Strubhart v. Perry Memorial Hosp. Trust Authority

Decision Date:	14 February 1995
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Parties:	Kristi L. STRUBHART, Personal Representative of the Estate of Geoffrey B. Tearney, Deceased, Appellant, v. PERRY MEMORIAL HOSPITAL TRUST AUTHORITY, Appellee.
Court:	Oklahoma Supreme Court

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903 P.2d 263

1995 OK 10

Kristi L. STRUBHART, Personal Representative of the Estate of Geoffrey B. Tearney, Deceased, Appellant, v. PERRY MEMORIAL HOSPITAL TRUST AUTHORITY, Appellee.

No. 73929.

Supreme Court of Oklahoma.

Feb. 14, 1995.

Partial Concurrence and Dissent by Justice Simms Changed

Feb. 23, 1995.

Rehearing Denied Sept. 20, 1995.

[*266] Certiorari to the Court of Appeals, Division 2 Appeal from the District Court of Noble County: Lowell Doggett, Trial Judge.

George D. Davis, Connie M. Bryan, McKinney, Stringer Webster, P.C., Oklahoma City, for appellant.

Page Dobson, Charles F. Alden III, Julie Trout Lombardi, Holloway, Dobson, Hudson & Bachman, Oklahoma City, for appellee.

LAVENDER, Justice.

A jury verdict was returned in favor of appellant, Kristi L. Strubhart (hereafter plaintiff), personal representative of the estate of Geoffrey B. Tearney (Geoffrey), deceased and against appellee, Perry Memorial Hospital Trust Authority (hospital) for negligence in causing Geoffrey's death. We decide whether the trial judge erred in granting a new trial to the hospital upon plaintiff's refusal to accept a remittitur. We hold that, although the trial court erred in granting hospital's alternative motion for a remittitur, we cannot say the trial court abused his discretion in ordering a new trial. We also adopt the doctrine of independent corporate responsibility to the extent this doctrine imposes a duty of ordinary care on hospitals to ensure that: 1) only competent physicians are granted staff privileges, and 2) once staff privileges are granted to a physician the hospital takes reasonable steps to ensure patient safety when it knows or should know the staff physician has engaged in a pattern of incompetent behavior. This theory of liability will be available to plaintiff on remand and retrial.

PART I. FACTS AND PROCEDURAL HISTORY.

Gayla Tearney, mother of Geoffrey, was admitted to the hospital to give birth. Dr. Richard Seal (Dr. Seal), the attending physician, was the parents' private physician who had staff privileges at the hospital. It is undisputed that Dr. Seal was not an employee of the hospital. He only had staff privileges there, i.e. he was allowed to use the facility to treat his patients. He was, thus, an independent contractor in regard to his treatment of both Gayla and the infant Geoffrey.

Geoffrey was born about 1:30 a.m. after a difficult labor and traumatic delivery by forceps. **[*267]** Dr. Seal stayed with the baby approximately one hour before placing the newborn in the hospital's nursery. Dr. Seal left the hospital about 3:00 a.m., leaving a third or fourth year medical student, a Sheila Kennedy, who the parties refer to as an extern medical student, in charge of Geoffrey. Nurse Jeanne Bowles, a hospital employee, was on duty in the nursery when the baby was brought there and had the immediate care of Geoffrey during the early morning hours, as Ms. Kennedy apparently had other duties to perform or spent her time in a van outside the hospital. Nurse Bowles testified she was concerned about the baby from the outset and that she had been informed by other hospital personnel about the traumatic delivery. [1] Also looking after the baby was a nurses' aid who was given the responsibility by Nurse Bowles of taking Geoffrey's vital signs every fifteen minutes.

Testimony revealed that Dr. Seal gave Nurse Bowles an order to call Kennedy first if there was a problem with the baby or before Bowles gave the baby oxygen, but if a disagreement arose between Bowles and Kennedy that could not be satisfactorily worked out that Seal be called. In view of her concern about the baby, at 3:45 a.m. Nurse Bowles called Ms. Kennedy to look at Geoffrey. Kennedy came to check on Geoffrey and told Nurse Bowles that Geoffrey was fine. At 4:00 a.m. Bowles, still concerned, contacted Kennedy again. Kennedy again checked Geoffrey and told Bowles the baby was fine. Bowles did not contact Dr. Seal during this time and she testified that after the second check by Kennedy she felt she must have been wrong in her concern for Geoffrey's condition. Testimony also revealed that the nurses' aid assigned to check Geoffrey's vital signs fell asleep twice during the night and the hospital records for the vital signs suggest vitals were not taken on two occasions.

Beginning shortly after 7:00 a.m. several other hospital employee nurses and Dr. Seal (who had returned to the hospital) cared for Geoffrey. Geoffrey was eventually transferred to a hospital in Oklahoma City in the late morning or early afternoon after it was discovered he had gone into hypovolemic shock caused by a subgaleal hematoma probably the result of an improper forceps delivery by Dr. Seal. The shock was caused by loss of blood which was the result of internal bleeding, probably from a vein, which was draining blood from the baby's body and collecting it into the space between the outer skull and overlying skin covering of his head. Geoffrey died of hypovolemic shock early in the evening at the hospital in Oklahoma City. 2

Plaintiff also presented evidence that Nurse Bowles and other hospital employees had previous concerns about Dr. Seal's treatment of patients, including his reluctance to transfer patients to more specialized facilities when the need arose. The trial court admitted this evidence giving a limiting instruction to the jury that he was permitting its introduction "only to show what was in the mind of the nurses and hospital personnel and how it may have, if in any way, or did affect or should have affected their actions." The prior episodes included 1) two other cases where infants were not transferred to specialized facilities and death occurred, one about a week before Geoffrey's death and the other about two years prior; 2) leaving surgery or "breaking scrub" on two occasions while patients were still on the operating table, which was a violation of hospital policy 3; 3) failure to arrive at the hospital for the delivery of a baby, requiring that a nurse **[*268]** deliver the infant; 4) sending a patient home within twenty-four (24) hours with an incision into her rectum without antibiotic coverage necessitating that the patient undergo surgery to cure an infection; and 5) two times when Seal apparently failed to report suspected physical and/or sexual abuse of children situations to appropriate authorities.

The focus of plaintiff's case against the hospital was that hospital employees, particularly Nurse Bowles, were negligent in their care of the infant from approximately 3:00 a.m. until 7:00 a.m. by their omission to take proper action to obtain adequate care for Geoffrey when it was recognized Geoffrey was a severely distressed infant. Plaintiff's theory was that the baby was noticeably and severely ill during this time and that Nurse Bowles should have contacted Dr. Seal during the night, or, if Dr. Seal failed to respond to the baby's condition when contacted, that Nurse Bowles should have "gone over his head" to the director of nursing or hospital administration so that steps could be taken to transfer the infant to a neonatal care facility in Oklahoma City, Tulsa or Enid.

Two medical doctor experts for plaintiff testified that failure of the nurses to have taken such action fell below the accepted standard of care for nurses and that such failure was a direct, contributing cause of Geoffrey's death. One expert also testified that the evidence of prior knowledge or questions concerning Seal's previous treatment of patients showed that hospital personnel knew they had a problem doctor on staff and that the nurses, following accepted standard nursing practice, should have taken this information into consideration when providing care and treatment to Geoffrey. This expert also opined that the nurses' aid falling asleep was a significant factor in causing the death because of the importance of having an accurate record of the vital signs with an infant in Geoffrey s condition. Plaintiff's other expert did not believe this was a significant factor in causing the death. Both medical experts for plaintiff were also of the view Dr. Seal's treatment of Geoffrey fell below accepted standard medical practice and was a contributing cause of the death.

Hospital's defense relied on the theory the negligence of Dr. Seal during the mother's labor, during delivery of the infant, and continuing thereafter until the baby's transfer to Oklahoma City, was the sole cause of Geoffrey's death. Hospital's experts were generally of the view that until sometime after 7:00 a.m. (after Seal had returned to the hospital) the baby's condition could not have been recognized by nurses as critical and that only when the baby "crashed" after this time was it evident that Geoffrey had gone into shock. 4 Hospital further attempted to show that hospital employees' care of Geoffrey during all times he was at the hospital did not fall below the accepted standard of nursing practice, that hospital employees reasonably followed the orders of Dr. Seal and that hospital employees had no adequate or obvious reason to contact Dr. Seal during the above critical hours or "go over his head" to seek independent care or transfer the infant to a more specialized facility. All three of hospital's experts backed up the hospital's theory of the case.

Initially, plaintiff sued the hospital, Dr. Seal, Ms. Kennedy and the Oklahoma College of Osteopathic Medicine & Surgery. Before trial plaintiff dismissed with prejudice all claims against the latter three. The plaintiff and Dr. Seal agreed to a pre-trial settlement of $150,000.00. The action proceeded to trial only against the hospital. The jury returned a verdict against hospital for $800,000.00, which the trial court reduced to $650,000.00 in light of the previous $150,000.00 settlement. 5 Hospital also filed post-trial motions for a new trial, judgment notwithstanding the verdict, or a remittitur. **[*269]** The trial judge ordered a new trial unless plaintiff agreed to a remittitur of $500,000.00 of the $800,000.00 jury verdict, meaning the verdict against the hospital would be reduced to $150,000.00 considering the previous reduction for the settlement.

Hospital's motion for new trial was based on many grounds, including misconduct of plaintiff's counsel, erroneous admission of evidence regarding prior alleged bad acts of Dr. Seal, error in certain instructions, award of excessive damages and improper attempt of outside persons to influence the jury. The remittitur motion was on the grounds the verdict was not supported by the evidence and that the excessive, punitive and unconscionable nature of the verdict was brought about by attorney misconduct and the erroneous admission of evidence.

In his written order granting a new trial upon plaintiff's failure to remit $500,000.00 of the verdict the trial judge ruled the jury award was grossly excessive, contrary to substantial justice and that the hospital did not receive a fair trial. He also ruled that the errors claimed in hospital's motion for new trial did occur, including, but not limited to, the following:

Much of the evidence of plaintiff was either hearsay or presented in such a way as to make it appear that the hospital was responsible for Dr. Seal's conduct which violated the earlier order of the Court to the effect that the theory of corporate negligence was not the law in Oklahoma; ....

The trial court's reference to corporate negligence concerned his earlier order dismissing from the case any theory of liability against the hospital based on the hospital's independent duty to supervise or recommend some action be taken against an allegedly incompetent physician with staff privileges at the hospital, even though the physician is not an employee of the hospital, i.e. the physician is an independent contractor. In recent years other jurisdictions deciding the question have virtually unanimously adopted some form of this theory, variously called corporate negligence, corporate responsibility or corporate liability, based on an independent duty of the institution itself owed directly to patients to ensure their safety and welfare while in the confines of the hospital. See e.g. Oehler v. Humana, Inc., 105 Nev. 348, 775 P.2d 1271 (1989); Insinga v. LaBella, 543 So.2d 209 (Fla.1989); Blanton v. Moses H. Cone Memorial Hospital, Inc., 319 N.C. 372, 354 S.E.2d 455 (1987); Pedroza v. Bryant, 101 Wash.2d 226, 677 P.2d 166 (1984); Tucson Medical Center, Inc. v. Misevch, 113 Ariz. 34, 545 P.2d 958 (1976). The Court of Appeals decided plaintiff failed to preserve in the petition in error the issue of whether Oklahoma recognizes such a theory of liability against a hospital and, therefore, did not decide the issue.

In addition to his written order the trial court made certain remarks at the hearing on hospital's motion which seem to show he misunderstood the role of a remittitur. He said in pertinent part:

We all know, in any negligence or malpractice case, basic issues are liability--and if there is liability, what are the damages. As far as damages are concerned, if liability is proven, the death of the child would justify the award that the jury gave in this case.

However, when you look at the liability issue and the weakness of the Plaintiff's case as far as liability is concerned, I have the initial feelings that the damages awarded in this case were excessive and that a remittitur may be in order.

Plaintiff appealed these rulings of the trial court and the Court of Appeals, Division 2, affirmed in a 2-1 decision. Plaintiff then sought certiorari which we previously granted.

PART II. STANDARD OF REVIEW.

PART II(A). NEW TRIAL.

A trial court has wide discretion in granting a new trial. Austin v. Cockings, 871 P.2d 33, 34 (Okla.1994). Normally, an appellate court will indulge every presumption in favor of the correctness of the ruling of the trial judge in sustaining a motion for new trial and such order will not be reversed on appeal unless the record clearly shows the trial court erred on a pure and unmixed question of law, or acted arbitrarily or capriciously. Id. Further, when the new trial is **[*270]** granted by the same judge who tried the case, a much stronger showing of error or abuse of discretion is required than if the party was appealing a refusal to grant a new trial. Fitts v. Standard Life and Accident Insurance Co., 522 P.2d 1040, 1043 (Okla.1974). 6 Thus, a decision to grant a new trial will not be reversed unless it is shown beyond all reasonable doubt the trial court materially and manifestly erred. Id.

Although the above standard is a strict one, a trial court's exercise of discretion must be a sound legal discretion in accordance with recognized principles of law, rather than an exercise of arbitrary discretion exercised at will. Dodson v. Henderson Properties, Inc., 708 P.2d 1064, 1065 (Okla.1985). Furthermore, where the issues raised necessitate an examination of the entire lower court record, we will examine such record to determine if the trial court, in granting the new trial, abused his discretion, acted arbitrarily, or erred on some unmixed question of law. Hansen v. Cunningham, 285 P.2d 432, 435 (Okla.1955). It is further the rule that a trial court may not merely substitute his or her judgment for that of the jury [Dodson, supra, 708 P.2d at 1065] and on review an order granting a new trial will be reversed where it is based, to the exclusion of all others, on a wrong, incorrect or insufficient reason or ground and there appears no tangible, substantial, or reasonably certain basis for concluding that if the matter were tried again the result would be different. Aldridge v. Patterson, 276 P.2d 202, First Syllabus (Okla.1954). Thus, if we can say with certainty the basis of the trial court's ruling did not, contrary to the trial court's opinion, constitute prejudice the order granting the new trial should be reversed. See Draper v. Lack, 339 P.2d 784, 787 (Okla.1959).

PART II(B). REMITTITUR.

The general rule is that the issue of damages in a personal injury action is left to the jury after hearing all the evidence. Dodson, supra, 708 P.2d at 1066. A verdict of a jury cannot be set aside as excessive unless it strikes mankind, at first blush, as beyond all measure unreasonable and outrageous and such as manifestly shows it was actuated by passion, prejudice, partiality or corruption. Austin Bridge Company v. Christian, 446 P.2d 46, 48 (Okla.1968). Clearly, a remittitur may be granted for an error in the admission of testimony or for the giving of an erroneous instruction, but only so long as such errors affect the question of damages and not solely that of liability. See Remittitur, Additur, and Partial New Trial, 6 Okla.L.Rev. 337, 338 (1953). Finally, as with a motion for new trial, the granting of a remittitur by a trial court may be reversed for an abuse of discretion or because the trial court acted arbitrarily or capriciously. See Wells v. Max T. Morgan Co., 205 Okla. 166, 236 P.2d 488, 490-491 (1951).

PART III. REMITTITUR WAS IMPROPER.

As noted, the jury verdict here was for $800,000.00 for the death of a newborn infant. As can further be seen from the comments of the trial judge at the hearing on hospital's post-trial motions, he clearly appeared to recognize that such an amount of damages was justified for the wrongful death of a child. The trial court's view merely seemed to be that because he felt the issue of the hospital's liability was weak, and errors occurred which pertained to the issue of liability, this somehow made it appropriate to grant a remittitur based on a conclusion the jury verdict was excessive. We believe such a conclusion on the trial court's part was error as a matter of law because: 1) the issues of liability and damages in a personal injury tort case are separate issues, and 2) the amount of the verdict here can in no way be considered excessive.

First off, nothing about the amount of the verdict strikes us as being outrageous or wholly unreasonable for the wrongful death of a child nor did the trial court indicate this was the case. Further, hospital [*271] makes no convincing argument that $800,000.00 for the death of a newborn child is outrageous or wholly unreasonable. The only assertions of the hospital in regard to its remittitur motion which we can discern from reviewing its arguments both here and in the trial court, are that errors which may have affected a finding of liability against the hospital resulted in an unfair or excessive jury verdict. Errors associated solely with the liability issues in a personal injury or wrongful death case may not be used to support a remittitur because a remittitur is incapable of curing errors associated solely with the liability issues. Accordingly, we believe the trial court abused his discretion in granting a remittitur and the record here shows such action on his part was erroneous.

PART IV. THE GRANT OF A NEW TRIAL TO HOSPITAL WAS APPROPRIATE.

The hospital raised six issues in its brief in support of its post-trial motions. These were 1) admission of evidence of Dr. Seal's prior conduct which hospital asserted related to corporate negligence was improperly admitted; 2) certain prejudicial remarks or conduct of plaintiff's counsel; 3) error in giving instruction No. 17 on the doctrine of lost chance and instruction No. 9, which hospital asserted allowed the jury to find liability without a finding of negligence; 4) the jury was improperly influenced outside the courtroom; 5) the verdict was not sustained by sufficient evidence; and 6) the damages were excessive. We find it necessary to review only the first of these issues because we believe the trial court cannot be said to have erred on some pure unmixed question of law, abused his discretion or acted arbitrarily or capriciously, in finally deciding the hospital was deprived of a fair trial by the admission of some or all of the evidence concerning Dr. Seal's allegedly prior bad acts.

Under our prior cases, a hospital receives patients under an implied obligation that it, through its personnel, will exercise ordinary care and attention for their safety, and such degree of care and attention should be in proportion to the physical and mental ailments of the patient. Rogers v. Baptist General Convention, Etc., 651 P.2d 672, 674 f.n. 1 (Okla.1982); Tulsa Hospital Association v. Juby, 73 Okla. 243, 175 P. 519 (1918). Generally, where a nurse follows the instructions or orders given her by the attending private physician, we have refused to hold her or her hospital employer liable for resulting injuries. Van Cleave v. Irby, 204 Okla. 689, 233 P.2d 963, 965 (1951). Further, although we have not directly so held, it has been held that nurses have a duty to the patients admitted to the hospitals where they are employed to take appropriate action for the well-being of their patients any time it is obvious an independent contractor physician is providing negligent or incompetent treatment that falls below acceptable medical standards or has given an order to the nurse that is so obviously negligent as to lead any reasonable person to anticipate that substantial injury would result to the patient by carrying out or following the order. See e.g. Blanton v. Moses H. Cone Memorial Hospital, Inc., supra, 354 S.E.2d at 458.

Here, plaintiff's case primarily boiled down to the view Nurse Bowles should have known of the obvious incompetent treatment of Dr. Seal and should have taken some action to remedy the situation. The experts were in sharp disagreement over whether a competent nurse would have questioned Dr. Seal's actions regarding Geoffrey or whether any inaction on Nurse Bowles's part, or any other hospital personnel, in not "going over his head" to seek out treatment for Geoffrey, exhibited negligent conduct. To overcome this sharp disagreement the record before us seems to show plaintiff spent an overwhelming amount of time honing in on the previous actions or inactions of Dr. Seal in other unrelated cases.

One of the hospital's main contentions in support of their new trial motion was that either the evidence of Dr. Seal's prior conduct was irrelevant to the issue of the hospital's liability in regard to Geoffrey's death, or, if relevant, its probative value was outweighed by its prejudicial effect and it should have been excluded under 12 O.S.1991, **[*272]** § 2403. 7 At trial, however, plaintiff convinced the trial court that this evidence was admissible under 12 O.S.1991, § 2404(B) 8 to show knowledge by hospital staff persons of Dr. Seal's prior inattentive care toward patients and that such knowledge and/or concern by hospital staff was merely one circumstance hospital personnel should have considered when affording treatment to Geoffrey in the exercise of ordinary care or in deciding whether to go over Dr. Seal's head. 9 Rather than one circumstance of many, a review of the record reveals, it was treated by plaintiff throughout examination of witnesses as the main circumstance hospital personnel should have considered. 10

Faced with his observations of the trial and having heard all the evidence, the trial judge, at the post-trial stage, reconsidered his earlier admission of this evidence and was of the view that the overwhelming nature of this testimony made it appear to the jury that the hospital was responsible for the actions of Dr. Seal or, as we interpret the record, made the hospital responsible for insuring some action be taken by hospital personnel to prevent his treatment of the infant. In our view, we cannot say the trial court erred in such a view and, furthermore, it is our conclusion some of this evidence was clearly inadmissible and prejudiced the hospital and, as the trial court ultimately decided, deprived the hospital of a fair trial.

In Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553 (1st Cir.1989), the United States Court of Appeals for the First Circuit had before it the question of whether evidence of prior complaints against a police officer were admissible, not to show the tendencies of the defendant, but to show his supervisors had knowledge of his poor performance record. A two-part test was devised to answer the question: 1) was the evidence of prior bad acts introduced for a legitimate purpose, and 2) should the evidence have been suppressed because of substantial prejudice? Id. at 572. We have further held that as the reviewing court, we will not overturn a trial court's ruling under the balancing test of § 2403 unless there is clear abuse of discretion. See Gabus v. Harvey, 678 P.2d 253, 256 (Okla.1984); See also Jones v. Stemco Mfg. Co., 624 P.2d 1044, 1046 (Okla.1981) (questions of the admissibility of evidence are generally within the discretion of the trial court and will not be reversed unless an abuse is clearly made to appear).

In our view, a review of the entire record does not show a clear case of abuse by the trial judge. Some of the evidence was at most only tangentially relevant, if relevant at **[*273]** all, to the liability of the hospital. The most glaring example of what we believe was irrelevant evidence were the prior episodes of Dr. Seal's alleged failure to report suspected physical and/or sexual abuse of two minor patients. These episodes can hardly be said to have a bearing on whether he was a competent doctor in treating the maladies of his patients. Although no one would, of course, condone failure to report such suspected abuse, even if it was conclusively shown Dr. Seal failed to so report what he actually thought was child abuse, such failure on his part is so unlike the treatment involved here, and so potentially prejudicial, that we, like the trial court, question its admissibility at all. Furthermore, no evidence was presented by plaintiff that Dr. Seal himself suspected child abuse in either case, only that nurses suspected it. Thus, 12 O.S.1991, § 2402, which provides that relevant evidence is admissible and that irrelevant evidence is not, seems to preclude admission of these episodes. The prejudice flowing from admission of testimony concerning these purported child abuse cases is apparent to us and it was compounded by the fact plaintiff, at virtually every turn during the trial, sought to refer to them.

As to the other prior episodes, although some of them would appear to show carelessness on the part of Dr. Seal, no witness directly testified that any of the other prior episodes constituted medical mismanagement by Dr. Seal. At most one expert for plaintiff said they indicated a "problem" doctor. Even if we assume this expert was correct and that one or more of these other episodes was relevant to show what was in the minds of hospital nurses, that does not ipso facto lead to the conclusion the trial court erred in finally determining the probative value of admission of some or all of the evidence was not substantially outweighed by unfair prejudice.

As the facts set out in Part I of this opinion show, the main portion of plaintiff's case against the hospital centered on Nurse Bowles and her purported omissions in failing to contact Dr. Seal or "going over his head" to seek independent assistance for Geoffrey. Nurse Bowles, the main focus of plaintiff's case, was shown to have personal knowledge of, at most, only two of the episodes, but like the child abuse testimony, plaintiff's attorney referred to all of the prior episodes throughout the trial. On this record, we simply cannot say the trial court erred in applying the balancing test required under § 2403. Clearly, the record before us does not show the trial court acted arbitrarily or capriciously or erred on a pure and unmixed question of law in finally deciding unfair prejudice outweighed any probative value of this prior episode evidence. Accordingly, the grant of a new trial to the hospital cannot be determined by us to have been error.

In that the case is remanded for retrial we do, however, think it is incumbent on us to provide guidance to the parties and the trial court on the admission of such testimony. We now do so.

As we set out in Part V(B), we impose a duty of ordinary care on hospitals to take reasonable measures to ensure patient safety when they are on notice or should be on notice they have granted staff privileges to an incompetent doctor. This potential theory of recovery is generally known as corporate negligence or responsibility. In our view, testimony about a doctor's prior conduct is admissible if the hospital, through its personnel, knows or should know with the exercise of ordinary care of the prior conduct, and the prior conduct of the doctor is such that a hospital exercising ordinary care would take some steps to either monitor or discipline the doctor. Purcell v. Zimbelman, 18 Ariz.App. 75, 500 P.2d 335, 343-344 (1972). Further, although we are not in a position to delineate each and every prior episode that may be admissible against a hospital to show that the hospital knew or should have known staff privileges have been granted to an incompetent doctor, such episodes or information of prior conduct might include the fact the doctor has previously been sued for malpractice (Id.) or experienced untoward results in prior cases. Id.

The admissibility of such evidence can be analogized to the situation where a person is sued for negligently entrusting an automobile to a reckless or incompetent driver and prior [*274] reckless driving acts or proof of incompetence to drive safely is admissible to show knowledge on the part of the entrustor of the previous reckless driving conduct. McCarley v. Durham, 266 P.2d 629, 632 (Okla.1954); Berg v. Bryant, 305 P.2d 517 (Okla.1956); See also Barger v. Mizel, 424 P.2d 41, 46 (Okla.1967) (to hold defendant liable for entrusting a vehicle to a careless, reckless or negligent driver, a plaintiff must show defendant knew the entrustee was incompetent, careless or reckless, or in the exercise of ordinary care should have known this by the facts and circumstances existent).

We also note that unless the previous conduct known or which should be known by the hospital is obviously incompetent conduct that would lead a hospital exercising ordinary care to take some affirmative steps to monitor or discipline the staff physician, expert testimony will be needed to show the conduct is of a type that would lead a hospital to take appropriate precautionary steps. Expert testimony is required where the fact in issue is not within the realm of ordinary experience of mankind. Johnson v. Misericordia Community Hospital, 99 Wis.2d 708, 301 N.W.2d 156, 172 (1981); See Turney v. Anspaugh, 581 P.2d 1301, 1307-1308 (Okla.1978) (rule that expert medical testimony is required to support professional negligence case is subject to exception where negligence is so grossly apparent that layman would have no difficulty in recognizing it); Boxberger v. Martin, 552 P.2d 370, 373-374 (Okla.1976) (general rule is that expert testimony is ordinarily necessary to establish causation in professional liability case unless the lack of care has been such as to require only common knowledge and experience to understand and judge it).

PART V. CORPORATE RESPONSIBILITY.

PART V(A). ISSUE NOT WAIVED FOR APPELLATE REVIEW.

As noted in Part I, the Court of Appeals refused to address the issue of whether corporate responsibility is available as a theory of recovery in Oklahoma because they were of the view plaintiff failed to preserve the issue for appellate review by virtue of failure to allege in her petition in error that the trial court erred in dismissing this claim before trial. The Court of Appeals was wrong in so concluding. Although we have ruled failure to raise an issue in the petition in error is fatal to its consideration on appeal [Kirschstein v. Haynes, 788 P.2d 941, 955 (Okla.1990)] we have not been overly technical in our application of this rule. Markwell v. Whinery's Real Estate, Inc., 869 P.2d 840, 842 (Okla.1994). We stated in Markwell:

[A]lthough the specifications or assignment of error should designate the allegations of error clearly so that the court and opposing parties may ascertain the issues raised, substantial compliance is sufficient, and mere technical and formal defects should be disregarded. Rules of pleading both at the trial level and the appellate levels have been liberalized to allow courts to focus attention on substantive merits of the dispute rather than upon procedural niceties. (footnote omitted)

Id.

In her amended petition in error plaintiff raised the following as issue and error number 5, "[c]orporate negligence is a recognized theory of hospital liability under Oklahoma law." A party may amend their petition in error at any time before brief in chief is filed "to include any error or any issue presented to and resolved by the trial court which is supported by the record." Rule 1.17(a) of the Rules of Appellate Procedure in Civil Cases, 12 O.S.1981, Ch. 15, App. 2. 11 The above allegation in the amended petition in error was sufficient to raise the issue of the propriety of corporate negligence or responsibility in the appeal of this case. The Court of Appeals, thus, erred in failing to reach the issue and we proceed to decide it.

PART V(B). DISCUSSION AND ADOPTION OF CORPORATE RESPONSIBILITY OR NEGLIGENCE FOR HOSPITALS.

A good discussion of the doctrine of independent corporate negligence or responsibility **[*275]** as it applies to hospitals is found in Pedroza v. Bryant, supra, where the Supreme Court of Washington adopted the doctrine. The following was said:

The doctrine of corporate negligence appears to have been introduced in Darling v. Charleston Community Mem. Hosp., 33 Ill.2d 326, 211 N.E.2d 253 (1965), where the Illinois Supreme Court found defendant hospital liable for its failure to review the plaintiff-patient's treatment and require consultation as needed. This established the concept that a hospital had an independent responsibility to patients to supervise the medical treatment provided by members of its medical staff. Liability for failure to do so was not founded on respondeat superior, which had been the traditional mode of recovery; rather, the court found the hospital liable for its own negligence and not that of the physician.

The doctrine of corporate negligence has since been utilized by courts to require hospitals to exercise reasonable care to insure that the physicians selected as members of hospital medical staffs are competent. Jurisdictions adopting corporate negligence have also held that hospitals have a continuing duty to review and delineate staff privileges so that incompetent staff physicians are not retained.

Before the emergence of corporate negligence, hospital liability for the negligence of a staff physician was based on the theory of respondeat superior. Plaintiffs found it difficult to recover, however, as courts tended to classify physicians as independent contractors for whose acts the hospital was not liable.....

The doctrine of corporate negligence reflects the public's perception of the modern hospital as a multifaceted health care facility responsible for the quality of medical care and treatment rendered. The community hospital has evolved into a corporate institution, assuming "the role of a comprehensive health center ultimately responsible for arranging and co-ordinating total health care." The patient treated in such a facility receives care from a number of individuals of varying capacities and is not merely treated by a physician in isolation. (some citations omitted).

677 P.2d at 168-169.

Although we have never expressly adopted the doctrine we did seem to recognize in Weldon v. Seminole Municipal Hospital, 709 P.2d 1058, 1061 (Okla.1985), that after a patient is admitted to a hospital without the supervision of a private doctor in attendance that a hospital in certain situations has a duty to supervise a patient's care and review a doctor's work. See also Hillcrest Medical Center v. Wier, 373 P.2d 45, 48 (Okla.1962) (when treatment of patient is left in the discretion of hospital personnel under only general orders of a private physician, hospital must exercise ordinary care and attention for the patient). 12 As noted, however, neither of these cases expressly adopted the doctrine of corporate negligence or responsibility as placing an independent duty on hospitals toward their patients in regard to the initial granting of staff privileges to private physicians or review of the privileges once granted. We now believe it is time to adopt this theory of liability to the extent we set out below. 13 We do not, however, believe it **[*276]** is necessary or wise to adopt the doctrine in all its particulars, especially to the extent the doctrine has been interpreted as placing a duty on hospitals to review a privately employed staff physician's work as a matter of course in all individual cases. In our view, the doctrine should generally be limited to imposing a duty of ordinary care on hospitals to ensure that: 1) only competent physicians are granted staff privileges, and 2) once staff privileges have been granted to a competent physician the hospital takes reasonable steps to ensure patient safety when it knows or should know the staff physician has engaged in a pattern of incompetent behavior. We believe the form of the doctrine we adopt today is merely a variation, or a reasonable and needed expansion, on our previous cases which have set out the general duty of hospitals to exercise ordinary care and attention for the safety of their patients. It is an independent duty owed by hospitals directly to their patients, rather than a form of respondeat superior or vicarious liability.

The doctrine we adopt does not make hospitals insurers of the safety of all patients admitted to the hospital by private physicians holding staff privileges with the hospital. A reasonable approach to the doctrine that we find persuasive is contained in Albain v. Flower Hospital, 50 Ohio St.3d 251, 553 N.E.2d 1038 (1990), overruled on other grounds, Clark v. Southview Hospital & Family Health Center, 68 Ohio St.3d 435, 628 N.E.2d 46 (1994). In Albain the Ohio Supreme Court stated the following:

In a hospital setting, th[e] rule [of corporate negligence] translates into a duty by the hospital only to grant and to continue staff privileges of the hospital to competent physicians. The hospital may delegate this duty to a staff physician committee, but it cannot escape its duty of care in the process of granting and continuing staff privileges by doing so.

In Johnson v. Misericordia Comm. Hosp., supra [99 Wis.2d], at 723, 301 N.W.2d at 164, the Wisconsin Supreme Court set out the proper limits of the hospital's liability:

"[t]he issue of whether ... [the hospital] should be held to a duty of care in the granting of medical staff privileges depends upon whether it is foreseeable that a hospital's failure to properly investigate and verify the accuracy of an applicant's statements dealing with his training, experience and qualifications as well as to weigh and pass judgment on the applicant would present an unreasonable risk of harm to its patients. The failure of a hospital to scrutinize the credentials of its medical staff applicants could foreseeably result in the appointment of unqualified physicians and surgeons to its staff. Thus, the granting of staff privileges to these doctors would undoubtedly create an unreasonable risk of harm or injury to their patients. Therefore, the failure to investigate a medical staff applicant's qualifications for the privileges requested gives rise to a foreseeable risk of unreasonable harm and ... a hospital has a duty to exercise due care in the selection of its medical staff."

Thus, a plaintiff must demonstrate that but for the hospital's lack of due care in selecting the physician, the physician would not have been granted staff privileges and the plaintiff would not have been injured. Moreover, once a competent and careful physician has been granted staff privileges, the hospital will not thereafter be liable unless it had reason to know that the act of malpractice would most likely take place. That is, where a previously competent physician with staff privileges develops a pattern of incompetence, which the hospital should become aware of through its peer review process, the hospital must stand ready to answer for its retention of such physician. [*277]

We must stress that this independent duty of the hospital is limited to the exercise of due care in the granting of staff privileges, and the continuation of such privileges, to independent private physicians. A physician's negligence does not automatically mean that the hospital is liable, and does not raise a presumption that the hospital was negligent in granting the physician staff privileges. Nor is a hospital required to constantly supervise and second-guess the activities of its physicians, beyond the duty to remove a known incompetent.....

* * * * * *

In short, the hospital is not the insurer of the skills of physicians to whom it has granted staff privileges. (some citations omitted)

Albain v. Flower Hospital, 553 N.E.2d at 1045-1046.

We generally agree with the Ohio Supreme Court's view of the doctrine of corporate negligence. A hospital should have a duty to ensure that staff privileges are granted only to competent physicians. Hospitals should also have a duty to take reasonable action to protect hospital patients from staff physicians who have exhibited a pattern of incompetence. We part with the Ohio Supreme Court, however, on its view staff privileges always must be revoked where a pattern of incompetence is involved. We believe there is no necessity for placing a strict duty on hospitals to cancel staff privileges in every case where a doctor's qualifications or competence have been called into question. In other words, depending on the specific factual situation, a hospital may satisfy the duty to the patient by taking lesser steps than total or full termination of staff privileges. Such steps may include limitations or restrictions on the staff privileges in regard to certain medical procedures. The duty might also be satisfied by requiring some type of oversight of the physician in certain situations or by requiring consultation with other physicians.

Failure to take any such steps, however, does not automatically mean a hospital is liable. We mention these alternatives merely to advise hospitals, and the public, that we see no necessity for putting a straightjacket on hospitals or tying a hospital's hands in dealing with the varied factual situations that might arise. Although complete termination might be appropriate in one situation it may not be in another--and, as with most fact questions generally in tort cases, whether the hospital's acts (or omissions) in any specific situation are reasonable in carrying out the independent duty to its patient will normally be for the jury. See Flower Hospital v. Hart, 178 Okla. 447, 62 P.2d 1248, First Syllabus (1936) (whether hospital has met its duty of ordinary care toward its patient presents an issue of fact to be determined by the jury). 14

We also note that, like the Ohio Supreme Court, we are aware that a number of our sister jurisdictions have greatly expanded the independent duty of hospitals to require them to totally ensure the patient's safety while at the hospital and to require supervision in individual cases. Albain, supra, 553 N.E.2d at 1046. Further, like the Ohio Supreme Court, we are unconvinced of the wisdom of such an approach [Id.] and we **[*278]** caution that the duty we establish today should not be read so as to place such an expansive new duty on hospitals. The primary medical care giver will remain the independent contractor private physician. A hospital should not be and is not required to constantly supervise and second-guess the activities of staff physicians [Albain, supra, 553 N.E.2d at 1046] nor is a hospital required to review a staff physician's diagnosis or treatment in all individual cases. 15

We merely hold that when a hospital, through its personnel, knows or in the exercise of ordinary care should know that they have granted staff privileges to an incompetent doctor we see no impediment to imposing a duty on the hospital to take some reasonable or appropriate steps to ensure that action is taken to protect patients admitted to the hospital by the private physician and we impose that duty on hospitals. 16 When the breached duty is predicated on the hospital's omission to act, i.e. failure to recommend some action be taken against an allegedly incompetent staff doctor, the hospital can only be held liable if it had reason to know it should have acted. Therefore, knowledge, either actual or constructive, is an essential factor in determining whether the hospital exercised reasonable care or was negligent. Tucson Medical Center, Inc. v. Misevch, supra, 113 Ariz. at 36, 545 P.2d at 960. A plaintiff, of course, must prove as in other tort cases that any violation of the duty was the proximate cause of his or her injury. To show causation, a plaintiff must prove some negligence on the part of the doctor involved to establish a causal relation between the hospital's negligence in granting or continuing staff privileges and a plaintiff's injuries. Johnson v. Misericordia Community Hospital, supra, 301 N.W.2d at 158.

We believe, failing to impose the above outlined duty on hospitals is to allow hospitals the ability to bury their heads in the sand in the face of known incompetents and to put in the hands of incompetent physicians the tools by which severe injury may be caused. Our holding, thus, rejects any view that a hospital can avoid liability even though it knows or should know it is allowing an incompetent physician to treat patients within the hospital. 17 CONCLUSION

Trial errors related solely to the issue of liability may not support the granting of a **[*279]** remittitur. The trial court was, thus, wrong when he granted the hospital's remittitur motion on this basis. We cannot, however, say that the trial judge abused his discretion, acted arbitrarily or capriciously, or erred on a pure and unmixed question of law, when he granted a new trial based on the admission of evidence he concluded unfairly prejudiced the hospital and resulted in the hospital not receiving a fair trial. We also adopt the doctrine of corporate negligence or responsibility as outlined above and this theory of recovery will be a viable one against the hospital upon retrial of this case. Accordingly, the Memorandum Opinion of the Court of Appeals is VACATED, the judgment of the trial court is AFFIRMED IN PART, REVERSED IN PART AND THIS MATTER IS REMANDED FOR NEW TRIAL.

ALMA WILSON, C.J., KAUGER, V.C.J., and OPALA and SUMMERS, JJ., concur.

HARGRAVE and WATT, JJ., concur except dissent from part V(B).

HODGES, J., dissent.

SIMMS, J., filed order on Feb. 23, 1995, stating:

"I concur with the majority in Parts I, II, and III, however, I concur in part and dissent in part to Part IV and dissent to Part V."

HODGES, Justice, dissenting:

As the majority recognizes, plaintiff's case hinged on whether the defendant hospital's Nurse Bowles should have known of the obvious incompetent treatment by Dr. Seal and should have acted to remedy the situation. However, I must disagree with the majority's conclusion that some of the evidence of Dr. Seal's prior conduct was inadmissible because it unfairly prejudiced the defendant.

Evidence of Dr. Seal's prior conduct was relevant to the issue of whether Nurse Bowles should have questioned Dr. Seal's competency and was negligent in not acting based on her knowledge of Dr. Seal's prior conduct. The probative value of this evidence substantially outweighed any "danger of unfair prejudice." See Okla.Stat. tit. 12, § 2403 (1991). Further, any prejudice to the defendant was cured by the trial judge's limiting instruction at the time of admitting the evidence [1] and by the jury instructions at the close of the evidence.

In appellee's trial brief, it raised several other issues in its attempt to persuade the trial judge to grant a new trial, order a remittur, or grant a judgment notwithstanding the verdict. After a review of the record, I find no merit to appellee's arguments and am convinced that the trial judge erred in granting a new trial.

For the above reasons, I would reverse the trial court's order granting a new trial and enter judgment for the plaintiff in the amount of $650,000--the $800,000 jury verdict less the $150,000 settlement.

1 Nurse Bowles was not the attending nurse for the delivery.

2 Hypovolemia is an abnormally low volume of blood circulating in the body, which usually follows a severe blood loss which may occur as a result of internal bleeding. It is a dangerous condition that can lead to shock and death. AMERICAN MEDICAL ASSOCIATION ENCYCLOPEDIA OF MEDICINE 564 (1989). A subgaleal hematoma is caused by bleeding into or between the outer skull surface and the overlying skin. SLOANE-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY 305 (West 1987) (definition of galea aponeurotica); WEBSTER'S NEW COLLEGIATE DICTIONARY (1979) (definition of hematoma); State v. Durand, 465 A.2d 762, 763 (R.I.1983).

3 On one of these occasions Dr. Seal went to a phone close to the operating room, called a local pharmacy and blew a whistle into the phone.

4 The term "crash" has basically been used by the parties to connote a severe or drastic change for the worse in the baby's condition and vital signs.

5 The Judgment on the Verdict of the jury issued by the trial judge reflects that the $150,000.00 settlement was on behalf of Dr. Seal, Ms. Kennedy and the Oklahoma College of Osteopathic Medicine & Surgery and not just in relation to Dr. Seal. The Court of Appeals' opinion in this matter reflects the settlement was only with Dr. Seal. This discrepancy is not pertinent to our decision here. Suffice it to say plaintiff does not dispute the correctness of the $150,000.00 reduction pursuant to 12 O.S.1981, § 832(H)(1).

6 It has been held the reason behind a stronger showing to reverse the grant of a new trial, as opposed to the denial of such a motion, is based on the view the granting of the new trial merely places the parties in the position of having to try the issues again. Horn v. Sturm, 408 P.2d 541, 546 (Okla.1965).

7 § 2403 provides:

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise.

Hospital appropriately objected at trial to the evidence of Dr. Seal's prior conduct on this same basis.

8 § 2404(B) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

9 Plaintiff also argues here, as in the trial court, the evidence of prior bad acts by Dr. Seal were admissible to support the theory of corporate negligence or responsibility we adopt in Part V(B) of this opinion. Even though plaintiff may be correct that some of the evidence may have been admissible to support such a theory of recovery to show notice to the hospital that it had an incompetent doctor on staff and it should have taken some steps to do something about it, e.g. revoke or suspend staff privileges, supervise more closely or restrict the staff privileges to ensure patient safety, this argument affords no basis to overturn the trial court's grant of a new trial in this case. The hospital was successful in convincing the trial court to dismiss this theory from the case pre-trial. Therefore, no instructions were given to the jury on the theory nor was the hospital, thus, prepared to mount a defense to it at trial. It would, thus, be improper for us to reverse the trial court's grant of a new trial on a theory of recovery neither submitted to the jury or prepared for by the hospital.

10 This is not to say plaintiff ignored Nurse Bowles's observations of the baby during the time she spent caring for him in the nursery. Such facts and others were brought out by plaintiff at trial. However, at every turn, the record shows plaintiff's attorney rarely missed an opportunity to repeat one or more of the episodes involving Dr. Seal's conduct in these other unrelated cases in his examination of witnesses.

11 The current Rule 1.17(a) remains the same. 12 O.S.1991, Ch. 15, App. 2, Rule 1.17(a). We note, "[a]mendment is not required if the issues briefed are fairly comprised within the assertions of error alleged." Markwell v. Whinery's Real Estate, Inc., 869 P.2d 840, 843 (Okla.1994).

12 In fact, in Weldon we cited Darling v. Charleston Community Memorial Hospital, 33 Ill.2d 326, 211 N.E.2d 253 (1965) cert. denied, 383 U.S. 946, 86 S.Ct. 1204, 16 L.Ed.2d 209 (1966), for this proposition and Darling is recognized by some courts as the case introducing the doctrine of corporate negligence. See e.g. Pedroza v. Bryant, 101 Wash.2d 226, 677 P.2d 166, 168 (1984). Weldon may, thus, have foreshadowed our adoption of the doctrine in some form.

13 At least twenty-two (22) states have adopted some form of the corporate negligence or responsibility doctrine. See Insinga v. LaBella, 543 So.2d 209, 214 f.n. * (Fla.1989). The Florida Supreme Court lists seventeen (17) jurisdictions: Arizona, California, Colorado, Georgia, Illinois, Michigan, Missouri, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Texas, Washington, West Virginia and Wisconsin. Our research has revealed that additionally Alabama, Florida in Insinga, Ohio, Pennsylvania and Wyoming have adopted some form of the doctrine. See Clark v. Allied Healthcare Products, Inc. 601 So.2d 902 (Ala.1992); Humana Medical Corporation of Alabama v. Traffanstedt, 597 So.2d 667 (Ala.1992); Coleman v. Bessemer Carraway Methodist Medical Center, 589 So.2d 703 (Ala.1991); Albain v. Flower Hospital, 50 Ohio St.3d 251, 553 N.E.2d 1038 (1990), overruled on other grounds, Clark v. Southview Hospital & Family Health Center, 68 Ohio St.3d 435, 628 N.E.2d 46 (1994); Thompson v. Nason Hospital, 527 Pa. 330, 591 A.2d 703 (1991); Greenwood v. Wierdsma, 741 P.2d 1079 (Wyo.1987). We have been unable to find any jurisdiction that has completely rejected the doctrine as a matter of its common law jurisprudence, although the Kansas Supreme Court has, at least, partially rejected the doctrine based on a specific legislative enactment granting hospitals immunity from liability for rendering professional services within the hospital by a physician licensed to practice medicine and surgery that is not an employee or agent of the hospital. McVay v. Rich, 255 Kan. 371, 874 P.2d 641 (1994).

14 A hospital may also avoid liability if it can show it has taken reasonable measures to ensure the patient's safety and well-being while at the hospital--steps that might include, but not necessarily be limited to, formulating, adopting and enforcing rules and policies to ensure quality care for the patients. Thompson v. Nason Hospital, note 13, supra, 591 A.2d at 707. Such rules, to be effective as a defense must, however, be designed so as to include policies to ensure that only competent doctors are both selected and retained on staff. Insinga v. LaBella, note 13, supra, 543 So.2d at 213. As noted in the text, whether such rules or other steps by the hospital will insulate it from liability for negligence where the evidence is disputed will normally be for the jury. We also note that although we have used the phrase "pattern of incompetence" we do not foreclose by such use the possibility that one prior episode of physician misconduct may be sufficient to call into play the duty we impose on hospitals. This is so for the reason one prior episode may be so egregious on the part of the doctor that the hospital should know it is dealing with an incompetent. In such a situation the hospital would be under the duty we impose here today to take reasonable steps to ensure patient safety. An example of such a situation would be where an obviously intoxicated physician shows up to perform surgery and he is observed by hospital personnel.

15 In our view, a hospital should be required in individual cases (i.e. where prior incompetence of the staff doctor is not in issue) to take reasonable alternative action only in situations where a hospital nurse (or other hospital personnel): 1) knows that a staff physician's diagnosis or treatment is below acceptable medical standards, or 2) the diagnosis or treatment is so obviously negligent as to lead any reasonable person to anticipate substantial injury would result to the patient from following the doctor's course of treatment. See Blanton v. Moses H. Cone Memorial Hospital, Inc., 319 N.C. 372, 354 S.E.2d 455, 458 (1987). Thus, in such individual cases, neither a nurse or her hospital employer will be liable for following the orders of a private independent contractor physician unless such orders are known to be negligent or are obviously negligent. This is so because nurses and other less trained hospital employees cannot and should not be expected to second-guess the orders, diagnosis or treatment of private physicians who have the primary responsibility for the treatment of their patients' maladies by virtue of their superior qualifications absent knowledge of negligent conduct on the part of the physician or obviously negligent conduct by the physician. Of course, when a patient is admitted to a hospital without a private physician and/or hospital employees are not under the direct supervision or control of a private staff physician, a hospital is held to a general negligence standard of ordinary care and attention for the patient's safety commensurate with the physical and mental ailments of the patient. Flower Hospital v. Hart, 178 Okla. 447, 62 P.2d 1248, 1249-1250 (1936).

16 As previously noted in the text, the duty we formulate today is also applicable to the initial decision to grant staff privileges. This duty should not be onerous as our statutes already provide that administrators in charge or the governing boards of each hospital licensed by the State Commissioner of Health shall adopt written criteria for use in determining which licensed doctors shall be granted staff privileges. 63 O.S.1991, § 1-707b.

17 We finally note that the duty we impose on hospitals is not subject to variation by virtue of any locality rule, i.e. the requirement that a medical practitioner be judged by the standards of practice ordinarily employed by similar practitioners in the same or similar communities. We have squarely held the locality rule is inapplicable to hospitals. Rogers v. Baptist General Convention, Etc., 651 P.2d 672, 674 f.n. 1 (Okla.1982).

1 The trial judge instructed the jury:

Ladies and gentlemen, these incidents [of Dr. Seal's prior conduct] that are being testified about don't have any relevance to the proof of what happened in this particular case, and I'm permitting this testimony only to show what was in the mind of the nurses and hospital personnel and how it may have, if in any way, or did affect or should have affected their actions. Now, you're the fact finders and you'll have to ultimately decide all these questions.

Nelson v. Pollay

Decision Date:	20 February 1996
Docket Number:	No. 80299, 80299
Citation:	Nelson v. Pollay, 916 P.2d 1369, 1996 OK 142 (Okla. 1996)
Parties:	Verna Mae NELSON, Individually, and as Personal Representative for Curtis Ray Nelson, deceased, Plaintiff-Appellant, v. Michael POLLAY, M.D., and Oklahoma Memorial Hospital, Defendants-Appellees.
Court:	Oklahoma Supreme Court

Id. vLex Fastcase: VLEX-891295412

Link: https://fastcase.vlex.com/vid/nelson-v-pollay-no-891295412

916 P.2d 1369

1996 OK 142

Verna Mae NELSON, Individually, and as Personal Representative for Curtis Ray Nelson, deceased, Plaintiff-Appellant, v. Michael POLLAY, M.D., and Oklahoma Memorial Hospital, Defendants-Appellees.

No. 80299.

Supreme Court of Oklahoma.

Feb. 20, 1996.

Rehearing Denied May 15, 1996.

Rick E. Romano, Romano & Romano, Oklahoma City, for Appellant.

Perry T. Marrs, Jr., Short Wiggins Margo & Adler, Oklahoma City, for Appellee Pollay.

Charles L. Waters, General Counsel, Richard W. Freeman, Jr., Assistant General Counsel, Charles M. Jackson, Assistant General Counsel, Department of Human Services, Oklahoma City, for Appellee Oklahoma Memorial Hospital.

OPALA, Judge.

This public-law controversy presents three questions: (1) Does the 1985 Governmental Tort Claims Act [GTCA or Act] 1 shield faculty physicians--who are teaching in a medical education program at Oklahoma Memorial Hospital [OMH or hospital]--from tort liability to a patient for negligence in providing medical or surgical services? (2) Does the 1985 version of the GTCA allow OMH to be answerable in tort (dehors the respondeat superior doctrine)--in a manner coextensive with the standards of liability that govern private hospitals--for the negligence of nonemployee-physicians occurring in the course of providing medical or surgical services at the hospital? and (3) Did the trial court err in giving summary judgment to the defendant faculty physician and to OMH? We answer the first question in the negative and the second and third in the affirmative, and remand the cause for further proceedings not inconsistent with this opinion.

I THE ANATOMY OF LITIGATION

Curtis Ray Nelson [Nelson] sought damages for inadequate medical treatment received after his admittance to OMH on January 27, 1986. 2 Nelson earlier had been diagnosed as suffering from neurofibromatosis. 3 Dr. Michael Pollay 4 [Pollay or faculty physician] treated him and supervised Dr. Bruce Pendleton [Pendleton], a non-party resident physician who was Nelson's primary doctor and surgeon. 5 Nelson's condition supposedly deteriorated during the ten-day period between his admittance (on January 27) and a laminotomy 6 (on **[*1372]** February 6) performed by Pendleton under Pollay's supervision and direction. 7

Nelson filed his pre-suit notice of claim on February 11, 1988 8 and commenced this medical malpractice action against Pollay and OMH on June 7, 1988. He alleged that his extensive physical deficiencies were caused by the delay and the improper performance of tendered medical treatment. OMH pressed for summary judgment on three grounds: (a) immunity from liability under the GTCA, (b) Nelson's failure either to establish any independent negligence by OMH or its employees or (c) to comply with the Act's pre-suit notice provisions before commencing the action. Pollay's summary judgment quest relies on (a) GTCA-conferred immunity from liability and (b) his nonliability either as an attending physician or in supervising resident interns. The summary judgment given to both defendants 9 rests solely on their immunity from tort liability under the terms of the 1985 GTCA.

Nelson died during the pendency of this action. His next of kin and personal representative, who was then substituted as plaintiff, 10 appeals.

II

THE 1985 VERSION OF THE GTCA DID NOT CONFER IMMUNITY UPON

FACULTY PHYSICIANS FOR NEGLIGENCE OCCURRING IN THE DELIVERY OF HEALTH-CARE SERVICES

Dr. Pollay's immunity from liability turns on our construction of the 1985 GTCA--the version in effect when the alleged injuries in suit occurred (between January 27 and February 6, 1986). The common-law doctrine of sovereign immunity was abrogated by our pronouncement in Vanderpool v. State. 11 The legislature later codified Oklahoma's sovereign immunity by enacting the 1984 GTCA, 12 which contained comprehensive statutory parameters for governmental tort liability. 13 Section **[*1373]** 152.1 14 sets out that governmental immunity of the state and its political subdivisions is waived "only to the extent and in the manner provided in" the Act. Subject only to the Act's specific limitations and exceptions, the GTCA extends governmental accountability to all torts for which a private person or entity would be liable. 15 In Anderson v. Eichner 16 we construed the 1986 and 1989 versions of the GTCA. There we held that the purview of protection from liability created by the Act does not encompass the practice of the healing art by providing medical or surgical services to patients. 17 We likewise conclude today that the 1985 version of the Act does not confer immunity on faculty physicians who are rendering medical services.

The cardinal rule of statutory construction calls for a judicial search to ascertain legislative intent. 18 The plaintiff argues that the legislature intended to place faculty physicians outside the scope of their employment while they are providing medical or surgical services to patients. We agree.

State employees acting within the scope of their employment are relieved by § 152.1(A) 19 of private liability for tortious conduct. This immunity grant allows public employees to perform their duties and make decisions on behalf of the state free from fear of suit. 20 In the task of determining whether Pollay (a faculty physician)--because of his employment status with the state--is immune from liability for the tort in suit, our analysis must begin with the definitional portion of the Act (§ 152(5)) 21 in which state employees are described. The § 152(5) text **[*1374]** creates a dichotomous division of faculty physicians into two distinct categories: (a) those acting in an administrative capacity (i.e., teachers) and (b) those who are not acting in an administrative capacity, such as physicians who are "practising medicine" at state teaching hospitals. For their tortious conduct as teachers the Act provides that the state is liable; for their like acts or omissions as practitioners, the state is not. The final provision in § 152(5) 22 clearly takes the employee/teaching-physicians out of the scope of their employment when they are practising medicine--whether for educational or other purposes--yet leaves them within the protection of respondeat superior 23 liability for those duties which are unrelated to treatment of patients.

In support of his immunity analysis, Pollay urges there is a distinction between "private physicians" and "faculty physicians". He contends that because physician-patient relationships with the former professionals are voluntarily formed while the latter cannot turn away patients, faculty physicians are immune from liability while providing medical services. Moreover, Pollay argues, immunity for faculty physicians while providing medical treatment advances legitimate public interests of the state in the delivery of medical services to the poor at substantially reduced levels of compensation. Just as firmly as we did so in Anderson, 24 we reject once more today's invitation to create a discriminatory distinction between medical treatment rendered to a "state " patient and that given to a private patient. Patients are not to be accorded a pariah legal status based on some means' test that would single out poor persons for a different treatment. 25 The plain language of the statute will not support this interpretation. Had the legislature intended to distinguish between liability for negligence in the rendition of medical treatment arising from a physician's role in the educational process and that occurring in the course of medical treatment arising from non-educational activities, it would have expressed that purpose in § 152(5).

In sum, we hold that the 1985 GTCA does not shield Pollay from tort liability for negligence in providing medical or surgical services to Nelson. 26

[*1375] III

UNDER THE 1985 VERSION OF THE GTCA, OMH IS ANSWERABLE IN

TORT FOR THE NEGLIGENCE OF NONEMPLOYEE-PHYSICIANS WHO

PROVIDE HEALTH-CARE SERVICES AT THE HOSPITAL IN A MANNER

CO-EXTENSIVE WITH THE STANDARDS OF LIABILITY THAT GOVERN

PRIVATE HOSPITALS

A. Statutory Immunity Theory

OMH urges it is immune from liability for the tortious acts of Pollay or any other physician in connection with Nelson's injuries. Our attention is directed to the terms of 51 O.S.1991 § 152(5), which provide in part that "in no event shall the state be held liable for the tortious conduct of any physician, resident physician or intern while practicing medicine or providing medical treatment to patients." 27

The quoted provisions of § 152 can lend no support to OMH's immunity quest in this case. The statutory text invoked was added to the definitional section of "state employee" after the occurrence of Nelson's injuries. 28 The version that governs the Nelson claim--51 O.S.Supp.1984 § 152(5)-- provided that "physicians acting in a nonadministrative capacity, except for resident physicians and interns, practicing at the State of Oklahoma Teaching Hospitals are not employees or agents of the state. " 29 No intent can be divined from the applicable 1985 version of § 152(5) to confer immunity on state teaching hospitals for those negligent acts of nonemployee-physicians which fall dehors the law's doctrine of respondeat superior. In short, under the provisions of the 1985 Act, OMH is answerable in tort in a manner co-extensive with the standards of liability that govern private hospitals under the same or like circumstances. 30 51 O.S.Supp.1985 § 153. A statutory grant of immunity must be explicit--immunity will not be divined from a legislative text that is silent, doubtful or ambiguous. 31

Although OMH is immune from respondeat superior liability for negligent acts of nonemployee-physicians acting in the delivery of health-care services, 32 its statutory grant of immunity does not extend to negligent acts or omissions by those OMH employees who are not physicians. 33

[*1376] B. Nonliability- and Limitations-Based Challenges

Although the trial court based its summary disposition solely on statutory immunity, OMH reasserts its nonliability and bar-of-limitation theories that were pressed below in its arguments for summary disposition of the claim. 34 An appellate court will not make first-instance determinations of law or fact. That is the trial court's function in every case--whether in law, equity or on appeal from an administrative body. 35 Because only OMH's statutory immunity argument came under nisi prius scrutiny, we cannot craft an initial decision upon any of the untried issues tendered on appeal. In short, all these issues must first be resolved by the trial court.

IV CONCLUSION

The 1985 GTCA's language is clear--faculty physicians are employees of the state acting within the scope of their employment when they are engaged in the performance of administrative duties, except when practising medicine. The claim before us arose from the treatment of a patient, not from acts of teaching or administering. Defendant Pollay was delivering medical services while engaged in the art of healing at a state teaching hospital. He is not shielded from liability by the 1985 version of the GTCA. Nor is OMH protected by the Act from liability (that falls dehors the doctrine of respondeat superior) for the negligence of nonemployee-physicians in the delivery of health-care services at its facility. For those delicts it is answerable in tort in a manner co-extensive with the standards of liability that govern private hospitals. The legislature has broad power in crafting the state's public tort liability. Its intent not to shield with immunity faculty physicians and state teaching hospitals is manifest from the statutory scheme in effect when Nelson's harm took place.

We hold that the purview of protection from liability created by the 1985 GTCA extends neither to (a) a faculty physician practising medicine or providing treatment to patients at a state teaching hospital nor (b) to a state teaching hospital for that conduct by nonemployee-physicians in providing medical or surgical services at the hospital for which private tort law would afford redress dehors the respondeat superior doctrine. 36

We express no opinion with respect to the actionability of the Nelson claim. This cause must be remanded for a nisi prius consideration of all untried issues to be resolved. The summary judgment to Pollay and OMH cannot stand. When on the judgment's reversal a cause is remanded it returns [*1377] to the trial court as if it had never been decided, save only for the "settled law" of the case. 37 On remand the parties are relegated to their prejudgment status.

The trial court's summary judgment is reversed and the cause remanded for further proceedings not inconsistent with this pronouncement.

ALMA WILSON, C.J., KAUGER, V.C.J., and LAVENDER, HARGRAVE and SUMMERS, JJ., concur.

SIMMS, J., concurs in Parts I and II and dissents from Part III.

HODGES and WATT, JJ., dissent.

1 51 O.S.Supp.1985 §§ 151 et seq.

2 "Oklahoma Memorial Hospital" operated under that name for only thirteen years. See 56 O.S.Supp.1980 § 401 (adopting the title "Oklahoma Memorial Hospital" effective July 1, 1980); 63 O.S.Supp.1993 § 3202.1 (reinstating the institution's earlier name of "University Hospital" effective July 1, 1993).

3 "Neurofibromatosis" is a disease commonly known as "Elephant Man's Disease" in which multiple tumors of various sizes slowly grow on peripheral nerves, including ones that can wrap around and enter the spinal cord. Taber's Cyclopedic Medical Dictionary 1203 (American Jurisprudence Proof of Facts, 3d Series, 16th ed. 1989). Nelson had been diagnosed to suffer from this disease at least 19 years earlier. His condition was coupled with spastic quadriparesis, multiple intraspinal neurofibroma and a seizure disorder.

4 Pollay is a Professor of Neurosurgery and Chief of the Department of Neurosurgery at the University of Oklahoma College of Medicine.

5 Two other non-party resident physicians provided medical services to Nelson: (1) Dr. Mark Talley (who performed two myelograms) and (2) Dr. Donald Horton (who examined Nelson the day he was admitted to OMH).

6 A laminotomy is a division of one of the vertebral laminae, which are the flattened parts of either side of the vertebral arch. Taber's, supra note 3 at 995-996. The surgery was performed to remove multiple tumors that were growing into and compressing the patient's spinal column and spinal cord. Nelson allegedly suffered from this procedure permanent spinal cord damage.

7 Nelson was admitted to OMH on January 27, 1986. Two myelograms, which are diagnostic radiographic or roentgenographic studies that produce pictures of tumors using radiopaque dye, were performed on Nelson (one on January 28 and the other on the 29th). Taber's, supra note 3 at 1167, 1614. On February 1, 1986, Nelson received a magnetic resonance imaging [MRI] treatment, a procedure where protons or neutrons are magnetized to provide images of certain areas of the body and to assist in determining the location of tumors. Taber's, supra note 3 at 1226. Plaintiff's expert witness criticized the laminotomy as both untimely and improperly performed.

8 According to Nelson: his pre-suit notice (to the Office of Risk Management, the Attorney General, and the Department of Human Services on February 11, 1988) was filed within 90 days of the date he discovered that his condition (paraplegia) was permanent (51 O.S.Supp.1985 § 156(B)); his claim was deemed denied 90 days later on May 11, 1988 (51 O.S.Supp.1984 § 157(A)); and his suit was timely filed on June 7, 1988 (within 180 days of the claim's denial) (51 O.S.Supp.1984 § 157(B)).

9 The pertinent portions of the summary judgment, filed August 21, 1992, are:

"The Court ... finds that said Motions [for Summary Judgment] should be granted as a matter of law based upon the immunity provisions of the Governmental Tort Claims Act. The Court does not express opinion concerning Defendants' arguments on statute of limitations. IT IS THEREFORE ORDERED that Defendants' Motions for Summary Judgment are hereby granted."

10 An action for personal injury is survivable under the provisions of 12 O.S.1991 § 1053. Haws v. Luethje, Okl., 503 P.2d 871, 873 (1972). Added following Nelson's death was a claim for wrongful death.

11 Vanderpool v. State of Oklahoma ex rel. Oklahoma Historical Society, Okl., 672 P.2d 1153, 1156-57 (1983), teaches that in the absence of a statute conferring partial or total immunity, the state, its political subdivisions and their employees acting within the scope of their employment would stand liable in tort in the same manner as a private individual or corporation. See also Anderson v. Eichner, Okl., 890 P.2d 1329, 1336 n. 15 (1994).

12 See Okl.Sess.L.1984, Ch. 226, effective October 1, 1985.

13 The terms of 51 O.S.Supp.1984 § 152.1 (effective October 1, 1985) are:

"A. The State of Oklahoma does hereby adopt the doctrine of sovereign immunity. The state, its political subdivisions, and all of their employees acting within the scope of their employment, whether performing governmental or proprietary functions, shall be immune from liability for torts.

B. The state, only to the extent and in the manner provided in this act, waives its immunity and that of its political subdivisions. In so waiving immunity, it is not the intent of the state to waive any rights under the Eleventh Amendment to the United States Constitution." (Emphasis added.)

14 For the pertinent provisions of 51 O.S.Supp.1984 § 152.1, see supra note 13.

15 The terms of 51 O.S.Supp.1985 § 153 provide:

"A. The state or a political subdivision shall be liable for loss resulting from its torts or the torts of its employees acting within the scope of their employment subject to the limitations and exceptions specified in this act and only where the state or political subdivision, if a private person or entity, would be liable for money damages under the laws of this state. The state or a political subdivision shall not be liable under the provisions of this act for any act or omission of an employee acting outside the scope of his employment.

B. The liability of the state or political subdivision under this act shall be exclusive and in place of all other liability of the state, a political subdivision or employee at common law or otherwise." (Emphasis added.)

16 Anderson, supra note 11 at 1337.

17 Anderson, supra note 11 at 1337.

18 Anderson, supra note 11 at 1337; So- Lo Oil Company, Inc. v. Total Petroleum, Inc., Okl., 832 P.2d 14, 18 (1992); Humphrey v. Denney, Okl., 757 P.2d 833, 835 (1988); Matter of Phillips Petroleum Co., Okl., 652 P.2d 283, 285 (1982); Lancaster v. State, Okl., 426 P.2d 714, 716 (1967); State v. Dinwiddie, 186 Okl. 63, 95 P.2d 867, 869 (1939).

19 See supra note 13 for the pertinent terms of 51 O.S.Supp.1984 § 152.1(A).

20 See Anderson, supra note 11 at 1336; Neal v. Donahue, Okl., 611 P.2d 1125, 1129 (1980). See also Wilson v. Gipson, Okl., 753 P.2d 1349, 1351-1352 (1988).

21 The terms of 51 O.S.Supp.1984 § 152(5) (effective October 1, 1985) provided:

"5. 'Employee' means any person who is authorized to act in behalf of a political subdivision or the state whether that person is acting on a permanent or temporary basis, with or without being compensated or on a full-time or part-time basis. Employee also includes all elected or appointed officers, members of governing bodies and other persons designated to act for an agency or political subdivision, but the term does not mean a person or other legal entity while acting in the capacity of an independent contractor or an employee of an independent contractor. For the purpose of this act, physicians acting in a nonadministrative capacity, except for resident physicians and interns, practicing at the State of Oklahoma Teaching Hospitals are not employees or agents of the state." (Emphasis added.)

Section 152(5) was extensively amended in 1986. That amendment was interpreted in Anderson, supra note 11. The 1986, 1990, 1991, 1992, 1993 and 1994 amendments of § 152(5) have no effect on this litigation.

22 For the pertinent provisions of 51 O.S.Supp.1984 § 152(5), see supra note 21.

23 Under the doctrine of respondeat superior a principal or employer is generally held liable for those acts of an agent or employee which fall within the latter's employment or authority. Qui facit per alium facit per se (the act of the employee is the act of the employer). This rule rests on the premise that, when exercising delegated authority, the employee stands under the complete control of the employer. Texaco, Inc. v. Layton, Okl., 395 P.2d 393, 396-397 (1964). See also Braden v. Hendricks, Okl., 695 P.2d 1343, 1352 (1985); Elias v. Midwest Marble and Tile Co., Okl., 302 P.2d 126, 127-128 (1956); Mid-Continent Pipeline Co. v. Crauthers, Okl., 267 P.2d 568, 571 (1954); World Pub. Co. v. Smith, 195 Okl. 691, 161 P.2d 861, 863 (1945). In most jurisdictions, the theory of respondeat superior is not extended to a hospital if the doctor is considered a private self-employed contractor. This view is applicable when a doctor-patient relationship pre-exists the patient's admission to the hospital. See Weldon v. Seminole Municipal Hospital, Okl., 709 P.2d 1058, 1059-1060 (1985). Under the theory of ostensible agency, a hospital can be vicariously liable for the negligence of a physician, notwithstanding the physician's independent contractor status, when the patient looks for treatment "solely to the hospital" rather than viewing the facility as merely "the situs where his physician would treat him for his problems." Id.

24 Anderson, supra note 11 at 1339.

25 We express no opinion today whether the physicians' noble efforts constitute a "state interest", but note that their pursuit cannot override a statutory enactment that gives them no immunity. See Anderson, supra note 11 at 1339 (holding that the GTCA contemplates neither (a) a dichotomous division of patients, who are malpractice plaintiffs, based upon a means' test nor (b) a judicial assessment of the doctors' beneficent motivation in providing medical services).

26 Because we conclude that the 1985 GTCA does not shield faculty physicians from tort liability, we need not reach the issue whether Pollay's purchase of liability insurance operates as a waiver of governmental immunity.

27 The quoted text was added to § 152(5) effective July 1, 1986 (Okl.Sess.L.1986, Ch. 247, § 21) and has not been changed by the 1990, 1991, 1992, 1993 and 1994 amendments of that section. The harm in suit occurred during the period between January 27 and February 6, 1986.

28 See discussion, supra note 27.

29 See 51 O.S.Supp.1984 § 152(5) (emphasis added), supra note 21.

30 While faculty physicians who are rendering medical services are not state employees, their nonemployee status does not relieve a state hospital of its responsibility properly to credential medical-staff physicians. Strubhart v. Perry Memorial Hosp. Trust Auth., Okl., 903 P.2d 263, 274-276 (1995), teaches that a hospital has an independent duty--owed directly to its patients--to exercise ordinary care in extending and supervising medical-staff privileges to physicians. Although state hospitals do not bear respondeat superior liability for negligence of faculty physicians--who are statutorily deemed nonemployees--these institutions are nonetheless answerable in tort for their own negligence in the credentialing process.

31 Anderson, supra note 11 at 1339; Ingram v. State, Okl., 786 P.2d 77, 80 (1990); Gunn v. Consolidated Rural Water & Sewer District No. 1, Okl., 839 P.2d 1345, 1349 (1992); Huff v. State, Okl., 764 P.2d 183, 185 (1988); Jarvis v. City of Stillwater, Okl., 669 P.2d 1108, 1111 (1983) (both Huff and Jarvis were abrogated by statutory amendments unrelated to the provisions which are tendered for our consideration in this case, see Bolin v. State, Okl.App., 838 P.2d 29, 30 (1992)).

32 We need not address today (as we did in Anderson, supra note 11 at 1337) the issue whether the 1985 GTCA affords immunity to resident physicians and interns.

33 See in this connection Strubhart, supra note 30 at 271; Eversole v. Oklahoma Hosp. Founders Assn., Okl., 818 P.2d 456, 461-462 (1991). The teachings of Weldon, supra note 23 at 1059, upon which OMH relies, afford no foundation for its immunity analysis. Drawn from the principles of the common law's vicarious liability in tort, they defy intermixture with statutory immunity principles.

34 The limitations-based challenge is whether--in a medical malpractice suit--a defendant's fraudulent concealment of injury extends the time (required by the GTCA) to give pre-suit notice. This argument is based on the so-called discovery rule, which is recognized as applicable in medical malpractice suits. 76 O.S.1991 § 18; Reynolds v. Porter, Okl., 760 P.2d 816, 820 n. 8 (1988); McCarroll v. Doctors General Hosp., Okl., 664 P.2d 382, 385-386 (1983). The critical determination--whether Nelson knew or should have known he was injured--is fact intensive. We can neither weigh those facts nor say as a matter of law (without having both the facts before us and their trial court's resolution) whether the discovery rule is to be applied.

35 When necessary findings of fact and conclusions of law are absent, the case must be remanded with directions that they be made by the trial court. Toxic Waste Impact Group, Inc. v. Leavitt, Okl., 890 P.2d 906, 913 (1995); Dyke v. St. Francis Hospital, Okl., 861 P.2d 295, 300 n. 13 (1993); Matter of Estate of Pope, Okl., 808 P.2d 640, 642 (1990); Robert L. Wheeler, Inc. v. Scott, Okl., 777 P.2d 394, 399 (1989); Teel v. Teel, Okl., 766 P.2d 994, 999 n. 19 (1988); American Ins. Ass'n v. Indus. Com'n, Okl., 745 P.2d 737, 740 n. 15 (1987); Sandpiper North Apartments v. Am. Nat Bank, Okl., 680 P.2d 983, 993 (1984); Matter of Estate of Bartlett, Okl., 680 P.2d 369, 377 (1984); Davis v. Gwaltney, Okl., 291 P.2d 820, 824 (1955).

36 Strubhart, supra note 30 at 274-276.

37 Fent v. Okl. Nat. Gas, Okl., 898 P.2d 126, 134 (1995); Thomas v. National Auto. & Cas. Ins. Co., Okl., 875 P.2d 424, 428 (1994); Dyke, supra note 35 at 304; Parker v. Elam, Okl., 829 P.2d 677, 682 (1992); Seymour v. Swart, Okl., 695 P.2d 509, 512-513 (1985).

Wisdom v. McCall, 90951

Decision Date:	13 April 1998
Docket Number:	No. 90951, 90951
Citation:	Wisdom v. McCall, 956 P.2d 155, 1998 OK 31 (Okla. 1998)
Parties:	Cindy L. WISDOM, Petitioner, v. Honorable C. Allen McCALL, Jr., Judge of the District Court of Comanche County, 5th Judicial District, Respondent.
Court:	Oklahoma Supreme Court

Id. vLex Fastcase: VLEX-888290611

Link: https://fastcase.vlex.com/vid/wisdom-v-mccall-no-888290611

956 P.2d 155

1998 OK 31

Cindy L. WISDOM, Petitioner, v. Honorable C. Allen McCALL, Jr., Judge of the District Court of Comanche County, 5th Judicial District, Respondent.

No. 90951.

Supreme Court of Oklahoma.

April 13, 1998.

CORRECTION ORDER

¶1 Original jurisdiction is assumed. Let the writ issue that prohibits respondent judge, or any other assigned judge from enforcing this Court's September 10, 1997 order in cause No. CJ-95-347 on the docket of the District Court, Comanche County, which in subparagraph 1) exempts from production the staffing, credentials, and peer review records relating to defendant LeBaud, a physician on the staff of defendant Southwestern. The provisions of 63 O.S.1991 § 1-1709 which are not applicable to those records, do not protect and exempt them [*156] from discovery. Strubhart v. Perry Mem. Hosp. Trust, 903 P.2d 263 (Okl.1995).

¶2 All Justices concur.

Funderburk v. Peterson

Decision Date:	03 May 1999
Docket Number:	No. 92, 389., 92
Citation:	Funderburk v. Peterson, 981 P.2d 301, 1999 OK 37 (Okla. 1999)
Parties:	Cassandra FUNDERBURK and Carl Funderburk, Petitioners, v. The Honorable David L. PETERSON, Judge of the District Court, Tulsa County, Oklahoma, Respondent.
Court:	Oklahoma Supreme Court

Id. vLex Fastcase: VLEX-886048181

Link: https://fastcase.vlex.com/vid/funderburk-v-peterson-no-886048181

981 P.2d 301

1999 OK 37

1999 OK 37

Cassandra FUNDERBURK and Carl Funderburk, Petitioners, v. The Honorable David L. PETERSON, Judge of the District Court, Tulsa County, Oklahoma, Respondent.

No. 92,389.

Supreme Court of Oklahoma.

May 3, 1999.

ORDER

¶ 1 Original jurisdiction is assumed. Let the writ issue directing the respondent-judge, or any other judge assigned or to be assigned to Funderburk v. Utica Part Clinic, Cause No. CJ-97-1827, on the docket of the District Court, Tulsa County, forthwith to order that Hillcrest Medical Center deliver for the respondent's *in camera* inspection *all* the insurance and malpractice claims' information which has been withheld from production. Upon inspection, the respondent-judge shall allow discovery of those materials that pertain to credentialing and peer review activities affecting Dr. Tillum. *Materials tending to show facts that were known and knowable about Dr. Tillum's level of skills are discoverable.* 12 O.S. § 3226, *Wisdom v. McCall,* 1998 OK 31, 956 P.2d 155, *Strubhart v. Perry Memorial Hospital Trust,* 1995 OK 10, 903 P.2d 263, *Tuller v. Shallcross,* 1994 OK 133, 886 P.2d 481; see in this connection *Buzzard v. McDanel,* 1987 OK 28, 736 P.2d 157, 160-161.

¶ 2 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 3rd DAY OF MAY, 1999.

¶ 3 ALL JUSTICES CONCUR.

Oklahoma Uniform Jury Instructions

Oklahoma Jury Instructions- Civil

Chapter 14

Section Instruction 14.15 - DUTY OF HOSPITAL

Cite as: O.S. §, __ __

DUTY OF HOSPITAL

Instruction No. 14.15

A hospital must exercise ordinary care and attention for its patients. Ordinary care means that care and attention required under all the circumstances that is appropriate to the physical and mental condition of each patient. A hospital has a duty to [(supervise care rendered to a patient by hospital employees)/(use reasonable care when providing the patient with a nurse/physician/(other health care provider))/(ensure that staff privileges are granted only to competent physicians)/(protect patients from staff physicians that it knows or reasonably should know are incompetent)].

Notes on Use

The last sentence sets out possible examples of a hospital's duty of care. The list is not intended to be complete, nor would a hospital necessarily have the duties to its patients that are set out in the sentence. For example, although a hospital ordinarily does not have a duty to furnish a patient with a physician, if it does do so, such as sometimes occurs in emergency room situations, the hospital must exercise reasonable care. Under certain circumstances, such as where a hospital has knowledge of substandard care, a hospital may even have a duty to review the work of a doctor whom the hospital did not furnish to the patient. *See Strubhart v. Perry Memorial Hosp. Trust Auth.,* 1995 OK 10, ¶ 42, 903 P.2d 263, 278. The trial judge should select the appropriate language according to the evidence presented at trial.

Comments

A hospital's liability for negligence may extend beyond liability based on *respondeat superior* for the acts of nurses and other employees who treat its patients. *See Eversole v. Oklahoma Hosp. Founders Ass'n*, 1991 OK 80, ¶ 17, 818 P.2d 456, 461 (affirming patient's verdict against hospital that also exonerated the nurse who had treated him). In *Weldon v. Seminole Mun. Hosp.*, 1985 OK 94, ¶ 9, 709 P.2d 1058, 1061, the Oklahoma Supreme Court described a hospital's duty of care, as follows: "Oklahoma has adopted the rule that a hospital has an implied duty to exercise ordinary care and attention in proportion to the physical condition of the patient." For other cases applying the same standard, see *Rogers v. Baptist Gen. Convention*, 1982 OK 69, n.1, 651 P.2d 672, 674; *St. John's Hosp. & School of Nursing, Inc. v. Chapman*, 1967 OK 126, ¶ 26, 434 P.2d 160, 168; *Hillcrest Medical Ctr. v. Wier*, 1962 OK 158, ¶ 16, 373 P.2d 45, 48; *Flower Hosp. v. Hart*, 178 Okla. 447, 448, 62 P.2d 1248, 1250 (1936); *Tulsa Hosp. Ass'n v. Juby*, 73 Okla. 243, 247, 175 P. 519, 523 (1918); *Warner v. Kiowa County Hosp. Auth.*, 1976 OK CIV APP 11, ¶ 32, 551 P.2d 1179, 1186. In addition, the Oklahoma Supreme Court ruled in *Strubhart v. Perry Memorial Hosp. Trust Auth.,* 1995 OK 10, ¶ 39, 903 P.2d 263, 277, as follows: "A hospital should have a duty

to ensure that staff privileges are granted only to competent physicians. Hospitals should also have a duty to take reasonable steps to protect hospital patients from staff physicians who have exhibited a pattern of incompetence." The Supreme Court also noted that in some circumstances a pattern of incompetence may be established by one prior episode that was so egregious that the hospital should have known it was dealing with an incompetent physician. 1995 OK 10, n.14, 903 P.2d at 277.

Historical Data

Amended by SCAD 2002-38, effective May 16, 2002 (superseded document available).

Citationizer© Summary of Documents Citing This Document

Cite	***Name Level***

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Oklahoma Jury Instructions- Civil		
Cite	*Name*	*Level*
	INFORMED CONSENT- EXCEPTIONS TO DUTY	*Cited*

Johnson v. Hillcrest Health Center, Inc.

Decision Date:	18 February 2003
Docket Number:	No. 97,076., 97,076.
Citation:	Johnson v. Hillcrest Health Center, Inc., 2003 OK 16, 70 P.3d 811 (Okla. 2003)
Parties:	Geraldine JOHNSON, Administratrix of the Estate of Henry Johnson, Deceased, Plaintiff/Appellant, v. HILLCREST HEALTH CENTER, INC., an Oklahoma corporation, Defendant/Appellee.
Court:	Oklahoma Supreme Court

Id. vLex Fastcase: VLEX-888706191

Link: https://fastcase.vlex.com/vid/johnson-v-hillcrest-health-888706191

70 P.3d 811

2003 OK 16

Geraldine JOHNSON, Administratrix of the Estate of Henry Johnson, Deceased, Plaintiff/Appellant, v. HILLCREST HEALTH CENTER, INC., an Oklahoma corporation, Defendant/Appellee.

No. 97,076.

Supreme Court of Oklahoma.

February 18, 2003.

Rehearing Denied June 2, 2003.

[*813] Howard K. Berry, III, Oklahoma City, OK, for Plaintiff/Appellant.

Michael J. Heron, Daniel L. Cox, Oklahoma City, OK, for Defendant/Appellee.

KAUGER, J.

¶ 1 The issues presented on certiorari are: 1) whether sufficient evidence exists to raise material issues of fact concerning whether the hospital breached the applicable standard of care and whether its breach may have caused or contributed to the death of the patient; and 2) whether the doctor's decision to discharge the patient from the hospital a second time was an intervening cause of the patient's injuries as a matter of law.1 We hold that summary judgment is precluded because: 1) sufficient evidence exists to raise material issues of fact concerning whether the hospital breached the applicable standard of care and the degree to which the breach may have caused or contributed to the patient's death; and 2) the summary judgment materials do not support a determination, as a matter of law, that the doctor's second discharge of the patient was an intervening cause of the patient's death.

FACTS

¶ 2 This cause concerns a negligence suit brought by the appellant, Geraldine Johnson (wife), the administratrix of her husband, Henry Johnson's (husband/patient/Johnson) estate, against the appellee, Hillcrest Heath Center (Hillcrest/hospital) of Oklahoma City, Oklahoma. On December 11, 1997, Johnson sought treatment for chest pains at the Hillcrest emergency room at about 10:30 a.m. The emergency room physician, concerned that Johnson's chest pains could be a heart attack, admitted Johnson to the hospital at about 1:45 p.m. for further testing under the care of Dr. Jozef Dzurilla (Dzurilla/doctor).

¶ 3 In 1997, laboratory blood tests known as CPK and CKMB isoenzyme tests (lab tests) were used to rule out a possible heart attack.2 After initial testing, if the total [*814] CPK level appeared elevated the laboratory would perform a CKMB test to identify myocardial heart isoenzymes to aid in determining if someone was experiencing a myocardial infarction commonly known as a heart attack. At 5:42 a.m. on December 12, 1997, a CPK isoenzyme test was performed on Johnson's blood. Because the test showed an elevated CPK level, the blood sample was submitted for a CKMB isoenzyme test.

¶ 4 According to the laboratory and the hospital, the raw data from the lab tests which indicated an abnormal range were posted to the hospital computer system by 11:26 a.m. on December 12, 1997. The test results, along with the pathologist's report (lab report) interpreting the results and suggesting that the patient had an "[e]arly acute myocardial injury," would ordinarily be placed in the patient's chart after the test results were posted to the computer system. However, Johnson's test results were apparently placed in the wrong chart on December 12, 1997. The raw data from the lab tests was available on computer terminals located throughout the hospital, including Johnson's floor, but the pathologist's report was not on the computer. Dr. Dzurilla, without checking the computer, concluded that Johnson was not suffering from a heart attack and Johnson was released at 11:40 a.m. on December 12, 1997.

¶ 5 The next day, Johnson was readmitted to the hospital again under the care of Dr. Dzurilla still complaining of chest pains. The doctor treated Johnson and discharged him on December 15, 1997. Dr. Dzurilla insists that the lab tests and the lab report were not in Johnson's chart during either of his stays at Hillcrest and that, had he seen the information, he would have confirmed the tests results and consulted with a cardiologist rather than discharge Johnson.

¶ 6 On December 19, 1997, Johnson was admitted to Southwest Medical Center where he was diagnosed and treated for a heart attack. Johnson later died at Southwest on December 21, 1997. On December 2, 1998, Johnson's wife filed a negligence action against the doctor. Subsequently, she amended her petition to include claims against the pathologist and the hospital. On June 22, 2000, the wife dismissed her claim against the pathologist. After settling with the doctor, she dismissed her claim against him on August 20, 2001.

¶ 7 On September 4, 2001, the hospital filed a motion for summary judgment, arguing that the wife could not show that it breached the applicable standard of care or that it caused or contributed to Johnson's death. On November 8, 2001, the trial court, without hearing arguments, entered an order granting summary judgment in favor of the hospital. Johnson appealed, and on July 25, 2002, the Court of Civil Appeals affirmed. We granted certiorari on October 21, 2002.

I.

¶ 8 SUFFICIENT EVIDENCE EXISTS TO RAISE MATERIAL ISSUES OF FACT CONCERNING WHETHER THE HOSPITAL BREACHED THE APPLICABLE STANDARD OF CARE AND THE DEGREE TO WHICH THE BREACH MAY HAVE CAUSED OR CONTRIBUTED TO THE PATIENT'S DEATH.

¶ 9 The wife's negligence claim against the hospital primarily concerns its alleged failure to post the lab tests and the lab report to her husband's chart and/or call them to the doctor's attention before Johnson was discharged from Hillcrest on December 12, 1997, and December 15, 1997. She asserts that: 1) the trial court erred in granting summary judgment to the hospital because her evidence establishes an actionable negligence claim against the hospital; and 2) material fact questions exist which preclude summary judgment.

¶ 10 The hospital argues that the wife's expert testimony evidence fails to establish an actionable negligence claim because she cannot show: 1) a breach of the applicable standard of care in its handling of the lab test or lab report; and 2) a causal link between the alleged deficiencies in its handling of the report and the death of the patient. In support of its argument, the hospital points to the deposition of the wife's expert **[*815]** witness in which the expert testified that: 1) the hospital's posting of its lab tests to the computer was an acceptable method of conveying the results to the doctor;3 and 2) the lab report interpreting the lab tests was not necessary to diagnosis the heart attack in this case.4

¶ 11 The wife counters that her expert's testimony shows that the hospital breached the duty of care that it owed to Johnson and that its breach caused and/or contributed to his injures. In support of her argument she points to her expert's deposition,5 an affidavit **[*816]** prepared by her expert witness,6 and to the deposition of Dr. Dzurilla.7 Nevertheless, she also insists that expert testimony is not necessary under the facts presented.

¶ 12 To support an actionable claim for negligence, a plaintiff must establish the concurrent existence of: a duty on the part of the defendant to protect the plaintiff from injury; a failure of the defendant to perform that duty; and an injury to the plaintiff resulting from the failure of the defendant.8 Negligence on the part of a hospital in the care and treatment of a patient consists of doing something it should not have done, or omitting an action it should have taken.9

¶ 13 Hospitals have an implied obligation or duty to exercise ordinary care in the delivery of professional services to their patients.10 A hospital's duty requires such care and protection to a patient as the patient's condition requires.11 Whether such requirements have been met presents an issue [*817] of fact to be determined by the jury.12 The applicable standard of care and deviations therefrom causing an injury are ordinarily established by expert testimony, unless the common knowledge of lay persons would enable a jury to conclude the applicable standard of care and whether its breach caused the injury.13

¶ 14 Title 63 O.S.2001 § 1-705,14 Oklahoma Administrative Code, 310: 667-19-2 (2001),15 and Oklahoma Administrative Code, 317:30-5-3 (1995), collectively, also impose upon hospitals a duty to document orders, treatment, tests, and services rendered in a patient's chart.16 Although neither party cites to these authorities, we are charged with the duty to take judicial notice of statutes and rules promulgated pursuant to the Administrative Procedures Act.17 Because rules and regulations enacted by administrative agencies and boards pursuant to the powers delegated to them have the force and **[*818]** effect of law,18 they are material and relevant to the issue of the applicable standard of care and its alleged breach.

¶ 15 The obvious purpose of the charting requirement is to provide a record to assist the physician in properly treating the patient. Physicians depend on the reliability and trustworthiness of the chart. As far as a hospital is concerned, there is no more important record than the chart for indicating the diagnosis, the condition, and the treatment required for patients.19 In our view, no degree of knowledge or skill is required other than that possessed by the average person to conclude that the applicable standard of care required the hospital to include completed lab tests and lab reports in the patient's chart to aid the doctor in diagnosing and treating the patient—regardless of whether lab tests are made available on the computer.20

¶ 16 A motion for summary judgment should be sustained only when the pleadings, affidavits, depositions, admissions or other evidentiary materials establish that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.21 All conclusions drawn from the evidentiary materials submitted to the trial court are viewed in the light most favorable to the party opposing the motion.22 Even when basic facts are undisputed, motions for summary judgment should be denied, if under the evidence, reasonable persons might reach different conclusions from the undisputed facts.23

¶ 17 The evidentiary materials show that the hospital's policy was to include the lab tests and lab reports in a patient's chart as soon as possible. Undoubtedly, doctors would not order the lab tests, nor would pathologists interpret the results if the test and the report did not aid a doctor in diagnosing a heart attack. Nothing in the expert's testimony indicates that the information would not have helped the doctor to make the proper diagnosis. **[*819]** ¶ 18 The expert testimony,[24] coupled with Dr. Dzurilla's testimony provide evidence from which the jury could determine causation.[25] On the record presented, the wife's evidence presents facts from which it could be determined that the hospital was negligent. Even if the lab tests were available on the computer, reasonable people might conclude that because the tests were placed in the wrong chart the hospital did not exercise appropriate care given Johnson's medical condition and that the hospital's actions caused or contributed to his death.

II.

¶ 19 THE SUMMARY JUDGMENT MATERIALS DO NOT SUPPORT A DETERMINATION, AS A MATTER OF LAW, THAT THE DOCTOR'S SECOND DISCHARGE OF THE PATIENT WAS AN INTERVENING CAUSE OF THE PATIENT'S DEATH.

¶ 20 The hospital asserts that, as a matter of law, the doctor's second discharge of the patient caused the patient's death and served as an independent and intervening cause, cutting off any liability on its part. The wife contends that: 1) the determinative issue regarding the hospital's liability is the reasonable foreseeability of the doctor's discharge and the patient's subsequent death and the extent it relates to the hospital's failure to provide the laboratory data which indicated a heart attack; and 2) because the question of reasonable foreseeability is for the jury to determine, summary judgment was improper.

¶ 21 The general rule is that a causal chain between a negligent act and an injury may be broken by an intervening event—a supervening cause.[26] Not every intervening event severs the causal link between the negligent act and injury.[27] When a cause merely combines with another act to produce injury, or several events coincide to bring about a single injury, each negligent actor may be held accountable.[28] [*820] ¶ 22 For an occurrence to rise to the magnitude of a supervening cause it must possess three attributes: 1) independence from the original negligent act; 2) adequacy of itself to bring about the complained-injury; and 3) it must not be reasonably foreseeable.[29] If the intervening force is of a character which, under the circumstances, would induce belief that it might be reasonably expected to occur, the final element is not met and the causal chain remains unbroken.[30] Whenever the causal factor under examination qualifies as one of supervening quality, the original negligence may be said to undergo a legal metamorphosis into a remote cause or "mere condition."[31]

¶ 23 We have reviewed the hospital's statement of undisputed facts in its motion for summary judgment and its reply, as well as the evidentiary materials submitted. On the record presented, we have found nothing which would support a determination that the doctor's discharge of the patient, after his second hospitalization, was an intervening cause as a matter of law. When the evidence is presented at trial, a jury might determine that the acts of the doctor and the hospital may be viewed as concurrent acts for which both may be liable.

CONCLUSION

¶ 24 A hospital's duty requires such care and protection to its patients as the patient's condition requires.[32] Charting provides a record to assist the physician in properly treating the patient. Physicians depend on the reliability and trustworthiness of the chart and as far as a hospital is concerned, there is no more important record than the chart for indicating the diagnosis, the condition, and for treating patients.[33]

¶ 25 Hospitals are required to document orders, treatment, tests, and services rendered in a patient's chart.[34] On the record presented, disputed facts and conflicting inferences from undisputed facts might lead reasonable people to conclude that: 1) even if the lab tests were available on the computer, the hospital did not exercise appropriate care given Johnson's medical condition; and 2) the hospital caused or contributed to the **[*821]** patient's death. Furthermore, the summary judgment materials do not support a determination, as a matter of law, that the doctor's second discharge of the patient was an intervening cause of the patient's death. Consequently, summary judgment was premature.

CERTIORARI PREVIOUSLY GRANTED; COURT OF CIVIL APPEALS OPINION VACATED; TRIAL COURT REVERSED AND CAUSE REMANDED.

WATT, C.J., HODGES, LAVENDER, HARGRAVE, SUMMERS, BOUDREAU, JJ., concur.

OPALA, V.C.J., concurs in part; dissents in part.

WINCHESTER, J., dissents.

1. The Court of Civil Appeals held that the issue of whether sufficient evidence exists to raise material issues of fact concerning the hospital's breach of the applicable standard of care and causation was dispositive. Consequently, it did not reach the intervening cause issue. When this court vacates the opinion of the Court of Civil Appeals, we may address any issue properly raised in the appeal or remand the cause to the Court of Civil Appeals for that court to address such an issue. Rule 1.80, 12 O.S.2001, Ch. 15, App. 1, Oklahoma Supreme Court Rules. *Hough v. Leonard,* 1993 OK 112, ¶ 18, 867 P.2d 438.

2. Stedman's Medical Dictionary, 26th Ed.1995 defines CPK as creatine phosphokinase and CK as creatine kinase. According to the pathologist, CKMB or CPKMB is one of the three isoenzymes separated in a CK or CPK test which refers to myocardial or heart.

3. The deposition of the wife's expert, Dr. Albert J. Kolibash, provides in pertinent part at:

p. 71

"... Q: If the system there at Hillcrest Health Center is this information is also available by computer on—in the ICU or the patient's floor, I suspect, much like it is here at your hospital, if this information is available by computer, is that an appropriate—for the hospital an appropriate process for them to follow.

A: The information is available on the computer, the computer is accessible to the physician and it's there within a reasonable period of time, yes, that's acceptable.

Q: Okay. If the evidence will be that this information is also available and would have been available on the second admission to the physician, is that also appropriate?

A: It's appropriate that it's available on the second admission, but it's inappropriate if that's the first time that that was available to the physician.

Q: We've already established that this was available the first go around.

A: I'm sorry. Then the answer to your question is yes...."

pp. 63-65

"... Q: How would those results in 1997 here at the Ohio State University Medical Center be relayed to you as a patient's physician?

A: Via computer.

Q: Is there—Okay.

A: Electronically.

Q: I take it once they're done in the lab, the lab personnel entered it into a computer and it's relayed directly to the floor or unit where that patient is?

A: Yes, sir.

Q: Is it then printed off on a printer?

A: If—No. we're trying to go to electronic records and we have the capabilities now to do this—This is the modern age, I guess, of computer technology where we can pull up all laboratory studies on any patient if you have those privileges. I can do it from my home even.

Q: Could you do that in 1997?

A: We were starting at that time. I don't remember. We—we could —We did have all the information put on computers in 1997, but we didn't go to—We also—We also had hard copies at that point in time.

Our operations here are a little bit different. We have house staff, residents and as well as fellows. It's a teaching hospital. So this information is—is these—This is how we train these kids to get this information right away, but the answer to your question is we would obtain this information both electronically and by a hard copy, both methods.

Q: If, in 1997, at Hillcrest Health Center, both methods were available to the physician, would that be acceptable?

A: Yes...."

4. The deposition of the wife's expert, Dr. Albert J. Kolibash, provides in pertinent part at:

pp. 69-70:

"... Q: Okay. If—if the evidence is that these values in that form was transported by computer to the floor where this patient was, would that be enough for you as this patient's doctor, to make a decision on the course of treatment for him?

A: Yes. If they were there that morning.

Q: Okay. Would you have waited to get the isoenzyme impression from the pathologist before you took any action with this patient?

A: No. Because I think that any internist or cardiologist would be able to interpret that in the context of the clinical situation. You have a gradually increasing CPK, the last result of which was above normal. You now have an MB fraction which is 9 percent, which is elevated. You have a patient that presented with chest pain with a number of risk factors. To me, that's a lot of evidence that could create a high suspicion there's a problem. And then I think you have enough evidence here to make a diagnosis of the subendocardial infarction or a non-Q-wave infarction.

Q: And based upon the evidence there in the chart, without the graph that somehow has been placed in the second admission, if we take that out of the equation, just with the evidence in the chart there, would you have enough information available to you to know that this patient had myocardial infarction?

A: Yes. I wouldn't need the graph. As a matter of fact, we don't—we don't even use graphs in our hospital.

Q: Okay. And that was my next question. Is that the same back in 1997, did you use graphs?

A: Not that I remember...."

5. The deposition of the wife's expert, Dr. Albert J. Kolibash provides in pertinent part at pp. 62-63:

"... Q: Okay, Dr. Kolibash, I'm Mike Heron. I represent Hillcrest Health Center in this lawsuit. Let me first just ask you if you have any criticism of any of the care and treatment rendered to Mr. Johnson by Hillcrest Health Center?

A: The only concern I have is how the results of the laboratory studies, particularly the CPK/MB was handled.

Q: Okay. You say it's a concern. Is that a criticism or just a concern?

A: Well, I don't understand how—When— Why is it that the test that was done—Yes, it's a criticism because when I read these records, I found the report of the CPK/MB which was performed on the morning at 8:00 on the 12th on the second hospitalization chart in these records and I—That, to me, seems inappropriate. Why wasn't—My question to myself was why is this test that was done, which is an important test and has significant information on it, why is it in the wrong chart and why was it not made available to the physician on the first hospitalization...."

6. The affidavit of Dr. Kolibash provides in pertinent part:

"... In my opinion as a Board Certified cardiologist and based on my review of material provided to me there was clearly a delay in diagnosing Henry Johnson's heart attack. That delay in diagnosing this heart attack caused or contributed to the death of Henry Johnson.

...

All factors that contributed to Dr. Dzurilla's failure to know and appreciate the results of the December 12th CKMB contributed to the delay that caused or contributed to the death of Henry Johnson.

... The pathologist's interpretation that indicated that there was evidence of `early acute myocardial injury' that was created on December 12, 1997 should have been posted on the chart on December 12th, 13th, 14th or 15th..."

7. Dr. Dzurilla's deposition provides in pertinent part:

at pp. 31-33:

"... Q: If someone had brought to your attention the information contained in Plaintiff's Exhibit 3 before he left the hospital on December 12th, would you have asked that he stay in the hospital?

A: I probably would have repeated the test.

Q: Would you have tried to get a cardiologist into the case?

A: Not at that point.

Q: If you had repeated the test and it confirmed the results, would you have got a cardiologist into the case?

A: So if I would repeat the test and if the results was confirmed, yeah, then I would get a cardiologist.

...

Q: Is it a possibility that is was—is was there on the 15th when you discharged him and you just overlooked it?

A: No...."

at p. 36

"... Q: All right. So at any rate if you had seen Plaintiff's Exhibit No. 3, you would have done further tests and based on the results of those tests made a decision about getting a cardiologist into the case or not. Is that a fair statement.

A: Yes...."

8. *Kraszewski v. Baptist Medical Center of Oklahoma,* 1996 OK 141, ¶ 6, 916 P.2d 241; *Phelps v. Hotel Management, Inc.,* 1996 OK 114, ¶ 6, 925 P.2d 891; *Krokowski v. Henderson National Corp.,* 1996 OK 57, ¶ 9, 917 P.2d 8.

9. *City of Okmulgee v. Clark,* 1967 OK 56, ¶ 8, 425 P.2d 457; *Hillcrest Medical Center v. Wier,* 1962 OK 158, ¶ 8, 373 P.2d 45; *Duke Sanitarium v. Hearn,* 1932 OK 458, ¶ 0, 13 P.2d 183.

10. *Franklin v. Toal,* 2000 OK 79, ¶ 14, ¶ 18, 19 P.3d 834; *Jackson v. Oklahoma Mem'l Hosp.,* 1995 OK 112, ¶ 12, 909 P.2d 765.

11. *Franklin v. Toal,* see note 10, supra at ¶ 18; *Harder v. F.C. Clinton, Inc.,* 1997 OK 137, ¶ 11, 948 P.2d 298; *Strubhart v. Perry Memorial Hosp. Trust Authority,* 1995 OK 10, ¶ 22, 903 P.2d 263 [Degree of care and attention proportionate with physical and mental ailments of patient.]; *Rogers v. Baptist General Convention of the State of Oklahoma,* 1982 OK 69, ¶ 18, 37 A.L.R.4th 193, 651 P.2d 672.

12. *Jackson v. Oklahoma Mem'l Hosp.,* see note 10, supra at ¶ 21; *City of Okmulgee v. Clark,* see note 9, supra at ¶ 7; *Hillcrest Medical Center v. Wier,* see note 9, supra at ¶ 7.

13. *Boxberger v. Martin,* 1976 OK 78, ¶ 14, 552 P.2d 370 [When physician's lack of care has been such as to require only common knowledge to understand and judge it, expert testimony is not required to establish that care nor is it required to establish the cause of an objective injury where there is other competent evidence to establish the cause with reasonable certainty.]; See, *Strubhart v. Perry Memorial Trust Authority,* 1995 OK 10, ¶ 33, 903 P.2d 263 [Unless conduct of doctor is obviously incompetent conduct, expert testimony is needed to show the conduct is a type that would lead hospital to take precautionary steps because expert testimony is required where the fact in issue is not within the realm of ordinary experience of mankind.]; *Turney v. Anspaugh,* 1978 OK 101, ¶ 20, 581 P.2d 1301 [Rule that expert medical testimony is required to support professional negligence case is subject to exception where negligence is so grossly apparent that layman would have no difficulty recognizing it.] See also, *Eversole v. Oklahoma Hospital Founders Ass'n,* 1991 OK 80, ¶ 16, 818 P.2d 456 [No degree of knowledge or skill is required other than that possessed by average person to conclude that allowing a dizzy patient to walk and then allowing him to fall does not ordinarily occur in the care of patients and that its occurrence is presumably a negligent act.]

14. Title 63 O.S.2001 § 1-705 provides in pertinent part:

"A. The State Board of Health, upon recommendation of the State Commissioner of Health and with the advice of the Oklahoma Hospital Advisory Council hereinafter provided for shall promulgate rules and standards for the construction and operation of hospital, for which licenses are required by the terms of this article, to provide for the proper care of patients. The promulgations of rules shall be subject to and be governed by the provisions of the Administrative Procedures Act...."

Because the statute has remained unaltered since 1999, references are to its current version.

15. OAC: 310:667-19-2 provides in pertinent part:

"... (b) Record of patient admission.

...

(4) Orders for medications, treatments and tests.

(A) All medication orders shall be written in ink and signed by the ordering practitioner authorized by law to order the medication. The order shall be preserved on the patient's chart. Signature stamps shall not be used as a substitute for the signature of the authorizing practitioner.

(B) All orders shall be written in ink and signed by the ordering practitioner. Orders received by resident physicians shall be co-signed if required by medical staff bylaws. The order shall be preserved on the patient's chart. Signature stamps shall not be used as a substitute for the signature of the authorizing practitioner.

(C) All orders taken from the practitioner, for entry by persons other than the practitioner, shall be countersigned as soon as possible...."

16. OAC 317:30-5-3 provides:

"Records in a physician's office or a medical institution (hospital, nursing home or other medical facility), must contain adequate documentation of services rendered. Such documentation must include the physician's signature or identifiable initials in relation to every patient visit, every prescription, or treatment. In verifying the accuracy of claims or procedures which are reimbursed on a time frame basis, it will be necessary that documentation be placed in the patient's chart as to the beginning and ending times for the services claimed."

17. Title 75 O.S.2001 § 252 provides in pertinent part:

"... All courts, boards, commissions, agencies, authorities, instrumentalities, and officers of the State of Oklahoma, shall take judicial or official notice of any rule, amendment, revision, or revocation of an existing rule promulgated pursuant to the provisions of the Administrative Procedures Act ..."

Davis v. GHS Health Maintenance Organization, Inc., 2001 OK 3, ¶ 25, 22 P.3d 1204; *Cox v. Dawson,* 1996 OK 11, ¶ 18, 911 P.2d 272; *Butler v. Oklahoma Horse Racing Comm'n,* 1994 OK 50, ¶ 1, 874 P.2d 1278.

18. *Cox v. Dawson,* see note 17, supra; *Toxic Waste Impact Group, Inc. v. Leavitt,* 1988 OK 20, ¶ 12, 755 P.2d 626; *Texas Oklahoma Express v. Sorenson,* 1982 OK 113, ¶ 3, 652 P.2d 285.

19. See, *Globe Indemnity Co. of New York v. Reinhart,* 152 Md. 439, 137 A. 43, 45 (1927) wherein the Court, when discussing the admissibility of a chart, described the hospital chart as:

"... [A] record required by the hospital authorities to be made by one whose duty it is to correctly make the entries therein contained. So far as the hospital is concerned, there could be no more important record than the chart which indicates the diagnosis, the condition, and treatment of the patients. This record is one of the important advantages incident to hospital treatment, for it not only records for the use of the physician or surgeon what he himself observes during the time he is with the patient, but also records at short intervals the symptoms, condition, and treatment of the patient during the whole time of the physician's absence. Upon this record the physician depends in large measure to indicate and guide him in the treatment of any given case. Long experience has shown that the physician is fully warranted in depending upon the reliability and trustworthiness of such record. It is difficult to conceive why this record should not be reliable...."

20. We do not comment on what the average person would conclude the applicable standard of care was in this case in 1997, as this is a jury question. Further, we refrain from commenting on whether the standard of care would be different today, given the increased implementation of computer technology in the medical profession since that time. We recognize that medical literature reflects and supports the advent of electronic medical records and even advocates the movement towards the elimination of handwritten clinical data in the foreseeable future. See Amy Jurevic Sokol, J.D., M.H.A. & Christopher J. Molzen, J.D., *The Changing Standard of Care in Medicine: E-Health, Medical Errors, and Technology Add New Obstacles,* 23 J. Legal M ed. 449 (2002); *See also* Charles Safran, M.D., *Electronic Medical Records*: A Decade of Experience, 285 J.A.M.A. 1766 (2001); Dena E. Rifkin, *Electronic Medical Records: Saving Trees, Saving Lives*, 285 J.A.M.A. 1764 (2001). m.D.

21. *K & K Food Services, Inc. v. S & H, Inc.,* 2000 OK 31, ¶ 16, 3 P.3d 705; *Skinner v. Braum's Ice Cream Store,* 1995 OK 11, ¶ 9, 890 P.2d 922; *Buck's Sporting Goods, Inc., of Tulsa v. First Nat. Bank & Trust Co. of Tulsa,* 1994 OK 14, ¶ 11, 868 P.2d 693.

22. *K & K Food Services, Inc. v. S & H, Inc.,* see note 20, supra; *Phelps v. Hotel Management, Inc.,* 1996 OK 114, ¶ 7, 925 P.2d 891; *State* ex rel. *Hettel v. Security National Bank & Trust Co. in Duncan,* 1996 OK 53, ¶ 24, 922 P.2d 600.

23. *Prichard v. City of Oklahoma City,* 1999 OK 5, ¶ 19, 975 P.2d 914; *Kraszewski v. Baptist Medical Center of Oklahoma,* see note 8, supra; *Krokowski v. Henderson National Corp.,* see note 8, supra.

24. The hospital argues that the expert's affidavit should not be considered on summary judgment because the wife is merely attempting to create issues of fact by submitting an affidavit which contradicts the deposition testimony. It relies upon two federal court opinions, *Radobenko v. Automated Equipment Corporation,* 520 F.2d 540, 544 (9th Cir.1975) and *Barticheck v. Fidelity Union Bank,* 680 F.Supp. 144 (D.N.J.1988) in support of its argument. The federal decisions are inapplicable and distinguishable on their facts. In both cases the plaintiffs inexplicably offered affidavits directly contradicting their prior depositions in order to avoid summary judgment. Here, conflicting inferences existed within the expert's deposition before the affidavit was ever prepared. For instance, in one portion of the deposition, the expert testified that providing the information via computer is acceptable and that the doctor could have diagnosed the heart attack without the information. See the deposition of the wife's expert, notes 3 and 4, supra. In another portion of the deposition the expert testified that: 1) providing the lab test and lab reports on computer was acceptable if they were also available in the chart; and 2) the lab tests and reports were significant and important information that the hospital should have made available to the patient's chart on the first hospitalization. See the deposition of the wife's expert, notes 3 and 5, supra. The conflicting inferences between the deposition and the affidavit are for the trier of fact to resolve.

25. If a defendant's action contributed to cause a plaintiff's injury, the defendant is liable even though his/her act or negligence alone might not have been a sufficient cause. *Bode v. Clark Equipment Co.,* 1986 OK 21, ¶ 13, 719 P.2d 824. The proximate or contributing cause of a plaintiff's injury is a question of fact for the jury. *Hampton By & Through Hampton v. Hammons,* 1987 OK 77, ¶ 14, 743 P.2d 1053. *Thompson v. Presbyterian Hosp. Inc.,* 1982 OK 87, ¶ 12, 652 P.2d 260. It becomes one of law only when there is no evidence from which the jury could reasonably find a casual link between the negligent act and the injury or where the facts are undisputed. *Busby v. Quail Creek Golf & Country Club,* 1994 OK 63, ¶ 19, 885 P.2d 1326; *Mansfield v. Circle K. Corp.,* 1994 OK 80, ¶ 15, 877 P.2d 1130; *Hampton By & Through Hampton v. Hammons,* see this note, supra. Where uncontroverted facts lend support to conflicting inferences, the choice to be made between opposite alternatives also presents an issue of fact for the jury. *Jackson v. Jones,* 1995 OK 131, ¶ 6, 907 P.2d 1067; *Wetsel v. Independent School Dist. I-1,* 1983 OK 85, ¶ 10, 670 P.2d 986; *Thomas v. Keith Hensel Optical Labs,* 1982 OK 120, ¶ 7, 653 P.2d 201.

26. *Bouziden v. Alfalfa Elec. Co-op., Inc.,* 2000 OK 50, ¶ 33, 16 P.3d 450; *Lefthand v. City of Okmulgee,* 1998 OK 97, ¶ 8, 968 P.2d 1224; *Jackson v. Jones,* see note 24, supra at ¶ 9.

27. *Jackson v. Jones,* see note 24, supra; *Thompson v. Presbyterian Hosp., Inc.,* see note 24, supra at ¶ 6; *Minor v. Zidell Trust,* 1980 OK 144, ¶ 7, 618 P.2d 392.

28. *Id.*

29. *Bouziden v. Alfalfa Elec. Co-op, Inc.,* see note 25, supra; *Franks v. Union City Public Schools,* 1997 OK 105, ¶ 8, 943 P.2d 611; *Lockhart v. Loosen,* 1997 OK 103, ¶ 10, 943 P.2d 1074.

30. *Jackson v. Jones,* see note 24, supra; *Atherton v. Devine,* 1979 OK 132, ¶ 4, 602 P.2d 634.

31. *Thompson v. Presbyterian Hospital, Inc.,* see note 24, supra; *Minor v. Zidell Trust,* see note 26, supra. The hospital relies on *Porter v. Norton-Stuart Pontiac-Cadillac of Enid,* 1965 OK 18, 405 P.2d 109 in support of its argument that the doctor's actions as a matter of law cut off any liability on its part. *Porter* involved an indemnity suit between a car dealership and an instrument manufacturer for the injury to the dealership's customer. While an employee of the instrument manufacturer was working on a car, the car lurched forward and ran over the customer. The customer sued the dealership and the manufacturer for negligence. The Court recognized that regardless of whether the dealership failed to maintain a safe premises or failed to warn the customer, the sole cause of the injury was the act of the manufacturer's employee moving the gear selector from neutral to drive. *Porter* is clearly distinguishable from the present cause on its facts. In *Porter,* the dealership's negligence, if any, was so far removed from the causal nexus between its negligence and the instrument manufacturer's negligence, that the Court held that it merely furnished a condition by which the injury was possible and a subsequent act caused the injury. Here, we cannot say that as a matter of law that the hospital was merely furnishing a condition by which the injury could have occurred. Rather, the evidentiary material suggests that it's failure to timely provide the test results could be determined by a jury to have been a cause or contributing factor in doctor's failure to properly diagnosis and treat the heart attack.

32. *Franklin v. Toal,* see note 10, supra at ¶ 18; *Harder v. F.C. Clinton, Inc.,* see note 11, supra; *Strubhart v. Perry Memorial Hosp. Trust Authority,* see note 11, supra; *Rogers v. Baptist General Convention of the State of Oklahoma,* see note 11, supra.

33. See, *Globe Indemnity Co. of New York v. Reinhart,* note 19, supra.

34. Title 63 O.S.2001 § 1-705, see note 14, supra; OAC: 310:667-19-2 see note 15, supra; OAC 317:30-5-3, see note 16, supra.

Moran v. City of Del City

Decision Date:	03 June 2003
Docket Number:	No. 97,346., 97,346.
Citation:	Moran v. City of Del City, 77 P.3d 588, 2003 OK 57 (Okla. 2003)
Parties:	Joshua MORAN and Ruth Moran, as parents and next friends of D. M., a minor, Plaintiffs/Appellants, v. The CITY OF DEL CITY, a municipal corporation, Defendant/Appellee.
Court:	Oklahoma Supreme Court

Id. vLex Fastcase: VLEX-888387433

Link: https://fastcase.vlex.com/vid/moran-v-city-of-888387433

77 P.3d 588

2003 OK 57

Joshua MORAN and Ruth Moran, as parents and next friends of D. M., a minor, Plaintiffs/Appellants, v. The CITY OF DEL CITY, a municipal corporation, Defendant/Appellee.

No. 97,346.

Supreme Court of Oklahoma.

June 3, 2003.

As Corrected June 17, 2003.

Rehearing Denied September 15, 2003.

[*589] Gary C. Bachman, Kenyatta R. Bethea, Holloway, Dobson & Bachman, Oklahoma City, OK, for Plaintiffs/Appellants.

Robert M. Anthony, Robert S. Lafferrandre, Pierce, Couch, Hendrickson, Baysinger & Green, Oklahoma City, OK, for Defendant/Appellee.

SUMMERS, J.

¶ 1 The primary issue on certiorari is whether an exemption from tort liability in the Governmental Tort Claims Act, 51 O.S. Supp.2000 § 151 *et seq.*, shields a political subdivision from liability based upon an allegation that the subdivision did not maintain its real property in a safe condition. We conclude that the "inspection powers or functions" exemption of the Governmental Tort Claims Act is not so broad as to include any act of a political subdivision that is designed to obtain knowledge of a condition or circumstance of its real property.

¶ 2 Two children were crossing a vacant lot when one fell into an uncovered sanitary sewer manhole. The other child went to an adjacent home to obtain help from adults. After one adult was unable to reach the outstretched arms of the child, another adult, Mr. Smart, used a rope to pull the child from the hole.

¶ 3 Mr. Smart described what he saw for the purpose of an affidavit used by Del City:

I noticed that the manhole lid and rim were gone, and that the concrete column of the manhole had been smashed down so that it was almost flush with the ground. **[*590]** A young boy (who was later identified to me as D.... M ....) was standing at the bottom of the manhole. He was chest-deep in sewer water, which smelled terrible.

This manhole is located in a vacant grassy lot that is owned and maintained by Del City. The lot is near athletic facilities used by children.

¶ 4 The parents of the child brought an action against the City of Del City. Del City filed a motion for summary judgment with a brief and affidavits. Del City argued that 1) the City was not negligent because the cause of the child's injuries was the intentional act of an unknown vandal, and 2) that the cause of action against the City was barred by the Governmental Tort Claims Act, (GTCA), 51 O.S.2001 § 151 *et seq.* Parents responded with their brief and affidavits. Del City responded and challenged affidavits submitted by the parents. The District Court granted Del City's motion for summary judgment without stating the specific grounds upon which the judgment was based.

¶ 5 The parents appealed and urged as error that questions of fact existed so as to preclude summary judgment. They included under this alleged error various assertions relating to whether Del City violated certain standards of care. The Court of Civil Appeals concluded that "The competing summary judgment materials and affidavits demonstrate substantial controversy over material facts concerning Morans' cause of action based upon the City's negligence." The appellate court concluded that the City's defense of supervening cause[1] could not be the basis of summary judgment because of disputed facts on what the City knew, or should of known, about the condition of the manhole prior to the child's injuries. But the appellate court concluded that summary judgment was nevertheless proper, because the claim that the City negligently failed to inspect and maintain the manhole was barred by 51 O.S.Supp.2000 § 155(13) of the GTCA. The parents then sought certiorari in this Court, claiming that Del City failed to properly maintain the lot and that their claim for relief was not barred by the GTCA.

¶ 6 Governmental immunity of a subdivision of the State is waived only to the extent and in the manner provided in the GTCA. *Salazar v. City of Oklahoma City,* 1999 OK 20, 976 P.2d 1056, 1066, *quoting,* 51 O.S.1991 § 152.1(B). A political subdivision shall be liable for loss resulting from its torts or the torts of employees committed within the scope of employment where private persons or entities would be liable under the laws of this state. *Walker v. City of Moore,* 1992 OK 73, 837 P.2d 876, 878, *citing,* 51 O.S.1991 § 153(A). However, the GTCA makes certain exemptions from this liability. 51 O.S.Supp.2000 § 155.[2] Included therein is the one urged by Del City and applied by the Court of Appeals.

§ 155. Exemptions from liability

The state or a political subdivision shall not be liable if a loss or claim results from: ... 13. Inspection powers or functions, including failure to make an inspection, review or approval, or making an inadequate or negligent inspection, review or approval of any property, real or personal, to determine whether the property complies with or violates any law or contains a hazard to health or safety, or fails to conform to a recognized standard;

51 O.S.Supp.2000 § 155(13).

On certiorari the parents make a distinction between inspection powers performed by Del **[*591]** City and "maintenance of the vacant lot" owned by Del City. Parents are correct.

¶ 7 We first note that § 155(13) makes no reference to a political subdivision's maintenance of property. But § 155 does expressly include exemptions from liability for claims arising from the "maintenance" of a prison, jail, correctional facility, juvenile detention facility, or state highway system. 51 O.S.Supp.2000 § 155(24), (25), (30).3 The interpretation of Del City is that the language of § 155(13): "failure to make an inspection, review or approval, or making an inadequate or negligent inspection" must include acts of maintenance that would, or should, result from inspections performed by a political subdivision.

¶ 8 A statute must be read to render every part operative and to avoid rendering parts thereof superfluous or useless. *In re Baby Girl L.,* 2002 OK 9, ¶ 21, 51 P.3d 544, 554. We construe the parts of the GTCA as consistent parts of a whole. *Pellegrino v. State ex rel. Cameron University ex rel. Board of Regents of State,* 2003 OK 2, ¶ 16, 63 P.3d 535, 540. Del City's construction of § 155(13) so as to include maintenance functions within the rubric of "inspection powers and functions" would make the "maintenance" provisions of § 155(24), (25), and (30) to be superfluous. Thus, the phrase "[i]nspection powers or functions" does not include the maintenance of property.

¶ 9 Del City relies upon *Brewer v. Independent School District No. 1,* 1993 OK 17, 848 P.2d 566, for the proposition that the "inspection exemption" from liability applies when a political subdivision fails to keep its property in a reasonably safe condition. In *Brewer* two of the allegations were that the school district negligently failed to keep its premises in a reasonably safe condition, and that it failed to inspect its premises at proper intervals. *Id.* 848 P.2d at 570. We said that no liability could be predicated on the latter allegation relating to inspection because of § 155(13). *Id.* However, summary judgment on the former allegation of keeping the premises in a safe condition was not addressed in the opinion as barred by § 155(13). Instead, the parties and the Court addressed the condition of the property as it related to the injured person's status as a trespasser, licensee or invitee. *Id.* 848 P.2d at 571. We said

Even in the absence of the attractive nuisance doctrine, the School still had a duty to Kristin either as a trespasser, licensee or invitee. Different duties are owed depending on the status of the injured person. *See Good v. Whan,* 335 P.2d 911 (Okla.1959).

The School concedes

that Kristin was a licensee. Brief of Appellee, at 7. Licensee status is accorded to those individuals who enter onto another's land for his or her own benefit, interest or pleasure under such circumstances that the landowner is presumed to be aware of the person's presence there. *Good,* 335 P.2d at 913, 914. An owner is charged with exercising ordinary care to avoid injuring a licensee, which is that degree of care a person of ordinary prudence would exercise under the facts and circumstances of the particular case. *Good* at 914. As a licensee, the School owed Kristin the duty to use ordinary care with regard to any defects or conditions in the nature of hidden dangers which were known or should have been known to the School. *Id.* at 913; see also *Henryetta Constr. Co. v. Harris,* 408 P.2d 522, 525 (Okla.1965).

Brewer, 848 P.2d at 571, emphasis added.

Thus, while we said that a claim couched in the language of a "failure to inspect" the **[*592]** premises was barred by § 155(13), we nevertheless considered potential liability based upon what the defendant knew or should have known about the premises. The political subdivision's premises liability in tort is not controlled solely by the "failure to inspect" exemption.

¶ 10 Del City also relies upon an opinion of our Court of Civil Appeals that cites *Brewer, Reynolds v. Union Public Schools,* 1998 OK CIV APP 101, 976 P.2d 557. The *Reynolds* court concluded that "if the negligent maintenance is based on the failure to discover (inspect) or negligent inspection, then the school is exempt from liability." *Reynolds,* at ¶ 7, 976 P.2d at 558. That court reasoned that if the maintenance personnel should have discovered the dangerous condition and did not do so, then the plaintiff's claim was one for negligent inspection, and must fail due to § 155(13). But maintenance of property is not the same thing as inspection of property for § 155(13). A landowner may be liable for negligent maintenance of property irrespective of its inspection powers or functions. We now disapprove of *Reynolds* insofar as it would extend an inspection power or function in § 155(13) to include the simple act of a landowner in acquiring or not acquiring knowledge of the landowner's property.

¶ 11 The concept of a person's duty to discover facts, and to anticipate what might occur under the circumstances, is involved, at some point, in all negligence cases. Negligence is sometimes defined by a person's duty to know certain facts and then guard against the consequences of them.

In negligence, the actor does not desire to bring about the consequences which follow, nor does he know that they are substantially certain to occur, or believe that they will. There is merely a risk of such consequences, sufficiently great to lead a reasonable person in his position to anticipate them, and to guard against them....

[Risk is defined] as a danger which is apparent, or should be apparent, to one in the position of the actor.

Prosser and Keeton on the Law of Torts, 169, 170 (5th ed.1984), (material omitted, explanation and emphasis added).

The negligence standard describes a duty of what "should be apparent" and is merely another way of saying what the person "should know" for a circumstance. Whether these facts are part of foreseeability, and are made a part of defining a particular duty, or as an element of causation,4 is not important to the point that liability in many types of negligence cases involves an adjudication of what the defendant should have known.

One of the most difficult questions in connection with negligence is that of what the actor may be required to know.... He may be negligent in failing to look, or in failing to observe what is visible when he does look.

Prosser and Keeton on the Law of Torts, 182 (5th ed.1984), (material omitted and emphasis added).

This concept is found in the Restatement (Second) of Torts.

(2) The words "should know" are used throughout the Restatement of this Subject **[*593]** to denote the fact that a person of reasonable prudence and intelligence or of superior intelligence of the actor would ascertain the fact in question in the performance of his duty to another, or would govern his conduct upon the assumption that such fact exists.

Restatement (Second) of Torts § 12(2).

This concept of creating liability based, in part, upon what the person, should know or should discover, is not foreign to our tort jurisprudence in general,5 or tort claims against the State in particular.6

¶ 12 The exercise of ordinary care in many circumstances requires a person to be aware of facts relating to a thing or a particular circumstance. An exemption arising from an "inspection power or function" cannot include becoming aware of circumstances in a general sense without also bringing many types of negligence cases within the class of exempted claims. We thus decline to follow the *Reynolds* analysis for the meaning of "inspect" in § 155(13). Were we to hold otherwise we would put in doubt the viability of every GTCA claim based upon what a defendant should have known. Such an interpretation would expand the application § 155(13) to the point that many other provisions of § 155 would be superfluous.

¶ 13 Our conclusion is buttressed by the fact that § 155(13) says that a state or a political subdivision shall not be liable if a loss or claim results from inspection powers or functions. Governmental entities possess governmental powers and governmental functions. Section 155 refers to legislative functions, § 155(1); judicial, quasi-judicial, or prosecutorial functions, § 155(2); licensing powers or functions, § 155(12); and inspection powers or functions, § 155(13). 51 O.S.Supp.2000 § 155. The GTCA speaks in terms of a power or function, and not conduct to acquire knowledge.

¶ 14 A particular inspection power or function is not necessarily synonymous with a particular act of checking something out. For example, in *State v. Chickasha Milling Co.,* 1937 OK 477, 71 P.2d 981, in the context of a tax ferret proceeding, the State invoked Okla. Const. Art. 2 § 28,7 and argued that it **[*594]** was authorized to inspect certain portions of defendant's business records. We explained that an inspection of records as part of adversary proceedings where the State is a party did not apply to an inspection as a result of an exercise of the State's constitutional visitorial8 powers. *Id.* 985-986.

¶ 15 We thus view § 155(13) as describing the exercise of a particular governmental "power" or "function" and not a simple familiarization with one's own property. Governmental entities exercise inspection powers and functions in many contexts, but no particular governmental inspection power or function is at issue in this case. We thus vacate that portion of the opinion of the Court of Civil Appeals holding that § 155(13) applies in this case to exempt Del City from liability.

¶ 16 On certiorari Del City also argues that § 155(6) exempts it from liability. Section 155(6) creates an exemption if the loss or claim results from "6. Civil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police, law enforcement or fire protection;...." 51 O.S.Supp.2000 § 155(6). Del City states that one allegation is that it failed to investigate reports of vandalism involving the removal of manhole covers and thereby created a dangerous condition. Del City argues that the § 155(6) exemption is known as the "negligent investigation exemption" and that the claim against Del City is based upon an allegation of negligent investigation of criminal activity.

¶ 17 We have explained this exemption as follows:

Section 155(6) of the GTCA affords immunity to a governmental subdivision for claims that result from "the failure to provide, or the method of providing, police, law enforcement or fire protection." "Protection" serves as the key word for the textual analysis of the critical sentence quoted here from subsection 6. The exemption in that subsection is invocable when the tort arises while a municipality is rendering services that fall into some category of police protection, law enforcement protection or fire protection.

In short, a governmental subdivision is not liable for deficiency of protective services extended by its police, law enforcement or fire fighting components.

Salazar v. City of Oklahoma City, 1999 OK 20, ¶ 26, 976 P.2d 1056, 1066, notes omitted. In *Salazar* we distinguished between providing protective services and carrying out law enforcement duties. *Id.* at ¶ 27, 976 P.2d at 1066. The exemption from liability applied to the former and not the latter.

¶ 18 The allegation against Del City is not that Del City was negligent in providing protection from criminal activity. Rather, it is an allegation that Del City, as an owner of real property, was a victim of wrongful activity, and then did not reasonably remedy an unsafe condition on its property that resulted from the wrongful activity. Del City's reliance upon § 155(6) is misplaced.

¶ 19 The Court of Civil Appeals (COCA) decided two issues in this matter. First, it decided that the City's defense of supervening cause could not be resolved by summary judgment procedure because of the existence of a substantial controversy over material facts. This issue was not presented on certiorari, and we leave undisturbed that portion of the opinion by the Court of Civil Appeals.

¶ 20 The Court of Civil Appeals also decided that the exemption of 51 O.S.Supp.2000 § 155(13) applied. We have concluded on certiorari that § 155(13) does not apply, and we accordingly vacate that portion of the COCA opinion. Because the COCA opinion was released for publication and we have vacated those portions of that opinion on the immunity issue, we also withdraw the COCA opinion from publication.

¶ 21 The judgment of the District Court granting summary judgment to Del City is **[*595]** reversed, and the matter is remanded to that court for further proceedings consistent with this opinion, and consistent with the opinion of the COCA to the extent that it decided that a controversy of facts precluded summary judgment on Del City's defense of supervening cause.

¶ 22 WATT, C.J., OPALA, V.C.J., HODGES, KAUGER, and BOUDREAU, JJ., concur.

¶ 23 LAVENDER, HARGRAVE, and WINCHESTER, JJ., dissent.

1. A supervening cause (or superseding cause) is a new, independent and efficient cause of the injury which was neither anticipated nor reasonably foreseeable. *Akin v. Missouri Pacific R. Co.,* 1998 OK 102, ¶ 38, 977 P.2d 1040, 1054-1055. A supervening cause that will insulate the original actor from liability is based upon a three-prong test where the cause is: (1) independent from the original negligent act, (2) adequate in itself to bring about the relevant injury, and (3) reasonably unforeseeable. *Akin,* 1998 OK 102, at n. 81, 977 P.2d 1040.

2. We have said that provisions of the GTCA applicable in a particular controversy are those in effect when the alleged injuries occurred. *Lykins v. Saint Francis Hosp., Inc.,* 1995 OK 135, 917 P.2d 1, 4. *Cf. Ingram v. State,* 1990 OK 2, 786 P.2d 77, 79, (analysis based upon the version of statute in effect when the injury occurred). The alleged injury in the case before us occurred on August 26, 2000. The version of § 155 in effect on that date is codified at 51 O.S.Supp.2000.

3. 51 O.S.Supp.2000 § 155(24), (25), (30), (emphasis added):

"24. Provision, equipping, operation or maintenance of any prison, jail or correctional facility, or injuries resulting from the parole or escape of a prisoner or injuries by a prisoner to any other prisoner; provided, however, this provision shall not apply to claims from individuals not in the custody of the Department of Corrections based on accidents involving motor vehicles owned or operated by the Department of Corrections;

25. Provision, equipping, operation or maintenance of any juvenile detention facility, or injuries resulting from the escape of a juvenile detainee, or injuries by a juvenile detainee to any other juvenile detainee; ...

30. Maintenance of the state highway system or any portion thereof unless the claimant presents evidence which establishes either that the state failed to warn of the unsafe condition or that the loss would not have occurred but for a negligent affirmative act of the state;"

4. We have recognized that "foreseeability" is a term used in both defining a duty and as an element of proximate cause. *Delbrel v. Doenges Bros. Ford, Inc.,* 1996 OK 36, 913 P.2d 1318, 1322. We have used "foreseeability" to describe an element of proximate cause. *Dirickson v. Mings,* 1996 OK 2, 910 P.2d 1015, 1019. We have also used "foreseeability" in defining a duty, and as describing the zone of risk, i.e., "whether the conduct `creates a generalized and foreseeable risk of harming others.'" *Iglehart v. Board of County Commissioners of Rogers County,* 2002 OK 76, ¶ 10, 60 P.3d 497, 502.

In this case we need not participate in the debate on the extent to which foreseeability is involved in either the duty or causation elements of negligence. *See, e.g.,* Dorsaneo, *Judges, Juries, and Reviewing Courts*, 53 S.M.U. L.Rev., 1497, 1522-1525 (2000), (Dean Green argued that "foreseeability" should be limited to foreseeability of harm and determined by the finder of fact, as opposed to a theory of risks used by the trial judge to determine the existence of a duty). Dorsaneo, *Judges, Juries, and Reviewing Courts,* 53 S.M.U. L.Rev., 1497, 1522-1525 (2000), (Dean Green argued that "foreseeability" should be limited to foreseeability of harm and determined by the finder of fact, as opposed to a theory of risks used by the trial judge to determine the existence of a duty). *See also* Green, *Foreseeability in Negligence Law*, 61 Colum. L.Rev. 1497, 1417-1418 (1961).

5. *See, e.g., Strubhart v. Perry Memorial Hosp. Trust Authority,* 1995 OK 10, 903 P.2d 263, 273-274, (in certain circumstances a hospital exercising ordinary care should know of doctor's prior conduct); *McGee v. Alexander,* 2001 OK 78, ¶ 34, 37 P.3d 800, 808, (circumstantial evidence can be used to establish whether the vendor knew or should have known of the inebriate's visible or noticeable intoxication); *Lockhart v. Loosen,* 1997 OK 103, ¶ 13, 943 P.2d 1074, 1080, (a duty to warn another arises when a person knew or reasonably should have known of a dangerous condition); *Edwards v. Basel Pharmaceuticals,* 1997 OK 22, 933 P.2d 298, 300, (our products liability law generally requires a manufacturer to warn consumers of danger associated with the use of its product to the extent the manufacturer knew or should have known of the danger); *Ingram v. Wal Mart Stores, Inc.,* 1997 OK 11, 932 P.2d 1128, 1130, (summary judgment was reversed because reasonable persons could differ as to whether owner of real property knew or should have known of a dangerous condition, or whether the property was checked often enough by owner's employees); *Avard v. Leming,* 1994 OK 121, 889 P.2d 262, 267, (a homeowner is liable for injuries to an invitee if evidence shows that the homeowner knew or should have known of a dangerous condition on the premises and failed to warn an invitee); *Mistletoe Exp. Service, Inc. v. Culp,* 1959 OK 250, 353 P.2d 9, 16, (court relied upon Restatement, Torts, § 302, Comment n, and its standard of what a person knows, or should know, about another, as such relates to a negligent hiring claim).

6. For example, in an action against a State hospital we said that a psychiatrist has a duty to exercise reasonable professional care when discharging a mental patient, and to take reasonable precautions to protect potential victims when in accordance with the standards of his of her profession the therapist knows, or should know, that a patient's dangerous propensities present an unreasonable risk of harm to others. *Wofford v. Eastern State Hospital,* 1990 OK 77, 795 P.2d 516, 520.

In *Ingram v. State,* 1990 OK 2, 786 P.2d 77, plaintiffs' action used a negligent entrustment theory, and they pled that defendants knew or "should have known" or "ought to have known" certain facts. *Ingram,* 786 P.2d at 80, 81. We reversed the dismissal order, and stated that "At a very minimum, she [plaintiff] has stated a claim for bodily injury that is founded on negligent entrustment of dangerous implements to the attacker, accomplished through unnamed State agents...." *Ingram,* 786 P.2d at 81.

7. Okla. Const. Art. 2 § 28: Corporate records, books and files.

The records, books, and files of all corporations shall be, at all times, liable and subject to the full visitorial and inquisitorial powers of the State, notwithstanding the immunities and privileges in this Bill of Rights secured to the persons, inhabitants, and citizens thereof.

8. Inspection of corporate records pursuant to visitorial power is a public right, existing in the State, and for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers. *Gilmer Oil Co. v. Ross,* 1936 OK 548, 62 P.2d 76, 78-79.

Taliaferro v. Shahsavari

Decision Date:	19 December 2006
Docket Number:	No. 102,225., 102,225.
Citation:	Taliaferro v. Shahsavari, 154 P.3d 1240, 2006 OK 96 (Okla. 2006)
Parties:	Sherry TALIAFERRO, Individually and as Personal Representative of the Estate of Gus William Taliaferro, Sr., Deceased, Plaintiff/Appellee, v. Mehran SHAHSAVARI, M.D., Defendant/Appellant.
Court:	Oklahoma Supreme Court

Id. vLex Fastcase: VLEX-886675987

Link: https://fastcase.vlex.com/vid/taliaferro-v-shahsavari-no-886675987

154 P.3d 1240

2006 OK 96

Sherry TALIAFERRO, Individually and as Personal Representative of the Estate of Gus William Taliaferro, Sr., Deceased, Plaintiff/Appellee, v. Mehran SHAHSAVARI, M.D., Defendant/Appellant.

No. 102,225.

Supreme Court of Oklahoma.

December 19, 2006.

[*1242] Certiorari to the Court of Civil Appeals, Division 4; Honorable Tom A. Lucas, Trial Judge.

¶ 0 In October of 2003, Gus Taliaferro died of a heart attack after being released from the care of Dr. Mehran Shahsavari. The appellee, Taliaferro's widow, Sherry Taliaferro, brought a medical malpractice action against the appellant, Dr. Shahsavari. At trial, the jury found for Dr. Shahsavari, and the widow moved for a new trial. The trial judge, Honorable Tom A. Lucas, granted the motion based on: 1) failure to exclude evidence of a prior incident between Dr. Shahsavari and an expert witness; 2) failure to excuse a prospective juror for cause; and 3) utilization of an improper jury instruction. Dr. Shahsavari appealed. We hold that the trial court did not abuse its discretion by granting the motion for a new trial.

CERTIORARI PREVIOUSLY GRANTED; COURT OF APPEALS OPINION VACATED; TRIAL COURT AFFIRMED.

Danny Shadid, Oklahoma City, OK, for Plaintiff/Appellee.

G. Calvin Sharpe, Malinda S. Matlock, Oklahoma City, OK, for Defendant/Appellant.

KAUGER, J.

¶ 1 The issue presented is whether the trial court erred in granting a new trial. We hold that it did not.

DISPUTED FACTS

¶ 2 On October 4, 2003, Gus Taliaferro, Sr. (Taliaferro/deceased) went to the Norman Regional Hospital Emergency Room complaining of shortness of breath and pain in his chest—his second episode that week. Dr. Brent Wauters, an ER physician, advised him that his symptoms were the result of pre-existing emphysema and sent him home. On October 7, 2003, Taliaferro returned to the emergency room with the same symptoms. Dr. Thomas Ingmire, an emergency room physician, ordered an electrocardiogram, chest x-ray, and cardiac enzyme tests, each of which yielded normal results. Dr. Ingmire also administered two breathing treatments to Taliaferro and recommended that he be admitted for a cardiopulmonary work-up.

¶ 3 Taliaferro was admitted to the care of the appellant, Dr. Mehran Shahsavari (Dr. Shahsavari/doctor), an internist in private practice at Norman Regional Hospital. On October 7-8, 2003, the doctor recommended breathing treatments every 4 hours. Relying on the tests performed the day before by Dr. Ingmire, Dr. Shahsavari ordered no further work-up and released Taliaferro at 10:45 a.m. on October 8, 2003. At 8:00 a.m. on October 9, 2003, Taliaferro returned to the hospital with severe sub-sternal chest pain. Despite treatment which included placement of stents and a balloon pump by a cardiologist, Dr. Dia Abochamh, Taliaferro died in the late afternoon on October 9, 2003. A week after Taliaferro's death, Sherry Taliaferro, the deceased's widow and representative of his estate (widow), met with Dr. Abochamh, who told her that her husband's death was the result of "manslaughter" committed by Dr. Shahsavari.[1]

¶ 4 On March 29, 2004, the widow brought an action for malpractice against Dr. Shahsavari. During *voir dire,* the widow objected to a prospective juror, Barbara Jean O'Neill (O'Neill). O'Neill had been an X-ray technician in heart catheterization labs for thirty years where she assisted doctors in the same kind of work that Dr. Shahsavari performed. O'Neill had a daughter-in-law who worked in Norman Regional's catheterization lab with Dr. Shahsavari on a regular basis. O'Neill had also been previously introduced to one of Dr. Shahsavari's expert witnesses by her daughter-in-law. **[*1243]**

¶ 5 The widow objected to O'Neill on the grounds that she would become an expert witness to the other jurors. The trial court chose not to excuse her based on her assertions during *voir dire* that she could be fair and impartial in weighing the evidence. The widow used her first peremptory challenge to remove O'Neill. The only other juror challenged for cause by the widow was prospective juror, Robert Winslow, whose father was a surgeon. The Court granted the challenge and removed Winslow. Another prospective juror, Corrie Sue Butler, had been a neonatal nurse at Norman Regional for 35 years. The widow did not challenge her, and she was seated as juror number four. Dr. Shahsavari made no challenges for cause.

¶ 6 At trial, one of the widow's expert witnesses was Dr. Dia Abochamh, the physician who had last treated Taliaferro. Dr. Abochamh testified that Dr. Shahsavari was negligent in failing to perform a cardiovascular work-up on Taliaferro, and that had a work-up been performed, Taliaferro's life most probably could have been saved.

¶ 7 The court, over the widow's objection, allowed evidence of an incident to be introduced at trial by Dr. Shahsavari for the purpose of showing evidence of Dr. Abochamh's motive or bias. In late July 2003, Dr. Abochamh vandalized Dr. Shahsavari's car by scratching it with a key. Dr. Abochamh could not recall the reason why he vandalized Dr. Shahsavari's car. Dr. Shahsavari maintains that the incident was a result of Dr. Abochamh's perception that he was not receiving the referrals from Dr. Shahsavari that he deserved.2 Dr. Abochamh self-reported the incident, and the hospital placed him on a six week leave of absence and requested that he undergo psychiatric evaluation and counseling for anger management. After his return to Norman Regional in early 2004, Dr. Abochamh's sponsoring physician terminated his relationship with him and asked him to leave Norman Regional. Dr. Abochamh subsequently left and now practices medicine in Port Arthur, Texas. Although the trial judge interrupted the doctor's counsel in the middle of introducing this evidence and warned her out of the hearing of the jury that the court had had enough of it and she was ". . . just beating it to death,"3 the judge did not prevent Dr. Shahsavari from fully introducing evidence of the incident.

¶ 8 At the close of argument, the court presented the Jury with several instructions. Instruction Number 15 (Oklahoma Uniform Jury Instruction 14.3) provided:

Alternative Methods of Diagnosis or Treatment

Where there is more than one medically accepted method of diagnosis, a physician has the right to use his best judgment in the selection of the diagnosis, after securing the informed consent of the patient, even though another medically accepted method of diagnosis might have been more effective. OUJI 14.3

The widow objected to the inclusion of Instruction Number 15 on the grounds that she felt the case did not involve a choice of diagnosis, but a failure to take any diagnostic action whatsoever. The trial court overruled the objection and included Instruction Number 15.

¶ 9 On February 15, 2005, the jury returned a 9-3 verdict in favor of Dr. Shahsavari. On March 10, 2005, the widow filed a Motion for New Trial. The trial court heard argument on the widow's motion on April 12, 2005, and granted the motion on May 17, 2005. The trial judge listed the following errors in the Order Granting Plaintiff's Motion for New Trial

1) admitting evidence of Dr. Abochamh's vandalism of Dr. Shahsavari's automobile; 2) not excusing juror O'Neill for cause; and 3) giving Jury Instruction Number 15, where the case did not involve choices of method of diagnosis. The Order's closing provides in pertinent part:

. . . By reason whereof, Plaintiff was denied a fair trial, and, although the Court cannot say that the outcome would have been different if the Court had not made the aforementioned errors, the Court believes **[*1244]** that both parties, including the Plaintiff, should have a fair trial.

¶ 10 Dr. Shahsavari appealed, and on April 25, 2006, the Court of Civil Appeals reversed and remanded, finding that the trial judge abused its discretion in granting the widow's motion for a new trial. We granted certiorari on June 26, 2006.

¶ 11 **THE TRIAL COURT DID NOT ERR BY GRANTING THE MOTION FOR A NEW TRIAL.**

¶ 12 The doctor argues that the trial court erred by granting a new trial because: 1) any alleged error that occurred was harmless and, thus, could not serve as the basis for granting a new trial; and 2) the trial court did not make the requisite finding that the outcome of the trial would have differed but for the alleged errors. The doctor insists that the trial court admitted to the absence of a lawful reason to grant a new trial. Taliaferro counters that the trial court did not err by granting the motion for a new trial because even if an individual error was insufficient to require a new trial, the cumulative effect of all of the errors resulted in an unfair trial.

¶ 13 The right of a party to a fair trial is preserved by 12 O.S.2001 § 651 which provides in pertinent part:

A. A new trial is a reexamination in the same court, of an issue of fact or of law or both, after a verdict by a jury, the approval of the report of a referee, or a decision by the court. The former verdict, report, or decision shall be vacated, and a new trial granted, on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of the party:

1. Irregularity in the proceedings of the court, jury, referee, or prevailing party, or any order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial. . . .

When a party is prevented from having a fair trial as a result of an error which materially affects the substantial rights of the party, a new trial is required.4 Reversible error has been held to be an error that creates a probability of change in the outcome of the lawsuit.5

¶ 14 This Court has long recognized that a trial court is vested with wide discretion as to whether to grant a new trial.[6] The burden to establish a trial court's abuse of discretion in granting a new trial rests with the appellant.[7] However, when a trial court's decision to grant a new trial is appealed, this Court will employ every presumption in favor of the correctness of the trial judge's ruling.[8] **[*1245]**

¶ 15 When the new trial is granted by the same judge who tried the case, a much stronger showing of error or abuse of discretion is required for this Court to reverse than if a party appeals from a refusal to grant a new trial.[9] We have previously noted that the requisite showing for reversal is that the record clearly shows that the trial court either erred on a pure and unmixed question of law or acted arbitrarily or capriciously.[10] Notwithstanding a stronger showing of abuse of discretion, a trial court's power to grant new trials is limited by the bounds of judicial discretion,[11] and it is an abuse of discretion for the trial court to grant a new trial based purely on harmless error.[12] We have, in some circumstances, reversed an order granting a new trial.[13]

a. Excusing Juror for Cause.

¶ 16 The first error enumerated by the trial court as grounds for granting the widow's motion for a new trial was the court's failure to excuse Juror O'Neill for cause. Ordinarily, a juror is established as impartial upon testifying to a belief that he or she can render an impartial verdict on the evidence presented.[14] However, 12 O.S.2001 § 572 provides the basis upon which a party may challenge a juror for cause without employing a peremptory challenge:

If there shall be impaneled, for the trial of any cause, any petit juror, who shall have been convicted of any crime which by law renders him disqualified to serve on a jury; or who has been arbitrator on either side, relating to the same controversy; or **who has an interest in the cause;** or who has an action pending between him and either party; or who has formerly been a juror in the same cause; or **who is the employer, employee, counselor, agent, steward or attorney of either party;** or who is subpoenaed as a witness; or who is of kin to either party; or any person who shall have served once already on a jury, as a talesman on the trial of any cause, in the same court during the term, he may be challenged for such causes; in either of which cases the same shall be considered as a principal challenge, and the validity thereof be tried by the court; and any petit juror who shall be returned upon the trial of any of the causes hereinbefore specified, against whom no principal cause of challenge can be alleged, may, nevertheless, **be challenged on suspicion of prejudice against, or partiality for either party,** or for want of competent knowledge of the English language, **or any other cause that may render him, at the time, an unsuitable juror;** but a resident and taxpayer of the State or any municipality therein shall not be thereby disqualified in actions in which such municipality is a party. **The [*1246] validity of all challenges shall be determined by the court.** (Emphasis added.)

¶ 17 The manifest purpose of the statute is to enable litigants to select a fair and impartial jury to try and determine questions of fact involved in their controversies, and it is for the court to determine the validity of all challenges.[15] The trial judge is the ultimate guardian of the constitutional guarantee of a fair and impartial jury. The right to a fair and impartial jury should not be left to a contest to determine who can, with leading questions, rehabilitate or disqualify a juror in a quest to either remove or keep a juror in the case. Due to Juror O'Neill's acquaintance with the expert witnesses, family connection to the hospital involved, and expertise in the particular medical field in question, she should have been excused for cause.

¶ 18 However, at trial, the widow offered no argument that an unfavorable juror was seated because she was forced to expend a peremptory challenge on Juror O'Neill. Juror Butler, a neo-natal nurse at Norman Regional Hospital, was seated on the jury, but the widow did not challenge Butler for cause. She used her two remaining peremptory challenges on other potential jurors, rather than to remove Butler. The widow made no showing at the trial level that there would have been a probability of a change in the outcome of the lawsuit if Juror O'Neill would have been removed for cause rather than by peremptory challenge.

b. Admission of Prejudicial Evidence.

¶ 19 The second error enumerated by the trial court as grounds for granting the widow's motion for a new trial was the court's decision to admit evidence of the Dr. Abochamh's vandalism of Dr. Shahsavari's automobile. The vandalism incident was a point of contention between the parties throughout the whole trial process.

¶ 20 Cross-examination of a witness for the purpose of eliciting facts to show bias or prejudice is always considered competent.[16] A trial court, because of its first-hand exposure to the evidence and familiarity with the trial proceedings, has broad discretion to decide whether the value of proffered evidence outweighs the prejudice to the opposing party.[17] The trial court made this determination after hearing the witnesses and the attorney's examination tactics.

¶ 21 Dr. Abochamh was the widow's primary witness, and the validity of his testimony was called into question by Dr. Shahsavari's persistent discussion of the vandalism incident. The car-keying incident was first alluded to in Dr. Ingmire's testimony when he mentioned that there "were some controversial" issues that came up with regard to whether Dr. Abochamh was a good doctor.18 **[*1247]**

¶ 22 On cross-examination, Dr. Shahsavari was questioned over the incident and on the conflicts he had with Dr. Abochamh.19 However, Dr. Shahsavari admitted that the conflict between Dr. Abochamh and him was not patient-care related.20 The incident was again mentioned in re-direct examination. The incident was, for a final time, fully explored in Dr. Shahsavari's closing argument.21

¶ 23 A trial court has broad discretion in determining the relevance of proffered evidence and in balancing its probative value and unfair prejudice.22 This court can reverse only upon finding that the trial court abused its discretion. If it had been kept in proper perspective (as the trial judge attempted, but stopped short of doing from the bench during the trial), the car vandalism evidence would have been relevant and material on the issues of bias, prejudice, credibility or motive. Instead, the presentation of that evidence became a distraction resulting in the prejudicial effect outweighing the probative value. We are not convinced that the trial court acted arbitrarily or capriciously or erred on a pure and unmixed question of law when it finally determined that the unfair prejudice outweighed any probative value of the evidence of the vandalism.23

c. Confusing Jury Instruction.

¶ 24 The third error enumerated by the trial court as grounds for granting widow's motion for a new trial was the court's decision to include Jury Instruction Number 15 (Oklahoma Uniform Jury Instruction 14.3) which provides:

Alternative Methods of Diagnosis of Treatment

Where there is more than one medically accepted method of diagnosis, a physician has the right to use his best judgment in the selection of the diagnosis, after securing the informed consent of the patient, even though another medically accepted method of diagnosis might have been more effective. OUJI 14.3

¶ 25 Instructions are explanations of the law of a case enabling a jury to better understand its duty and to arrive at a correct conclusion.24 It is the trial court's duty to instruct on the fundamental issues of a case. Failure to do so is grounds for a new trial.25 In giving instructions, the trial court is not required to frame the issues, but it must state the law correctly.26 Fundamental error occurs when the trial court does not [*1248] accurately instruct the jury on the law.27 The test of reversible error in giving jury instructions is whether the jury was misled to the extent of rendering a different verdict than it would have rendered had the errors not occurred.28

¶ 26 Although the law was stated correctly in Jury Instruction Number 15, this instruction was inapplicable to the facts in this cause and it misled the jury. "Diagnosis" is defined in *Black's Law Dictionary* as, a medical term, meaning the discovery of the source of a patient's illness or the determination of the nature of the disease from a study of its symptoms.29 Similarly, *Dorland's Illustrated Medical-Legal Dictionary* defines "diagnosis" as either the determination of the nature of a case of disease or the art of distinguishing one disease from another.30 These definitions speak of action, not inaction.

¶ 27 The doctor did not perform any diagnosis, as the record reflects, on the deceased, the day before the fatal heart-attack.31 The doctor relied on the results of tests performed by Dr. Ingmire.32 The doctor did not order any tests and did nothing else except monitor the deceased. A physician arrives at a diagnosis as a result of trying different treatments on the patient and seeing what works.33 The doctor did not perform any type of testing on the deceased the day before the fatal heart attack. This inaction cannot be characterized as a diagnosis.

¶ 28 The widow characterizes her theory of negligence as that of inaction, rather than one of choosing a less effective method of treatment. She contends that the instruction neither applied to the evidence nor to the issues presented. We agree.

¶ 29 The instruction of alternative diagnosis should only be given when the evidence allows the jury to find that more than one method of diagnosis is recognized by the average practitioner.34 To justify this type of instruction, the defendant must show that the method of diagnosis has substantial support within the medical community.35 In order to make this showing, the doctor's expert **[*1249]** must testify that the challenged method of diagnosis has substantial support and is generally recognized within the medical community.36

¶ 30 The question in the usual failure to diagnose case is whether the doctor was negligent in failing to recognize the significance of the symptom or symptoms. The alleged negligence lies in failing to do something, not in negligently choosing between two or more courses of action.37 Doing something and doing nothing do not add up to two methods of diagnosing a disease. In this case, the doctor's experts gave opinions as to whether the doctor breached the standard of care. However, none of these witnesses testified that there were alternative methods of diagnosis employed by the doctor. Because alternative methods of diagnosis were not employed, the instruction should have not have been given. The trial court erred when it allowed this instruction to be read to the jury.

d. The order granting a new trial.

¶ 31 A trial court, when entertaining a motion for a new trial, has wide discretion to determine whether certain happenings in the course of a trial are error and whether such errors necessitate a new trial. The boundary of that discretion is that a trial court may not order a new trial purely because of harmless error. The doctor would have us construe the closing language of the Order Granting Plaintiff's Motion for New Trial to mean that the trial court considered all three enumerated errors to be harmless.

¶ 32 The trial court was clearly employing the language of 12 O.S.2001 § 651,38 by holding that the widow was denied a fair trial. The right to a fair trial is a substantial constitutional right.39 In *State v. Martin,* 1927 OK 147, ¶ 5, 125 Okla. 24, 256 P. 681 the court recognized that it is a constitutional duty of courts of general jurisdiction to ensure a fair trial whenever a citizen's life, liberty, property, or character are at stake.40 The trial court's finding that the widow was denied her substantial constitutional right to a fair trial establishes that it considered the cumulative combination of these errors to have prejudiced the widow's case to the jury, necessitating a new trial. The trial court's aside noting its uncertainty as to whether the outcome may have been different was merely a nod to the often untraceable pathways by which a cause may arrive at its conclusion and was not an admission that he was granting a motion for a new trial based on harmless error.41

CONCLUSION

¶ 33 A trial court has wide discretion as to whether to grant a motion for a new trial.42 It is the duty of the trial court to safeguard the rights of the litigants to a fair trial and where, in the opinion of the court, a party has not been so protected, may grant a new trial to obviate the error which has occurred.43 In applying the difficult standard which must be met on appeal to show that the trial court erred in granting a new trial, we determine that the appealing doctor has not met the burden. **[*1250]**

CERTIORARI PREVIOUSLY GRANTED; COURT OF CIVIL APPEALS OPINION VACATED; TRIAL COURT AFFIRMED.

WATT, C.J., LAVENDER, OPALA, KAUGER, EDMONDSON, TAYLOR, COLBERT, JJ., concur.

WINCHESTER, V.C.J., HARGRAVE, J., dissent.

1. Transcript of Proceedings had on February 11, 2005, Vol. V, p. 1198.

2. Transcript of Proceedings had on February 11, 2005, Vol. V, p. 1123-1126.

3. Transcript of Proceedings had on February 11, 2005, Vol. V, p. 1131.

4. Title 12 O.S.2001 § 651 provides in pertinent part:

A new trial is a reexamination in the same court, of any issue of fact or of law or both, after a verdict by a jury, the approval of the report of a referee, or a decision by the court. The former verdict, report, or decision shall be vacated, and a new trial granted, on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of the party:

1. Irregularity in the proceedings of the court, jury, referee, or prevailing party, or any order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial. . . .

Akin v. Missouri Pac. R.R. Co., 1998 OK 102, ¶ 34, 977 P.2d 1040. See also, Title 12 O.S.2001 § 78 which provides:

The court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

Title 12 O.S.2001 § 2104 (A) provides in pertinent part:

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of a party is affected. . . .

5. *Public Serv. Co. v. Brown,* 1998 OK 121, ¶ 7, 972 P.2d 354; *Missouri, Kan. & Okla. Trans. Lines v. Jackson,* 1968 OK 28, Syllabus, 442 P.2d 287; *Badgwell v. Lair,* 1958 OK 122, ¶ 8, 325 P.2d 968.

6. *Capshaw v. Gulf Ins. Co.,* 2005 OK 5, ¶ 7, 107 P.3d 595; *Public Serv. Co. v. Brown,* see note 5, supra at ¶ 6; *Propst v. Alexander,* 1995 OK 57, ¶ 8, 898 P.2d 141.

7. *Capshaw v. Gulf Ins. Co.,* see note 6, supra at ¶ 9; *Thomas v. E-Z Mart Stores, Inc.,* 2004 OK 82, ¶ 5, 102 P.3d 133.

8. *Capshaw v. Gulf Ins. Co.,* see note 6, supra; *Propst v. Alexander,* see note 6, supra; *Strubhart v. Perry Memorial Hosp. Trust Auth.,* 1995 OK 10, ¶ 16, 903 P.2d 263.

9. *Public Serv. Co. v. Brown,* see note 5, supra; *Thomas v. E-Z Mart Stores, Inc.,* see note 7, supra; *Propst v. Alexander,* see note 6, supra.

10. *Capshaw v. Gulf Ins. Co.,* see note 6, supra; *Dominion Bank of Middle Tenn. v. Masterson,* 1996 OK 99, ¶ 16, 928 P.2d 291; *Sligar v. Bartlett,* 1996 OK 144, ¶ 13, 916 P.2d 1383; *Propst v. Alexander,* see note 6, supra; *Salyer v. Central Nat'l Bank,* 1957 OK 142, ¶ 9, 312 P.2d 458. We have also noted that a showing that the trial court materially and manifestly erred beyond all reasonable doubt would be sufficient to reverse a trial court's granting of a new trial. *Propst v. Alexander,* see note 6, supra; *Strubhart v. Perry Memorial Hosp. Trust Auth.,* see note 8, supra.

11. *Public Serv. Co. v. Brown,* see note 5, supra at ¶ 7; *Lindsay v. Sikes,* 1971 OK 40, ¶ 21-22, 483 P.2d 1141; *Montgomery v. Murray,* 1970 OK 226, ¶ 17, 481 P.2d 755.

12. *Public Serv. Co. v. Brown,* see note 5, supra; *Montgomery v. Murray,* see note 11, supra at ¶ 18; *Missouri, Kan. & Okla. Trans. Lines v. Jackson,* see note 5, supra.

13. *Capshaw v. Gulf Ins. Co.,* see note 6, supra at ¶ 15 [The order granting a new trial was erroneous as a matter of law.]; *Thomas v. E-Z Mart Stores, Inc.,* see note 7, supra ¶ 29 [The trial court erred on a question of law.]; *Public Serv. Co. v. Brown,* see note 5, supra at ¶ 9 [No probability in change in outcome of the lawsuit shown.]; *Lindsay v. Sikes,* see note 11, supra at ¶ 24 [Trial court abused discretion in granting a new trial.]; *Montgomery v. Murray,* see note 11, supra at ¶ 20 [Trial court abused discretion in granting new trial based on harmless error.]; *Missouri, Kan. & Okla. Trans. Lines v. Jackson,* see note 5, at ¶ 15 [It is error to grant a new trial based on harmless error.]; *Salyer v. Central National Bank,* see note 10, supra at ¶ 11 [New trial should not be granted for an error which there was no injury.].

14. *International News Serv. v. News Pub. Co. of Enid,* 1926 OK 411, ¶ 9, 247 P. 87.

15. *Keck v. Bruster,* 1962 OK 35, ¶ 14, 368 P.2d 1003.

16. *Rhoades v. Young,* 1971 OK 1, ¶ 9, 479 P.2d 570; *Frierson v. Hines,* 1967 OK 60, ¶ 9, 426 P.2d 362. Title 12 O.S. Supp.2002 § 2608 (B) outlines:

B. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime as provided in Section 2609 of this title, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness if they:

1. Concern the witness's character for truthfulness or untruthfulness;

2. Concern the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

17. *Jordan v. Cates,* 1997 OK 9, ¶ 20, 935 P.2d 289. *See also Badillo v. Mid Century Ins. Co.,* 2005 OK 48, ¶ 66, Fn. 20, 121 P.3d 1080; *Andress v. Bowlby,* 1989 OK 78, ¶ 7, 773 P.2d 1265.

18. Transcript of Proceedings had on February 9, 2005, Vol. III, p. 429. The pertinent testimony provides:

Q: Did you ever hear anybody comment in any way about Dr. Abochamh practicing bad medicine?

A: In those specific words?

Q: Yeah.

A: I can't say that I can specifically remember that.

Q: Or that he wasn't a good doctor or just words to that effect?

A: I know there were some controversial issues that came up—

Q: No. I am talking about whether anybody talked about him practicing bad medicine.

A: In so many words, no, sir, I can't say that I recall that.

19. Transcript of Proceedings had on February 10, 2005, Vol. IV, pp. 771-80. Dr. Shahsavari testified regarding the car keying incident, the extent of the damages, the cost of repair, the strain it caused on his relationship with Dr. Abochamh, the action he took with hospital administration, and the repercussions which followed.

20. Transcript of Proceedings had on February 10, 2005, Vol. IV, p. 780. Provides the pertinent testimony:

Q: So the conflict between you and Dr. Abochamh is not patient-care related, it was all related to the car-keying incident and the damage he caused to your property?

A: That's right.

21. Transcript of Proceedings had on February 15, 2005, Vol. VII, pp. 1584-90. In closing argument, the incident was mentioned by defendant's counsel no less than three times.

22. *Jordan v. Cates,* see note 17, supra.

23. Title 12 O.S.2001 § 2401 provides:

`Relevant evidence' means 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 without the evidence.

Title 12 O.S.2001 § 2402 provides:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Oklahoma, by statute or by this Code. Evidence which is not relevant is not admissible.

Title 12 O.S.2001 § 2403 provides:

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise.

24. *Smicklas v. Spitz,* 1992 OK 145, ¶ 11, 846 P.2d 362; *Midland Valley R.R. Co. v. Pettie,* 1945 OK 259, ¶ 15, 162 P.2d 543.

25. *Smicklas v. Spitz* see note 24 supra; *LPCX Corp. v. Faulkner,* 1991 OK 46, ¶ 20, 818 P.2d 431; *Bradley Chevrolet, Inc. v. Goodson,* 1969 OK 25, ¶ 7, 450 P.2d 500.

26. *Smicklas v. Spitz* see note 24, supra; *Sellars v. McCullough,* 1989 OK 155, ¶ 15, 784 P.2d 1060.

27. *B-Star, Inc. v. Polyone Corp.,* 2005 OK 8, ¶ 23, 114 P.3d 1082; *Sellars v. McCullough,* see note 26, supra.

28. *Johnson v. Ford Motor Co.,* 2002 OK 24, ¶ 28, 45 P.3d 86; *Woodall v. Chandler Material Co.,* 1986 OK 4, ¶ 13, 716 P.2d 652; *Missouri-Kan.-Tex.R.R. Co. v. Harper,* 1970 OK 77, ¶ 15, 468 P.2d 1014.

29. Black's Law Dictionary 408 (5th ed.1979) provides:

A medical term, meaning the discovery of the sources of a patient's illness or the determination of the nature of his disease from a study of its symptoms. The art or act of recognizing the presence of disease from its symptoms, and deciding as to its character also the decision reached, for determination of type or condition through case or specimen study or conclusion arrived at through critical perception or scrutiny. A `clinical diagnosis' is one made from a study of the symptoms only and a `physical diagnosis' is one made by means of physical measure, such as palpation and inspection.

30. Dorland's Illustrated Medical-Legal Dictionary 458 (28th ed.1994).

31. Transcript of Proceedings had on February 9, 2005, Vol. III, pp. 631-32. The pertinent testimony provides:

Q: You didn't take any vital signs yourself in the—

A: But I observed him.

Q: Did you take his temperature?

A: I did not take his temperature, no.

Q: Did you take his pulse?

A: I listened to his heart.

Q: You didn't record his heart rate?

A: No, I did not.

Q: Did you record his respiration?

A: I did not.

32. Transcript of Proceedings had on February 9, 2005, Vol. III. p. 637. The pertinent testimony provides:

Q: All of those numbers are numbers that basically arrived in the emergency room, right?

A: That's true.

Q: That's nothing that you did or you ordered, it's just you wrote it down from the information you got?

A: Yes, sir.

33. *See, State v. LeBlanc,* 559 A.2d 349 (Me.1989) wherein a medical expert testifying at trial described a working diagnosis as the result of trying different treatments on the patient and seeing what works.

34. *Miller v. Kim,* 191 Wis.2d 187, 528 N.W.2d 72 (App.1995).

35. *Yates v. University of West Virginia Board of Trustees,* 209 W.Va. 487, 549 S.E.2d 681 (2001).

36. *Id.*

37. *Id.*

38. Title 12 O.S.2001 § 651, see note 4, supra.

39. A full and fair trial is guaranteed by the Due Process Clause of the 14th Amendment to the United States Constitution. *Bracy v. Gramley,* 520 U.S. 899, 904-905, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997); *Withrow v. Larkin,* 421 U.S. 35, 46, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975); *In re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955). The Okla. Const. art. 2, § 19 provides in pertinent part:

"The right to trial by jury shall remain inviolate...."

40. *See also, Boston v. Buchanan,* 2003 OK 114, ¶ 1, Fn. 1, 89 P.3d 1034.

41. In the words of Michel Eyquem de Montaigne, "Men by various Ways arrive at the same End." Michel de Montaigne, *The Complete Essays* 1 (M.A. Screech ed., Penguin Classics 1993) (1572).

42. *Capshaw v. Gulf Ins. Co.,* see note 6, supra; *Public Serv. Co. v. Brown,* see note 5, supra at ¶ 7; *Propst v. Alexander,* see note 6, supra.

43. *Negrate v. Gunter,* 1955 OK 118, ¶ 0, 285 P.2d 194; *Peoples Finance* & Thrift Co. v. Ferrier, 1942 OK 343, ¶ 0, 129 P.2d 1015.

Sanders v. Cole

Decision Date:	25 April 2019
Docket Number:	Case No. 114,713
Citation:	Sanders v. Cole, 454 P.3d 761 (Okla. Civ. App. 2019)
Parties:	Verda Jean Keys SANDERS, Plaintiff/Appellant, v. Michael COLE, D.O., an individual; Jack Mocnik, Jr., M.D., an individual; John Fitter, M.D., an individual; St. John Medical Center, Inc., a company doing business in the State of Oklahoma, Defendants/Appellees, and Justin Thankachan, M.D., an individual; Thomas Nunn, D.O., an individual; South Tulsa Ear, Nose and Throat, PC, a company doing business in the State of Oklahoma; Max Swenson, PA-C, an individual; Timothy McCay, D.O., an individual; Hillcrest Healthcare Systems, Inc., formerly known as Southcrest Hospital, companies doing business in the State of Oklahoma; Gaurangi Anklesaria, M.D., an individual; and Crest Care Family Medicine, PLLC, a company doing business in the State of Oklahoma, Defendants.
Court:	United States State Court of Appeals of Oklahoma. Court of Civil Appeals of Oklahoma

Id. vLex Fastcase: VLEX-893879283

Link: https://fastcase.vlex.com/vid/sanders-v-cole-case-893879283

454 P.3d 761

Verda Jean Keys SANDERS, Plaintiff/Appellant,

v. Michael COLE, D.O., an individual; Jack Mocnik, Jr., M.D., an individual; John Fitter, M.D., an individual; St. John Medical Center, Inc., a company doing business in the State of Oklahoma, Defendants/Appellees,andJustin Thankachan, M.D., an individual; Thomas Nunn, D.O., an individual; South Tulsa Ear, Nose and Throat, PC, a company doing business in the State of Oklahoma; Max Swenson, PA-C, an individual; Timothy McCay, D.O., an individual; Hillcrest Healthcare Systems, Inc., formerly known as Southcrest Hospital, companies doing business in the State of Oklahoma; Gaurangi Anklesaria, M.D., an individual; and Crest Care Family Medicine, PLLC, a company doing business in the State of Oklahoma, Defendants.

Case No. 114,713

Court of Civil Appeals of Oklahoma, Division No. 2.

FILED APRIL 25, 2019

Mandate Issued: December 5, 2019

Iris A. Philbeck, Sapulpa, Oklahoma, for Plaintiff/Appellant

Charles H. Moody, Leslie C. Weeks, RODOLF & TODD, Tulsa, Oklahoma. for Defendant/Appellee St. John Medical Center

Thomas A. LeBlanc, Matthew B. Free, Dan W. Ernst, BEST & SHARP, Tulsa, Oklahoma, for Defendants/Appellees Michael Cole, D.O., Jack Mocnik, Jr., M.D., & John Fitter, M.D.

SUBSTITUTE OPINION AFTER REHEARING THE COURT'S PRIOR OPINION HAVING BEEN WITHDRAWN

OPINION ON REHEARING BY JOHN F. FISCHER, PRESIDING JUDGE:

¶1 Verda Jean Keys Sanders appeals a judgment in this medical negligence case in **[*765]** favor of doctors Michael Cole, Jack Mocnik, Jr., John Fitter (the defendant radiologists) and St. John Medical Center, Inc. Because the district court erred in excluding expert testimony offered by Sanders and erred in granting a motion for directed verdict in favor of St. John, we vacate the judgment entered in favor of the defendants and remand this case for further proceedings.[1]

BACKGROUND

¶2 Sanders filed this suit alleging that various physicians misdiagnosed and failed to properly treat the cholesterol granuloma near the base of her skull.[2] As a result, Sanders claimed that she suffered severe and permanent injuries, including loss of hearing, loss of sight and facial paralysis that would not have occurred but for the physicians' negligence. She sued St. John, alleging it was responsible for the actions of the physicians who failed to correctly diagnose and properly treat her condition. The relevant facts are not disputed. The legal consequences of those facts and the district court's rulings in regard thereto are dispositive of this appeal.

¶3 On December 26, 2009, Sanders called an ambulance and told the driver she wanted to be taken to the St. John emergency room. She complained of dizziness, weakness, a headache, severe pain in her left ear, blurred vision and slurred speech. Sanders was evaluated by an emergency room physician, who ordered a CT scan of her head and a CT angiogram of her head and neck. A neurologist at St. John also ordered an MRI of her brain. Although it appears that physicians at St. John initially reviewed these studies, eventually they were referred to the defendant radiologists for interpretation. As a result, Dr. Fitter interpreted the CT scan, Dr. Mocnik interpreted the CT angiogram, and Dr. Cole interpreted the MRI. At some point, Sanders was admitted to St. John under the care of Dr. Thankachan, a hospitalist employed at St. John. Sanders was diagnosed as having Bell's palsy. Dr. Thankachan prescribed antibiotics for a sinus infection. He discharged Sanders on December 29, 2009.

¶4 Sanders returned to St. John on January 20, 2010, complaining of the same symptoms. Again, an emergency room physician employed by St. John ordered a CT scan of Sanders' head. Dr. Fitter interpreted the January 20 study. Sanders was not admitted. She was again diagnosed with Bell's palsy and advised that the symptoms would subside over time.

¶5 Sanders returned to St. John on February 18, 2010, complaining of the same symptoms. She was again seen in the emergency room, where another CT scan of her head was ordered. Dr. Cole interpreted the February 18 study. Sanders was prescribed steroids for Bell's palsy and sent home.

¶6 Sanders returned a fourth time to St. John on March 6, 2010. In addition to her previous symptoms, Sanders complained of partial facial paralysis, speech impairment and loss of hearing. She was again prescribed steroids for Bell's palsy and sent home.

¶7 Thereafter, Sanders was seen at other facilities by several other physicians who are no longer involved in this case. On December 21, 2010, Sanders saw Dr. Connor, a neurologist. He reviewed the radiologic studies performed at St. John and diagnosed Sanders as having a tumor at the base of her skull near her ear canal. Dr. Connor referred Sanders to a surgeon for further treatment. That treatment was unsuccessful and Sanders was left with permanent facial paralysis and hearing loss.

¶8 Sanders' case was tried to a jury. After the close of evidence, the district court granted **[*766]** St. John's motion for a directed verdict. The jury then returned a unanimous verdict in favor of the defendant radiologists, which the district court accepted and on which it entered the judgment that is the subject of this appeal. Sanders filed a motion for new trial, which the district court denied. This appeal followed.

STANDARD OF REVIEW

¶9 Sanders could have appealed both the judgment and the denial of her motion for new trial. "[I]f the decision on the motion [for new trial] was against the moving party, the moving party may appeal from the judgment ... from the ruling on the motion, or from both." 12 O.S.2011 § 990.2(A). However, she did not appeal the ruling on her motion for new trial. Her appeal is confined to four errors of law she contends the district court made during the trial that warrant reversal of the judgment. Issues of law are reviewed by an appellate court pursuant to the de novo standard. *Christian v. Gray* , 2003 OK 10, ¶ 41, 65 P.3d 591. De novo review is plenary, independent and non-deferential. *Neil Acquisition L.L.C. v. Wingrod Inv. Corp* ., 1996 OK 125, n.1, 932 P.2d 1100.

ANALYSIS

¶10 Of the four assignments of error raised by Sanders, we find that two are dispositive: (1) the district court erred in refusing to permit Sanders' treating physician to testify as an expert witness; and (2) the district court erred in granting St. John's motion for directed verdict.

I. The Expert Witness Issue

¶11 Dr. Connor was the first physician to discover Sanders' tumor. He was offered as a fact witness to testify as one of Sanders' treating physicians. However, he was also listed as an expert witness. As evident from his pretrial deposition, Dr. Connor intended to testify that Sanders' tumor was apparent from the radiologic studies performed at St. John, including the first studies performed on December 26, 2009. It was Dr. Connor's opinion that the failure to correctly diagnose Sanders' condition when she was being treated at St. John caused her subsequent and permanent injuries.

¶12 The defendants filed a motion in limine arguing that (1) Dr. Connor was not a radiologist and, therefore, could not render an expert opinion regarding the standard of care applicable to radiologists; and (2) as a fact witness, Dr. Connor could not testify as an expert regarding causation. The defendants supported their motion in limine with the affidavit of their own expert witness, a board certified radiologist. She stated that the defendant radiologists had not breached the standard of care for radiologists when they failed to detect the tumor in Sanders' head. The district court granted the motion in limine.

¶13 At trial, Dr. Connor was asked if, in his opinion, "missing this diagnosis of her tumor in her head caused her damages." The defendants renewed their objection based on the ruling on their motion in limine. The district court conducted a lengthy discussion out of the presence of the jury. At the conclusion of the discussion and argument, the court ruled that Dr. Connor was testifying as a fact witness and as Sanders' treating physician; therefore, he could not testify as an expert witness. The district court also ruled that, because Dr. Connor was not a radiologist, he could not give an opinion regarding the standard of care for radiologists. The court limited the scope of Dr. Connor's testimony as follows:

Dr. Connor is here to testify about from the time he saw Ms. Sanders, what he saw, what he diagnosed, what his treatment of her is. He can talk about what he saw when he looked at the images, but he can't testify as to a standard of care because he's not a radiologist.

That was error.

¶14 "The facts or data in the particular case upon which an expert bases an opinion or inference may be those **perceived by** or made known to the expert at **or before** the hearing." 12 O.S.2011 § 2703 (emphasis added). The test for competency of a fact witness is whether the witness has "personal knowledge" of the matter. 12 O.S.2011 § 2602. As the district court recognized, a treating physician has personal knowledge of **[*767]** certain facts regarding a patient's condition. But that does not preclude a treating physician from also rendering an opinion as an expert regarding those facts. The defendants have not cited any authority to support the proposition that a fact witness cannot also testify as an expert witness under appropriate circumstances, and we find none. Even a lay witness is permitted to give opinion testimony in certain circumstances. 12 O.S.2011 § 2701. The defendants did not challenge Dr. Connor's qualifications as a neurologist. Therefore, it was error to exclude his expert opinion based on the facts he perceived as Sanders' treating physician. "In Oklahoma a physician treating a patient may use a medical history provided by the patient when making an opinion on causation of the patient's injury." *Christian v. Gray* , 2003 OK 10, ¶ 29, 65 P.3d 591.

¶15 Further, the defendants' argument that Dr. Connor cannot testify as an expert because he is a neurologist and the defendants are radiologists was specifically rejected in *Smith v. Hines* , 2011 OK 51, 261 P.3d 1129. In that case, the doctor defendant argued that because the plaintiff's expert was a neurologist, not an orthopedic surgeon, he was not qualified as an expert to evaluate any damage that occurred during orthopedic surgery. The Court found the defendant's argument "unconvincing." *Id.* n.12. That finding was confirmed in the second *Smith* case. *Smith v. Hines* , 2013 OK 65, ¶ 1, 362 P.3d 646 ("We found that argument unconvincing in [*Smith I*] and we do so here as well.").

¶16 The defendants argue that *Smith* is distinguishable because it involved a summary judgment ruling, and they raise an evidentiary objection to Dr. Connor's testimony. They contend that *Smith* stands only for the proposition that a neurologist's opinion regarding the causation of nerve damage after knee surgery is sufficient to establish a question of fact precluding summary judgment, not that such opinion would be admissible at trial regarding the standard of care. The purported distinction is unclear. "A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." 12 O.S.2011 § 2056(E). If the Supreme Court found the neurologist's opinion in *Smith* sufficient for summary judgment purposes, it "would be admissible in evidence." *Id* . The defendants' attempt to distinguish *Smith* is unpersuasive.

¶17 Consequently, the fact that Dr. Connor is not certified in the same specialty as the defendant radiologists does not preclude him from being qualified as an expert witness in this case.

In Oklahoma the testimony of an expert is controlled by the applicable statutes found in the Oklahoma Evidence Code, 12 O.S.[2011] § 2702 (Testimony by Experts); § 2703 (Bases of Opinion Testimony by Expert); § 2704 (Opinion on Ultimate Issue); and § 2705 (Disclosure of Facts or Data Underlying Expert Opinion).

Christian v. Gray , 2003 OK 10, ¶ 5, 65 P.3d 591 (footnotes omitted). Section 2702 establishes a two-pronged test for determining the admissibility of expert witness testimony: "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert v. Merrell Dow Pharm., Inc* ., 509 U.S. 579, 592, 113 S. Ct. 2786, 2796, 125 L.Ed.2d 469 (1993) (adopted by the Oklahoma Supreme Court in *Christian v. Gray* , 2003 OK 10, ¶¶ 9, 14, 65 P.3d 591).

¶18 The defendants did not file a " *Daubert* motion" to challenge Dr. Connor's qualifications as a neurologist. Consequently, we are only concerned with the second, "assist the trier of fact" prong of the *Daubert* test: "This requirement ‘goes primarily to relevance.’ " *Christian v. Gray* , 2003 OK 10, ¶ 9, 65 P.3d 591 (quoting *Daubert* , 509 U.S. at 591, 113 S.Ct. 2786). The defendants' argument is a simple one; only physicians trained as radiologists can testify regarding whether a radiologist made a mistake by not finding Sanders' tumor. We agree with the concurring Opinion in *Gaines v. Comanche County Medical Hospital* , 2006 OK 39, 143 P.3d 203. "**No profession will be permitted to monopolize the expertise in any field of scientific knowledge if another is shown to possess like or equal insight into the matter that lies under judicial inquiry.** " **[*768]** *Id* . ¶ 12 (Opala, J., with whom Watt, C.J., and Colbert, J., join concurring) (emphasis in original) (footnote omitted).

¶19 Fundamentally, the defendants' argument misconstrues the purpose of the standard of care.

A medical malpractice claim, like all negligence claims, contains three elements: (1) a duty owed by the defendant to protect the plaintiff from injury, (2) a failure to properly exercise or perform that duty, and (3) plaintiff's injuries proximately caused by the defendant's failure to exercise the required duty of care.

Nelson v. Enid Med. Assocs., Inc. , 2016 OK 69, ¶ 8, 376 P.3d 212 (footnote omitted). The standard of care is directed at the second element. *See also* Okla. Uniform Jury Instructions - Civil No. 14.2: "In [(diagnosing the condition of)/treating/(operating upon)] a patient, a specialist must use [his/her] best judgment and apply with ordinary care and diligence the knowledge and skill that is possessed and used by other specialists in good standing engaged in the same special field of practice at that time."

¶20 The defendants contort the standard of care element into an argument that only a radiologist can determine if another radiologist made a mistake. Clearly there are areas of specific knowledge primarily within the expertise of radiologists, but they are not involved here. The ability to identify Sanders' tumor was, according to Dr. Connor, within the basic knowledge acquired by all medical students. The defendant radiologists may disagree, but this record does not establish that only a radiologist would be qualified by "knowledge and skill" to testify whether the radiologic studies done at St. John showed that Sanders had a tumor. *Id.*

¶21 The standard of care describes the quality of care the defendant radiologists were required to provide to Sanders. It does not limit the evidence admissible to prove that the defendant radiologists did or did not discharge their duty to provide that care, except in the most general sense. And, as the *Smith* cases make clear, "the same special field of practice" does not necessarily mean the same discrete and previously recognized medical specialty. It includes those whose training and experience qualify them to render an opinion regarding the "ordinary care and diligence" required to treat a patient in any particular situation.

¶22 For that reason, the defendants' argument ignores the evidentiary analysis required by the second prong of the *Daubert* test. That analysis "is a flexible one, and focuses on the evidentiary relevance and reliability underlying the proposed submission, and not on the conclusions they generate." *Christian v. Gray* , 2003 OK 10, ¶ 8, 65 P.3d 591 (citation omitted). " '[W]itnesses may be competent to testify as experts even though they may not, in the court's eyes, be the "best" qualified. Who is "best" qualified is a matter of weight upon which reasonable jurors may disagree.' " *Nelson v. Enid Med. Assocs., Inc.* , 2016 OK 69, ¶ 36, 376 P.3d 212 (quoting *Feliciano-Hill v. Principi* , 439 F.3d 18, 25 (1st Cir. 2006)). *See also Gaines v. Comanche Cnty. Med. Hosp.* , 2006 OK 39, n.11, 143 P.3d 203 (Opala, J., with whom Watt, C.J., and Colbert, J., join concurring) (noting that the value of expert witnesses' testimony is for the trier of fact to determine). The defendants may argue that a radiologist is "best" qualified to determine whether Sanders' tumor should have been discovered by the defendant radiologists who first reviewed the radiologic studies done at St. John. That does not mean, however, that any other doctor would be unqualified to provide relevant evidence on that issue. And that is the real issue raised by the defendants' motion in limine.

¶23 In his deposition, Dr. Connor testified that "all doctors look at x-rays ... not all knowledge is confined to a radiologist." He testified that all medical students take radiology as one of the "basics that one learns." Dr. Connor testified that in addition to this basic training, he was a board certified neurologist with years of experience interpreting radiologic studies like those performed on Sanders at St. John. Dr. Connor testified that he discovered an abnormality on the December 26, 2009 studies within fifteen minutes, during the first time he looked at them. He testified that he did not think it required a radiologist to see Sanders' tumor, [*769] that it was a large tumor, and: "It takes two seconds to see the thing, you know." Dr. Connor testified in his deposition that as a result of the delay in appropriate treatment, Sanders suffered hearing loss and permanent paralysis of her face.3 Finally, although Dr. Connor refused to testify that any of the radiologists breached the standard of care applicable to radiologists, he did testify that they made a "gross error," a "pretty blatant mistake" that "had huge consequences."

¶24 Ultimately, the defendants' argument that Dr. Connor is not qualified to testify as an expert relies on the fact that Dr. Connor would not testify whether the defendant radiologists breached the standard of care for a radiologist.4 That is not the evidentiary issue relevant to *Daubert* 's second prong. Whether the defendant radiologists breached the applicable standard of care is for the jury to determine. *Nelson* , 2016 OK 69, ¶ 9, 376 P.3d 212. The *Daubert* issue is whether Dr. Connor's testimony will "assist" the jury in deciding that issue. "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion ...." 12 O.S. Supp. 2013 § 2702. The Supreme Court held in *Smith v. Hines* , 2011 OK 51, 261 P.3d 1129, that a neurologist was qualified to render an opinion regarding the causation of injuries suffered after an orthopedic surgery. *Id* . ¶ 20. In *Nelson v. Enid Medical Associates, Inc.* , 2016 OK 69, 376 P.3d 212, the Court held that a hospitalist is qualified to render an opinion regarding whether a surgeon's four-hour delay in reviewing a CT scan and starting a patient on antibiotics contributed to the patient's death. *Id* . ¶¶ 54, 61. We find no difference between a neurologist's or hospitalist's opinion testimony regarding a surgeon's negligence and a neurologist's testimony regarding any negligence by these radiologists. The district court erred as a matter of law when it excluded the expert opinion testimony of Dr. Connor. *Id.* ¶ 11 (citing *Christian v. Gray* , 2003 OK 10, ¶ 43, 65 P.3d 591).

¶25 In their petition for rehearing, the defendant radiologists argued that this Court could not reverse a jury verdict without reviewing Dr. Connor's trial testimony. During the oral argument, they argued that the exclusion of Dr. Connor's expert testimony was harmless because Dr. Connor testified about causation despite the district court's ruling. We now have the trial testimony of Dr. Connor and do not find any testimony by him to the effect that, in his opinion, the failure of the radiologists to correctly diagnose Sanders' tumor caused her permanent injuries. In fact, counsel for the defendant radiologists renewed his motion in limine objection on several occasions after the district court's initial ruling to prevent Dr. Connor from testifying regarding the role of the radiologists in causing Sanders' injuries. The district court's error of law in excluding Dr. Connor's expert testimony was not cured by Dr. Connor's trial testimony.5 **[*770]**

II. The Directed Verdict Issue

¶26 In the pretrial order, Sanders listed the following grounds for recovery that she generally asserted against all of the defendants, "medical negligence/negligence" and "respondeat superior." At the close of the evidence, St. John moved for a directed verdict, arguing that Sanders had failed to prove her respondeat superior theory of liability against the hospital. St. John's motion did not address its own potential negligence. Counsel for St. John argued that no evidence had been introduced to show that St. John employed the defendant radiologists or controlled the manner in which they practiced. Counsel quoted from Sanders' trial testimony to establish that no one told Sanders when she arrived at the emergency room on December 26, 2009, that the radiologists were not employed by St. John; no one asked her which radiologist she wanted to use; no one discussed the defendant radiologists' employment status with her; and, had she known that the radiologists were not St. John employees, she would not have insisted on going to another hospital. Based on this evidence, St. John argued that Sanders had failed to prove that the hospital was vicariously liable for any negligence resulting in her injury because (1) there was no evidence of an employment or agency relationship between St. John and the defendant radiologists; (2) no one at St. John made any representation to her about the radiologists; and (3) Sanders did not change her position to her detriment because the employment status of the radiologists did not matter to her.

¶27 The district court took a different approach, finding that Dr. Thankachan was the only physician who provided treatment to Sanders at the hospital, "at least initially." The court found that, although Dr. Thankachan "relied on diagnostic images or reports from the radiologists," he, not the radiologists, was Sanders' "treating physician." The district court relied on *Weldon v. Seminole Municipal Hospital* , 1985 OK 94, 709 P.2d 1058, in which the Supreme Court refused to hold a hospital liable for the negligence of the plaintiff's physician who merely used the hospital as the "situs" for his treatment. *Id* . ¶ 8. The district court reasoned that ostensible agency would only extend liability to St. John for a physician who provided treatment at the hospital, and Dr. Thankachan had been dismissed from the case. The court commented that Sanders probably would not have changed her position had she known the defendant radiologists were not employed by St. John, "but that's a question of fact I can't answer ...." Nonetheless, because, according to the district court, Sanders had failed to prove that anyone other than Dr. Thankachan provided treatment to her at St. John, it granted St. John's motion for a directed verdict. This was error.

¶28 Oklahoma recognizes three circumstances in which a hospital may be held liable for negligent medical care provided at its facility: (1) violation of the hospital's duty to exercise ordinary care regarding its patients, (2) negligent care provided by one with apparent authority to provide patient care at the hospital, and (3) where the hospital is estopped to deny that the provider of negligent care is its agent. The first can result from the negligence of hospital employees, such as employed physicians and nurses, or those who are agents controlled by the hospital. *Johnson v. Hillcrest Health Ctr., Inc.* , 2003 OK 16, 70 P.3d 811 (doctor employee); *Smith v. St. Francis Hosp* ., 1983 OK CIV APP 58, 676 P.2d 279 (controlled agent doctor); *Skidmore v. Oklahoma Hosp.* , 1929 OK 117, 137 Okla. 133, 278 P. 334 (nurses). However, a hospital may also be held directly liable for the negligence of an independent contractor if hospital personnel are negligent in granting or continuing staff privileges to an independent contractor that the hospital knows or should know is incompetent. **[*771]**

Strubhart v. Perry Mem'l Hosp. Trust Auth. , 1995 OK 10, ¶ 42, 903 P.2d 263 ; Okla. Uniform Jury Instructions - Civil No. 14.15.6 In addition to a hospital's direct liability, two theories of vicarious liability have also been recognized, liability based on the doctrine of apparent authority, and liability based on estoppel. *Smith* , 1983 OK CIV APP 58, ¶ 13, 676 P.2d 279 (cited with approval in *Weldon v. Seminole Mun. Hosp.* , 1985 OK 94, 709 P.2d 1058). St. John failed to establish that it was entitled to a directed verdict regarding any of these theories of liability.

A. St. John's Potential Negligence

¶29 St. John argues that it is not liable because Dr. Thankachan was Sanders' only treating physician and he was dismissed from the case. In its summary judgment briefing, St. John cited *Sisk v. J.B. Hunt Transport, Inc.* , 2003 OK 69, 81 P.3d 55, for the proposition that dismissal with prejudice of an employee releases the employer from any liability based on the respondeat superior doctrine. *Sisk* is not cited in St. John's appellate briefing, but we assume it is making the same argument here. This argument not only misses the point, but also it is not supported by the evidence.

¶30 First, it does not appear from this record that Dr. Thankachan was Sanders' only "treating physician." When Sanders returned to St. John on January 20 and February 18, 2010, the emergency room physicians on duty ordered additional radiologic studies and referred those studies to one or more of the defendant radiologists for interpretation. Based on those interpretations, it does not appear that Sanders was referred to Dr. Thankachan. Regardless, she was not admitted to the hospital. And, she continued to be diagnosed with Bell's palsy rather than a brain tumor. Consequently, the fact that Dr. Thankachan was dismissed from this case does not resolve St. John's potential respondeat superior liability for the acts of its personnel responsible for Sanders' treatment subsequent to December 26, 2009.

¶31 Second, St. John's argument misses the point. To determine St. John's liability for any breach of its duty to Sanders, the jury must decide whether the defendant radiologists were negligent, and, if so, whether St. John employees knew or should have known that the radiologists were incompetent when they granted staff privileges to the defendant radiologists and referred Sanders' radiologic studies to them for interpretation. *Strubhart v. Perry Mem'l Hosp. Trust Auth.* , 1995 OK 10, ¶ 42, 903 P.2d 263. Even after the dismissal of Dr. Thankachan, the same question must be answered as to any such knowledge possessed by the St. John emergency room physicians who referred the January 20 and February 18 radiologic studies to the defendant radiologists for interpretation.[7] In addition, as Sanders correctly argues, any evidence of prior lawsuits against the defendant radiologists based on their professional competence, although apparently excluded by the district court, is relevant to this issue.

¶32 Third, it is undisputed that, on December 26, 2009, the only decision Sanders made regarding her medical treatment was to tell the ambulance driver that she wanted to go to St. John. The emergency room physician on duty at St. John who ordered the CT scans, and the St. John neurologist who ordered [*772] the MRI, selected the defendant radiologists to interpret those studies.[8] Further, it does not appear that the decision to admit Sanders was made until after the defendant radiologists' interpretations had been provided to Dr. Thankachan. Therefore, it is reasonable to infer, as the district court did, that Dr. Thankachan relied on the defendant radiologists' reports when he was deciding that Sanders needed to be admitted to the hospital, diagnosing her condition and determining what treatment she should receive. The defendant radiologists' interpretation of Sanders' radiologic studies provided not only the basis for the initial Bell's palsy diagnosis, but also the basis for that misdiagnosis by all of Sanders' "treating physicians" at St. John.

¶33 Finally, *Weldon v. Seminole Municipal Hospital* , 1985 OK 94, 709 P.2d 1058, does not, as St. John argues, limit a hospital's potential liability for malpractice only to that committed by a "treating physician." *See* , *e.g.* , *Johnson v. Hillcrest Health Ctr., Inc.* , 2003 OK 16, 70 P.3d 811 (hospital potentially liable for failure of hospital clerk to put lab results in patient's medical chart that were critical to diagnosis and treatment). We also find *Roth v. Mercy Health Center, Inc.* , 2011 OK 2, 246 P.3d 1079, instructive in determining who is considered a treating physician for purposes of deciding a hospital's liability. In *Roth* , the Supreme Court reversed summary judgment in favor of a hospital where the orders and medical opinions of two private practice cardiologists consulted by the hospital's physician "were used in treating" a patient and allegedly contributed to the patient's death. *Id.* ¶ 10. Therefore, it does not matter whether the defendant radiologists met with, spoke to or had any direct contact with Sanders during her treatment. Their interpretation of the radiologic studies provided the basis for the misdiagnosis and inappropriate treatment provided to Sanders at St. John regardless of whether they were her "treating physicians."[9]

¶34 The directed verdict cannot be sustained as to St. John's potential negligence based on the erroneous conclusion that Dr. Thankachan was Sanders' only "treating physician." St. John is liable if the defendant radiologists were incompetent and St. John employees knew or should have known that fact but took no action to prevent them from treating Sanders.

B. St. John's Vicarious Liability

¶35 St. John also argues that Sanders failed to prove her respondeat superior theory of liability because the defendant radiologists were not employees of St. John or agents who were subject to the control of St. John regarding the manner in which they provided medical care. "[R]espondeat superior holds the master liable for injury proximately resulting from the negligent act of a servant done while in the course and scope of the servant's employment with the master." *Fox v. Mize* , 2018 OK 75, ¶ 8, 428 P.3d 314 (citation omitted). The fact that the defendant radiologists were not St. John employees appears to be undisputed.10

¶36 However, this case was tried and St. John's motion for directed verdict argued on the basis of apparent authority and agency by estoppel. "When issues not raised by the ... pretrial conference order **[*773]** ... are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the ... pretrial conference order." 12 O.S.2011 § 2015(B). One fundamental purpose of the apparent authority doctrine is to hold a defendant liable for the acts of those who are not its employees or controlled agents. "The existence of actual authority between principal and agent is not a pre-requisite to establishing apparent authority." *Stephens v. Yamaha Motor Co., Ltd .*, 1981 OK 42, ¶ 8, 627 P.2d 439. Therefore, the fact that the defendant radiologists were not St. John employees does not resolve all of the issues raised by St. John's motion for a directed verdict.

1. Apparent Authority

¶37 Generally, "the theory of respondeat superior is not extended to a hospital if the doctor is considered a private contractor operating on his/her own behalf ...." *Anderson v. Eichner* , 1994 OK 136, n.24, 890 P.2d 1329 (citing *Weldon v. Seminole Mun. Hosp.* , 1985 OK 94, ¶ 4, 709 P.2d 1058). "But, under the theory of ostensible agency a hospital can be vicariously liable for the negligence of a physician, notwithstanding the physician's independent contractor status ...." *Anderson* , 1994 OK 136, n.24, 890 P.2d 1329. According to the Restatement, "[o]stensible agency is merely a synonym for apparent authority and is so used by many courts." Restatement (Second) of Agency § 8 cmt. e (1958).

Apparent authority results from a manifestation by the principal to a third person that another is his agent. The manifestation may be made directly to a third person or to the community by signs or by advertising. Restatement 2d, Agency, § 8, 27, 49. But, "apparent authority exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized."

Stephens v. Yamaha Motor Co., Ltd ., 1981 OK 42, ¶ 8, 627 P.2d 439 (quoting Restatement (Second) of Agency § 8 cmt. e). In order to establish liability based on apparent authority, therefore, a plaintiff must prove: (1) a manifestation by the defendant that the tortfeasor is the defendant's agent; (2) a belief by the plaintiff that the tortfeasor is the defendant's agent; and (3) a reasonable basis for the plaintiff's belief. *Id.*

¶38 In Oklahoma, this exception to the general rule regarding the vicarious liability of a hospital was first recognized in *Smith v. St. Francis Hospital, Inc.* , 1983 OK CIV APP 58, 676 P.2d 279. In *Smith* , this Court held that a hospital could be held liable for the negligence of a physician providing medical care at the hospital even though the physician was an independent contractor, if there was no pre-existing patient-physician relationship and the patient "looked solely to and relied upon Hospital for his treatment and was treated by medical personnel regulated and authorized by Hospital to render medical services in its emergency room ...." *Id* . ¶ 13.

¶39 In *Weldon v. Seminole Municipal Hospital* , 1985 OK 94, 709 P.2d 1058, the Oklahoma Supreme Court recognized that Oklahoma "has joined those jurisdictions which have made an exception to the general rule that a doctor is an independent contractor and a hospital is exempt from invocation of respondeat superior." *Id.* ¶ 4. The *Weldon* Court applied the test articulated in *Smith* :

In order to invoke respondeat superior or agency by estoppel the test as adopted by the Oklahoma Court of Appeals is: "[W]hether the plaintiff, at the time of his admission to the hospital, was looking to the hospital for treatment of his physical ailments or merely viewed the hospital as the situs where his physician would treat him for his problems."

Id. ¶ 7 (quoting *Smith* , 1983 OK CIV APP 58, ¶ 12, 676 P.2d 279). "The Court may also consider whether there was a pre-existing relationship between the plaintiff and the treating physicians.... [and] whether the hospital pays the doctor a salary or bills for the doctor's services." *Roth v. Mercy Health Ctr., Inc.* , 2011 OK 2, ¶ 32, 246 P.3d 1079 (citations omitted).

¶40 St. John cites *Sparks Bros. Drilling Co. v. Texas Moran Exploration Co.* , 1991 OK 129, 829 P.2d 951, for the proposition that a defendant cannot be held **[*774]** vicariously liable unless the plaintiff changed her position to her detriment. *Id* . ¶ 17. *Sparks* relied on *Rosser-Moon Furniture Co. v. Oklahoma State Bank* , 1943 OK 89, ¶ 6, 192 Okla. 169, 135 P.2d 336, which in turn relied on the works Corpus Juris Secundum and American Jurisprudence. However, the analysis of apparent authority in those treatises differs from that expressed in the Restatement (Second) of Agency. The Restatement view of apparent authority was adopted in *Stephens v. Yamaha Motor Co., Ltd* ., 1981 OK 42, ¶ 8, 627 P.2d 439, after the Court noted that a different articulation of the rule had been used in *Rosser-Moon Furniture*. Detrimental reliance is not an element a plaintiff must prove to establish apparent authority. *Id.* ; *see also* Restatement (Second) of Agency § 8 (1958).11

¶41 Consequently, to establish her apparent authority claim, Sanders must prove that: (1) St. John manifested an intent that the defendant radiologists were authorized to provide medical services at its hospital; (2) Sanders believed that the defendant radiologists were authorized to provide medical care on behalf of St. John; and (3) Sanders' belief that the defendant radiologists were authorized to provide medical care at St. John was reasonable. *Stephens* , 1981 OK 42, ¶ 8, 627 P.2d 439. To be entitled to a directed verdict, St. John must establish the absence of any evidence supporting at least one of those elements. *Cf* ., *Cook v. Bishop* , 1988 OK 120, ¶ 9, 764 P.2d 189 (a motion for directed verdict is "somewhat like a delayed motion for summary judgment"), and *Runyon v. Reid* , 1973 OK 25, ¶ 13, 510 P.2d 943 (summary judgment for the defendant is proper where there is no controversy as to one fact material to the plaintiff's case and that fact is in the defendant's favor). St. John failed to do so in the district court, and it has failed to do so here.

¶42 St. John held itself out to the public as a place where people like Sanders could come and receive medical treatment on an emergency basis from physicians authorized to provide that care at the hospital.12 "It is entirely reasonable that patients entering [St. John] through its emergency room properly relied upon [St. John's] representation that the treating doctors and staff of [St. John's] emergency room were acting on behalf of [St. John], and not as individuals." *Smith v. St. Francis Hosp* ., 1983 OK CIV APP 58, ¶ 12, 676 P.2d 279.

¶43 Further, Sanders testified that she believed that St. John personnel in charge of her medical care would decide which radiologists to use. Based on this record, that belief was reasonable. As the defendants clearly established, Sanders did not know the defendant radiologists. No one at St. John asked her which radiologist she wanted to use, and she relied solely on St. John personnel to select a radiologist. Consequently, this case is distinguishable from *Weldon* , where the negligent physician was the plaintiff's own family physician and instructed her to meet him at the hospital, where he would treat her condition, and the plaintiff looked solely to him, not the hospital, to provide that treatment. *Weldon v. Seminole Mun. Hosp.* , 1985 OK 94, ¶ 1, 709 P.2d 1058. This Court's [*775] decision in *Smith* has been cited with approval by the Supreme Court in *Weldon* , 1985 OK 94, ¶ 4, 709 P.2d 1058, and *Roth v. Mercy Health Center, Inc.* , 2011 OK 2, ¶ 32, 246 P.3d 1079, for its recognition of a hospital's potential liability for any physician cloaked with the hospital's apparent authority. In contrast to the facts in *Weldon* , the facts in *Smith* are indistinguishable from those here. [M]embers of the public [like Sanders] who avail themselves of a hospital's emergency room services under these circumstances have a right to expect competent medical treatment from the medical personnel cloaked with ostensible authority by the hospital's conduct which reasonably leads the public to believe that medical treatment will be afforded by physicians acting on behalf of the hospital, and not on their respective individual responsibility.

Smith , 1983 OK CIV APP 58, ¶ 13, 676 P.2d 279. St. John did not argue otherwise. St. John's vicarious liability argument failed to distinguish between apparent authority and agency by estoppel and focused solely on the estoppel doctrine.

¶44 Consequently, for purposes of its motion for directed verdict, St. John has conceded that it may be liable based on the doctrine of apparent authority. This record supports that conclusion. The emergency room physicians employed by St. John, who treated Sanders on each of her first three visits to the hospital, sent the electronic studies they had ordered to the defendant radiologists for interpretation. Again, if the defendant radiologists were not competent and the emergency room physicians knew or should have known that fact, St. John may be liable. In addition, as Sanders' condition continued to deteriorate over a period of three months, it does not appear that any of the emergency room physicians she saw after December 2009 questioned the misdiagnosis or reported Sanders' failure to respond to the treatment that was prescribed. In addition, according to Sanders, the doctors and nurses she encountered at St. John after December 2009 expressed frustration when she continued to return to the hospital and embarrassed her for continuing to seek treatment.13 If any of this conduct failed to meet the standard of care, St. John may be liable.

2. Agency by Estoppel

¶45 St. John did argue that Sanders failed to prove that the hospital could be held vicariously liable because she did not change her position based on the employment status of the defendant radiologists. Although the elements necessary to prove apparent authority and agency by estoppel are "usually present" in a particular case, apparent authority and estoppel are distinguishable. Restatement (Second) of Agency § 8 cmt. d (1958). Apparent authority is a contract-based theory holding a party liable for its actual statements and representations. *Id* . Estoppel is a tort theory used to prevent loss to an innocent person. *Id* . Although the Supreme Court generally adopted section 8 of the Restatement (Second) of Agency regarding apparent authority in *Stephens v. Yamaha Motor Company, Limited* , 1981 OK 42, ¶ 8, 627 P.2d 439, no Oklahoma decision has specifically addressed all of the elements of estoppel. However, the decisions that have addressed the issue are consistent with section 8 of the Restatement. To estop the defendant from denying that the tortfeasor is its agent, a plaintiff must prove that: (1) the defendant misrepresented that the tortfeasor was its agent or was silent when the defendant had a duty to state that the tortfeasor was not its agent; (2) the plaintiff relied on the defendant's misrepresentation or silence **[*776]** and believed that the tortfeasor was the defendant's agent; and (3) the plaintiff changed positions and suffered a loss based on this belief. Restatement (Second) of Agency § 8B (1958). St. John's argument that Sanders failed to prove detrimental reliance, because she had no knowledge of or concerns regarding the defendant radiologists' employment status, is without merit.

¶46 First, this argument concedes the first two elements of estoppel. St. John failed to disclose that the defendant radiologists were not its agents, and Sanders believed that they were St. John agents. Those elements are also supported by the record.

¶47 Second, even assuming that the relevant inquiry is whether Sanders would have insisted on a different hospital had she known that the defendant radiologists were not employed by St. John, her testimony was that she told the ambulance driver that she wanted to go to St. John and she "thought the hospital made those decisions" about which radiologist to use. Therefore, the evidence on the change-in-position element is at least contested. *See* *Messler v. Simmons Gun Specialties, Inc.* , 1984 OK 35, ¶ 28, 687 P.2d 121 (noting that the court disregards evidence favorable to the movant which is disputed when ruling on a motion for a directed verdict). But that is not the relevant inquiry. What is relevant is whether Sanders "has suffered a loss." Restatement (Second) of Agency § 8B cmt. e (1958). Evidence that she did is sufficient to establish the change in position required for estoppel. *Id.* For purposes of St. John's motion for directed verdict, Sanders has satisfied that element. By choosing to go to St. John, her brain tumor was misdiagnosed, resulting in permanent injury.

¶48 Third, as the district court correctly noted, whether Sanders would have insisted on going to another hospital, if she had known the defendant radiologists were not St. John employees, is a question of fact for a jury to determine. *Roth v. Mercy Health Ctr., Inc.* , 2011 OK 2, ¶ 32, 246 P.3d 1079 (citing *Reed v. Anderson* , 1927 OK 334, ¶ 4, 127 Okla. 64, 259 P. 855).

3. The Limits of St. John's Vicarious Liability

¶49 In its final argument, St. John asserts that a hospital's vicarious liability is limited to emergency room physicians employed by the hospital: "[T]he Supreme Court has affirmatively refused to hold a hospital responsible for non-emergency room physicians since the *Smith* case." We find this argument disingenuous. First, there were at least two physicians for which the hospital in *Smith* could be held liable, the emergency room physician the court found was the controlled agent of the hospital, and a surgeon with privileges at the hospital and to whom the plaintiff was referred by the emergency room physician for treatment. As previously noted, this Court's decision in *Smith* was cited with approval in *Roth* , 2011 OK 2, ¶ 32, 246 P.3d 1079. *Roth* is particularly dispositive of St. John's argument because it reversed summary judgment in favor of a hospital, finding a material issue of fact as to whether the patient looked to the hospital to provide the medical care rendered by two private practice cardiologists whom the hospital's physician consulted regarding the patient's care. *Id.* ¶ 34.14

¶50 A hospital's liability is not determined by a physician's specialty or area of practice, but by the hospital's conduct in manifesting its intent to authorize the physician to provide medical services on behalf of the hospital or by its failure to inform patients that physicians appearing to provide services on behalf of the hospital are not authorized to do so. Restatement (Second) of Agency §§ 8 and 8B (1958).

CONCLUSION

¶51 The central issue in this case is whether the defendant radiologists' failure to identify **[*777]** Sanders' tumor was the proximate cause of her subsequent injuries. The issue raised by St. John's motion for directed verdict is whether it can be held liable for any negligence by those radiologists. St. John had a duty to provide "that care and attention required under all the circumstances that is appropriate to the physical and mental condition of [Sanders]." Okla. Uniform Jury Instructions - Civil No. 14.15. As relevant to this case, that included the duty to determine whether the radiologists were competent before they were selected to interpret the radiologic studies of Sanders' head and neck. *See Strubhart v. Perry Mem'l Hosp. Trust Auth.* , 1995 OK 10, 903 P.2d 263. Likewise, St. John may be liable even if the defendant radiologists were non-agent, independent contractors but appeared to be providing care on behalf of the hospital or under circumstances where St. John would be estopped to deny that fact. *Smith v. St. Francis Hosp* ., 1983 OK CIV APP 58, 676 P.2d 279.

¶52 A motion for directed verdict requires the determination "of whether there is any evidence to support a judgment for the party against whom the motion is made, and the trial court must consider as true all the evidence and inferences reasonably drawn therefrom favorable to the non-movant, and disregard any evidence which favors the movant." *Gillham v. Lake Country Raceway* , 2001 OK 41, ¶ 7, 24 P.3d 858. "A motion for directed verdict ... should not be sustained unless there is an entire absence of proof tending to show a right to recover ...." *Downing v. First Bank in Claremore* , 1988 OK 67, ¶ 8, 756 P.2d 1227. Considering as true all of the evidence favorable to Sanders, together with all of the inferences that reasonably may be drawn therefrom, and disregarding all the evidence favorable to St. John that is disputed, we cannot conclude that there is an entire absence of proof "tending to show that Sanders does not have a right to recover." *Id.*

¶53 The district court erred in granting St. John's motion for directed verdict. Likewise, and for the reasons previously discussed, it was error to limit the testimony of Dr. Connor to "what he saw, what he diagnosed, what his treatment of [Sanders was]" from the first time he saw her and thereafter. Dr. Connor should have been permitted to testify as an expert witness regarding his opinion of the defendant radiologists' responsibility for the injuries suffered by Sanders. The judgment appealed is vacated, and this case is remanded for further proceedings consistent with this Opinion.

¶54 **VACATED AND REMANDED FOR FURTHER PROCEEDINGS** .

THORNBRUGH, C.J. (sitting by designation), and GOODMAN, J., concur.

1 Our original Opinion in this case was issued on March 9, 2018. The defendant radiologists and St. John filed motions for rehearing, which we granted. Oral argument was held on November 15, 2018. In response to arguments made by the defendants during the oral argument, we ordered that the record be supplemented. We withdraw our original Opinion and issue this Opinion to incorporate our resolution of the issues raised during the oral argument.

2 A cholesterol granuloma is a benign cyst containing an expanding mass. For simplicity, we will, as the parties and the witnesses often did, refer to Sanders' cholesterol granuloma as a tumor. The tumor was located near the petrous bone at the base of Sanders' skull near her inner ear and was compressing the seventh and eighth nerves in that area which control facial muscles, hearing and balance.

3 At trial, the defendants argued that this was a "new opinion" that should not be permitted because it was not previously disclosed. It was not new and was clearly disclosed from Dr. Connor's responses during his deposition. Any details regarding that opinion that had not been previously discussed resulted from the defendants' failure to ask the appropriate questions because they focused, instead, on the fact that Dr. Connor was not a radiologist.

4 Many of the questions that elicited this testimony were premised on defense counsel's suggestion that the standard of care applicable to radiologists allowed them to have an acceptable rate of "misses." Dr. Connor testified that he was not aware of any such allowance, but if it was acceptable, "I think that's farce." If there is such a requirement, it can be presented to the jury on remand as a factor relevant to determining whether the defendant radiologists were negligent.

5 The defendant radiologists also argue that this Court used the wrong standard of review. Rather than the de novo standard used by this Court regarding the district court's legal ruling that Dr. Connor could not testify as an expert, the defendant radiologists contend we should have used the clear abuse of discretion standard, citing this Court's Opinion in *C-P Integrated Services, Inc. v. Muskogee City-County Port Authority* , 2009 OK CIV APP 57, 215 P.3d 835. The defendant radiologists suggest that the issue was one of trial management "in the context of days of testimony from numerous witnesses, including Dr. Connor." First, *C-P Integrated* involved a ruling limiting the scope of an expert's testimony. Here the district court ruled Dr. Connor could not provide any testimony as an expert. Second, the defendant radiologists' argument misrepresents the scope of the abuse of discretion standard. The "clear abuse of discretion standard includes appellate review of both fact and law issues." *Christian v. Gray* , 2003 OK 10, ¶ 43, 65 P.3d 591. The defendant radiologists' argument focuses only on the factual aspect of the standard and fails to appreciate that the district court's error was a legal one requiring de novo review. "A de novo standard applies when the error is one of law." *Id* . (citation omitted) (stating the standard of appellate review required when reviewing a district court's ruling on expert witness testimony).

6 A hospital must exercise ordinary care and attention for its patients. Ordinary care means that care and attention required under all the circumstances that is appropriate to the physical and mental condition of each patient. A hospital has a duty to [(supervise care rendered to a patient by hospital employees)/(use reasonable care when providing the patient with a nurse/physician/(other health care provider))/(ensure that staff privileges are granted only to competent physicians)/(protect patients from staff physicians that it knows or reasonably should know are incompetent)].

7 In its appellate briefing, St. John argues that Sanders did not raise a negligent credentialing claim. However, no citation to the record is provided to support this contention. And, in her appellate briefing, Sanders relies on *Strubhart v. Perry Memorial Hospital Trust Authority* , 1995 OK 10, 903 P.2d 263, for that proposition. Further, during the oral argument counsel for Sanders stated that she had tried to make a credentialing claim but that the district court would not allow it. More importantly, "negligent credentialing" is not a separate tort, it is one way in which a defendant can be found negligent and negligence is a claim clearly asserted by Sanders in the pretrial order. This Opinion does not preclude either party from raising that issue on remand for disposition by the district court.

8 These facts are either admitted by the defendants, disclosed in the supplemented record or apparent from the deposition of Dr. Connor, whose trial testimony was limited by a ruling we have reversed.

9 From the oral argument and the additional materials added to the record it appears that St. John physicians and/or personnel instructed the defendant radiologists to confirm or rule out that Sanders' symptoms were caused by a stroke, which caused the radiologists to focus on a different area of the radiologic studies from where the tumor was located. This Opinion does not preclude or limit the scope of any defense or claim by any party on remand.

10 The exact relationship between the defendant radiologists and the hospital cannot be determined from the appellate record. However, it was clear from the oral argument that the defendant radiologists were not "strangers," but radiologists who had been granted staff privileges by St. John and St. John physicians were authorized to refer radiologic studies of St. John patients to the defendant radiologists for interpretation. In ruling on a motion for directed verdict, the court considers as true all inferences favorable to the non-movant. *Gillham v. Lake Country Raceway* , 2001 OK 41, ¶ 7, 24 P.3d 858.

11 St. John's petition for rehearing points out the confusion in Oklahoma jurisprudence on this issue and argues for a different view of the law that would combine the elements of apparent authority and agency by estoppel, in essence requiring proof of detrimental reliance for all claims where the defendant cannot be held vicariously liable. We decline to adopt that view.

12 In its petition for rehearing, St. John argued there is no evidence in the record that it made any affirmative representation to Sanders that the defendant radiologists or even the emergency room physicians who treated Sanders were its agents. St. John's point is unclear. For example, there is no testimony in this record that there was a sign above the entrance to the hospital that stated "St. John Emergency Room." But it is undisputed that Sanders wanted to go to St. John and that she was treated at St. John's emergency room before being admitted to St. John's hospital. There is no testimony in this record that anyone at St. John told Sanders that the physicians in the emergency room were St. John's agents. But the fact that they were there and provided treatment to Sanders is undisputed. We do not understand St. John to be arguing that the emergency room physicians, for example, were not authorized to be there, were not authorized to provide Sanders treatment or that they just wandered in off the street and happened to be there when Sanders arrived. It certainly did not do so during the oral argument. Quite obviously, that position would raise additional exposure for St. John, as previously discussed.

13 St. John argues in its petition for rehearing that there is no "trial testimony" to support this statement. Sanders' trial testimony was not included in the original record. This fact is disclosed from the argument made by counsel for St. John in support of its motion in limine representing what Sanders had said during her deposition. (ROA 831, p. 16). Although we gave all parties the opportunity to supplement the record, St. John chose not to add Sanders' trial testimony to confirm its claim that Sanders changed her deposition testimony. Further, St. John argues that this Court created "a cause of action for embarrassment." St. John's argument misses the point. It is not that Sanders was embarrassed as she continued to be seen by St. John physicians and nurses; the point is that on those subsequent visits St. John personnel continued to misdiagnose Sanders' tumor as Bell's palsy. It is clear from the oral argument that Sanders is asserting that claim directly against St. John.

14 In *Roth* , the Supreme Court reserved for future determination whether a hospital can be held liable under the doctrine of apparent authority or estoppel for the negligence of a physician who is consulted by a hospital physician or to whom the hospital's patient is referred for treatment. We do not decide that issue in this case because the state of the record is insufficient. *Cf.* Restatement (Second) of Agency § 255 (1958), regarding the liability of a principal for the acts of subagents.

Instruction 14.15 - Duty of Hospital

Library:	Oklahoma Jury Instructions - Civil
Edition:	2020
Currency:	2020
Year:	2020

Id. vLex Fastcase: VLEX-954821327

Link: https://fastcase.vlex.com/vid/instruction-14-15-duty-954821327

DUTY OF HOSPITAL

Instruction No. 14.15

A hospital must exercise ordinary care and attention for its patients. Ordinary care means that care and attention required under all the circumstances that is appropriate to the physical and mental condition of each patient. A hospital has a duty to [(supervise care rendered to a patient by hospital employees)/(use reasonable care when providing the patient with a nurse/physician/(other health care provider))/(ensure that staff privileges are granted only to competent physicians)/(protect patients from staff physicians that it knows or reasonably should know are incompetent)].

Notes on Use

The last sentence sets out possible examples of a hospital's duty of care. The list is not intended to be complete, nor would a hospital necessarily have the duties to its patients that are set out in the sentence. For example, although a hospital ordinarily does not have a duty to furnish a patient with a physician, if it does do so, such as sometimes occurs in emergency room situations, the hospital must exercise reasonable care. Under certain circumstances, such as where a hospital has knowledge of substandard care, a hospital may even have a duty to review the work of a doctor whom the hospital did not furnish to the patient. *See Strubhart v. Perry Memorial Hosp. Trust Auth.,* 1995 OK 10, ¶ 42, 903 P.2d 263, 278. The trial judge should select the appropriate language according to the evidence presented at trial.

Comments

A hospital's liability for negligence may extend beyond liability based on *respondeat superior* for the acts of nurses and other employees who treat its patients. *See Eversole v. Oklahoma Hosp. Founders Ass'n*, 1991 OK 80, ¶ 17, 818 P.2d 456, 461 (affirming patient's verdict against hospital that also exonerated the nurse who had treated him). In *Weldon v. Seminole Mun. Hosp.*, 1985 OK 94, ¶ 9, 709 P.2d 1058, 1061, the Oklahoma Supreme Court described a hospital's duty of care, as follows: "Oklahoma has adopted the rule that a hospital has an implied duty to exercise ordinary care and attention in proportion to the physical condition of the patient." For other cases applying the same standard, see *Rogers v. Baptist Gen. Convention*, 1982 OK 69, n.1, 651 P.2d 672, 674; *St. John's Hosp. & School of Nursing, Inc. v. Chapman*, 1967 OK 126, ¶ 26, 434 P.2d 160, 168; *Hillcrest Medical Ctr. v. Wier*, 1962 OK 158, ¶ 16, 373 P.2d 45, 48; *Flower Hosp. v. Hart*, 178 Okla. 447, 448, 62 P.2d 1248, 1250 (1936); *Tulsa Hosp. Ass'n v. Juby*, 73 Okla. 243, 247, 175 P. 519, 523 (1918); *Warner v. Kiowa County Hosp. Auth.*, 1976 OK CIV APP 11, ¶ 32, 551 P.2d 1179, 1186. In addition, the Oklahoma Supreme Court ruled in *Strubhart v. Perry Memorial Hosp. Trust Auth.,* 1995 OK 10, ¶ 39, 903 P.2d 263, 277, as follows: "A hospital should have a duty to ensure that staff privileges are granted only to competent physicians. Hospitals should also have a duty to take reasonable steps to protect hospital patients from staff physicians who have exhibited a pattern of incompetence." The Supreme Court also noted that in some circumstances a pattern of incompetence may be established by one prior episode that was so egregious that the hospital should have known it was dealing with an incompetent physician. 1995 OK 10, n.14, 903 P.2d at 277.

Historical Data

Amended by SCAD 2002-38, effective May 16, 2002 (superseded document available).