense verdict. The plaintiffs made it clear that they would settle for the policy limits anytime, even after the trial had begun.

{¶ 55} Based on the evidence presented at trial, and at the prejudgment interest hearing, we cannot determine that the trial court abused its discretion in awarding prejudgment interest. Moreover, appellant has partially satisfied the judgment with voluntary payments to the plaintiffs, precluding them from now contesting the damages award.

Pursuant to , an appellant is entitled, as a matter of law, to a stay of execution pending appeal, provided that the appellant posts the supersedeas bond in the

amount established by the trial court. *Lafarciola*, at 4. Appellant failed to do so. Therefore, we find no merit in appellant's final assignment of error.

Judgment affirmed.

It is ordered that appellees recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to

, J., concurs.
, J., concurs in Part and dissents in Part (With Separate Opinion).
N.B. This entry is an announcement of the court's decision. See and ; Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to unless a motion for reconsideration with supporting brief, per , is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per . See, also, S.Ct.Prac.R. II, Section 2(A)(1).

CONCURRING & DISSENTING OPINION

, J. concurring & dissenting.
***9** {¶ 56} I agree with the majority that appellants' first five assignments of error lack merit and that the judgment awarding monetary damages to plaintiffs-appellees should be affirmed. However, in my opinion, defendants-appellants had an objectively reasonable basis for believing that they were not liable. Therefore, they did not fail to make a good faith effort to settle this matter. Although their defense was ultimately unsuccessful, they should not be penalized for pursuing it at trial. Consequently, I would hold that the award of prejudgment interest was an abuse of discretion.

{¶ 57} Before addressing appellants' assignments of error, however, I would have addressed two potentially dispositive arguments raised by appellees. I believe these arguments ultimately lack merit, but appellees still deserve a ruling from this court on them.

{¶ 58} First, appellees argue that this appeal is moot because a portion of the judgment has been paid. While voluntary full satisfaction of a judgment will moot an appeal, I cannot agree that partial satisfaction has the same effect. Appellants' insurers paid less than $4,000,000 on a total award of almost $24,000,000. I perceive no reason why appellants should not be

permitted to pursue this appeal, at least to the extent that the judgment has not been paid. Therefore, I would reject this argument.

{¶ 59} Second, appellees contend that Dr. DiCenzo's dismissal of her appeal is dispositive of Powers Professional Corp.'s appeal, because Powers conceded that it was vicariously liable for Dr. DiCenzo's actions and Dr. DiCenzo now admits liability. I was unable to find any Ohio authority on this issue. Other jurisdictions have had mixed reactions to it. Compare

with

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{¶ 60} In my opinion, an employer should not be bound by its employee's actions in litigation when the employee is separately named as a party because the employer cannot control the employee in that circumstance. Thus, I agree with the line of authority which holds that a judicial admission of liability by an employee is not a proper foundation for vicarious liability and that the employer may contest the issue of the employee's negligence even if the employee does not. Accordingly, I would hold that Dr. DiCenzo's dismissal of her appeal was not dispositive of Powers' appeal.

{¶ 61} Turning now to the prejudgment interest issue, prejudgment interest may be awarded if the court determines that the party required to pay a money judgment "failed to make a good faith effort to settle the case," and the party receiving the award did not fail to make such a good faith effort. . We review the trial court's decision whether to award prejudgment interest under an abuse of discretion standard. In *Kalain,* the supreme court held that:

***10** {¶ 62} "A party has not 'failed to make a good faith effort to settle' under if he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer."

{¶ 63} As the majority correctly notes, prior to trial, appellants' trial counsel assessed the probability of a defense verdict at 50 percent; their insurer's counsel believed that the likelihood of a defense verdict was 60 percent. These assessments were based on the strength of a factual argument, that any negligence by Dr. DiCenzo was not a proximate cause of the injury because of the Code Pink Team's intervening negligence in failing to properly intubate the infant. This argument was objectively reasonable, though unsuccessful. Therefore, appellants' minimal offer of settlement was not unwarranted; indeed, appellants would have been justified in not making any offer. Consequently, I would hold that appellants did not "fail to make a good faith effort to settle" this matter, and the award of prejudgment interest was an abuse of discretion.

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