

IN THE SUPREME COURT OF OHIO

Loretta Schelling	:	Supreme Court No. 2007-2202
	:	
Plaintiff/Appellee	:	On Appeal From the Williams
	:	County Court of Appeals, Sixth
v.	:	Appellate District
	:	
Community Hospitals	:	Court of Appeals
Of Williams County	:	Case No. WM-07-001
	:	
Defendant/Appellant.	:	

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**MERIT BRIEF OF APPELLANT  
COMMUNITY HOSPITALS OF WILLIAMS COUNTY**

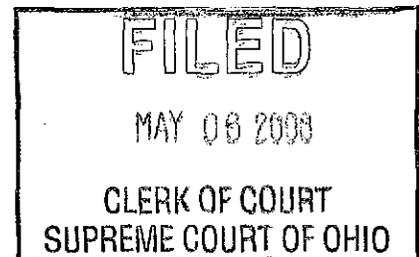
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## INTRODUCTION

This case presents a critical issue that will have a substantial impact on the healthcare industry in Ohio, and on the future of negligent credentialing claims against Ohio hospitals. Specifically, in accepting jurisdiction over this appeal, this Court has agreed to undertake the task of clarifying whether a plaintiff may proceed on a negligent credentialing claim against a hospital in the absence of a prior finding, either by adjudication, admission, or direct stipulation, that the plaintiff's injuries were caused by the negligence of the subject physician.

In accepting that task, the Court now has the opportunity to do what Chief Justice Moyer urged it to do nearly fifteen years ago in *Browning v. Burt* (1993), 66 Ohio St.3d 544: to articulate, precisely and clearly, that a plaintiff must prove the negligence of a physician before she can proceed with a credentialing claim against the hospital where her injury occurred. In doing so, the Court would make it clear to Ohio litigants that absent a prior direct admission, finding or specific stipulation as to the negligence of the subject physician, a claim for negligent credentialing is not ripe for adjudication. That outcome would not only be consistent with long standing case law dealing with potential liability for credentialing non-employee physicians, but would also be consistent with the very basic principals that govern corporate liability for non-employee misconduct. Moreover, it would be aligned with the clear intent by the Ohio Legislature, as well as the trend seen in other jurisdictions that recognize negligent credentialing claims, which is to insulate hospitals from liability on these claims.<sup>1</sup> Finally, from a public

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<sup>1</sup> As this Court is aware, Ohio Revised Code Section 2305.251(B), put in effect on April 9, 2003, has created a rebuttable presumption against a negligent credentialing claim where, as here, the hospital was a member of one of the specified private accrediting organizations, such as the Joint Commission on Accreditation of Healthcare Organizations. Where a plaintiff is unable to rebut the presumption, which is a significant burden in that it must be rebutted by a preponderance of the evidence, judgment must be entered in favor of the hospital on its motion. *Id.* (Emphasis added)

policy standpoint, overturning the decision of the Court of Appeals and adopting the Proposition of Law set forth herein, would be consistent with the General Assembly's recent attempts to address problems plaguing the healthcare industry through tort reform legislation.

#### STATEMENT OF THE CASE

This action originally involved a claim of medical malpractice against the Plaintiff/Appellee's private podiatrist, Stephen Humphrey, M.D., alleging that he negligently performed two surgical procedures on her feet at the Defendant/Appellant hospital. (See Complaint filed on February 10, 2005). Later, the Plaintiff/Appellee amended her Complaint to assert allegations that Community Hospitals of Williams County was negligent in credentialing Dr. Humphrey. (See Amended Complaint, filed on April 20, 2005). That claim was based on the fact that Dr. Humphrey maintained staff privileges at the hospital during the times that he performed surgery on Ms. Schelling, and premised on claims of non-medical misconduct by Dr. Humphrey for which the hospital was allegedly aware. *Id.* It should be noted that, although the holding by the Court of Appeals cites to and relies on this misconduct, the actual trial court record does not establish those issues. (See Court of Appeals Decision of October 12, 2007). Rather, these unsubstantiated facts were submitted for the first time at the appellate level, attached to the Plaintiff/Appellee's brief through unauthenticated police reports and the like. (See Plaintiffs' Appellate Brief filed on March 23, 2007).

In any event, the Hospital answered the Amended Complaint by denying the allegations and subsequently filing a motion to bifurcate and stay the negligent credentialing claim from the underlying negligence claim. Bifurcation was granted by the trial court. (See Order of August 11,

2005). In so holding, the trial court agreed that a finding of negligence against Dr. Humphrey was a prerequisite to placing the claim of negligent credentialing before the jury.

While the case was pending, but following the bifurcation order, Dr. Humphrey filed for personal bankruptcy and an automatic stay of the entire case was issued. Prior to the completion of the bankruptcy proceedings, the Plaintiff/Appellee apparently negotiated with the bankruptcy trustee, agreeing to reduce the claim she asserted against the bankruptcy estate. Any such agreement was with the bankruptcy trustee, not with Dr. Humphrey directly. (See Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss dated November 29, 2006). There was no evidence presented to the trial court of any monies actually paid out to the Plaintiff/Appellee, or that Dr. Humphrey ever acknowledged by admission or stipulation that he owed any monies to her as a result of negligence. Rather, the trial court record clearly establishes that Dr. Humphrey specifically denied that he violated the standard of care or was negligent in his treatment of Ms. Schelling. (See Answer of Stephen Humphrey, M.D., filed on March 28, 2005).

After agreeing to reduce her claim with the bankruptcy trustee, Ms. Schelling voluntarily dismissed her medical malpractice claim against Dr. Humphrey, without prejudice, leaving only the claim for negligent credentialing against the Defendant/Appellant. (See Plaintiffs' Notice of Dismissal of Defendant, Stephen Humphrey, M.D., filed on October 30, 2006). Based on the fact that the claim of medical malpractice against the subject physician had been dismissed, the Defendant/Appellant moved for a dismissal of the negligent credentialing claim for failure to state a claim upon which relief could be granted. Specifically, the Hospital argued that without a prior finding of negligence against Dr. Humphrey, the negligent credentialing claim was not ripe and, further, that negligence could no longer be established with Dr. Humphrey having been dismissed. (See Defendant's Motion to Dismiss filed on November 17, 2006). In essence, the

Defendant/Appellant argued that a finding of negligence on a medical malpractice claim is not only an essential element, but in reality a legal prerequisite to proceeding on a claim for negligent credentialing based on this Court's prior holding in *Albain v. Flower Hospital* (1990), 50 Ohio St. 3d 251. *Id.* The trial court agreed, and, in granting the motion to dismiss for failure to state a claim, held by implication that the alleged negligence of Dr. Humphrey could no longer be proven in light of his dismissal from the case.

The Plaintiff/Appellee appealed, and the Court of Appeals reversed and remanded the matter back to the trial court by order dated October 12, 2007. In its order, the Appellate Court provided no guidance as to how the issue of physician negligence was to be established from a procedural standpoint other than to state "the element of staff physician negligence as a component of a negligent credentialing claim can be proven without the allegedly negligent physician as a named party." (Citation omitted). (See Court of Appeals Decision and Judgment Entry of October 12, 2007 at ¶ 17). In reaching that conclusion, the Sixth District apparently failed to consider or fully appreciate the undue burden it placed on the Hospital which, by virtue of its decision, would be forced to defend a claim of medical negligence on behalf of a doctor who was not its employee and who was no longer engaged in the case.

#### STATEMENT OF THE FACTS

According to the medical records, Ms. Schelling first presented with complaints of foot pain to Dr. Humphrey on November 26, 2002. Dr. Humphrey performed two surgeries on Ms. Schelling, one occurring on January 23, 2003 and the other on February 20, 2003. Both were tarsal tunnel releases performed on the heel, and both were reported as having been completed without complication. However, Ms. Schelling continued to have pain in both feet and the

records articulate a suspicion of nerve damage as the cause of her ongoing pain complaints. Ms. Schelling alleged that these ongoing problems were complications caused by the two surgeries performed by Dr. Humphrey, which she believed were performed sub-standard. Ms. Schelling also believed that Dr. Humphrey was suffering from a mental health condition at the time of these surgeries which impacted his ability to perform them properly, although there was no evidence of that in the trial court record, despite the fact that the Court of Appeals appears to have accepted those allegations as facts. (See, generally, Defendant's Motion to Bifurcate filed in July 26, 2005, Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss filed on November 29, 2006, and the Court of Appeals Decision and Judgment Entry filed October 12, 2007 as support of these facts).

#### ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

**Proposition of Law: A plaintiff cannot proceed on a negligent credentialing claim against a hospital in the absence of a prior direct finding, either by adjudication, admission, or stipulation, that the plaintiff's injury was caused by the negligence of the physician who is the subject of the negligent credentialing claim.**

The notion that physician negligence must be established as a prerequisite to a viable claim for negligent credentialing is not new. Rather, the issue was first addressed in 1990, in *Albain*, supra, where this Court clearly established the elements of this tort. Specifically, the *Albain* Court held that Ohio hospitals have a "direct duty to grant and to continue [staff privileges] only to competent physicians." It went on to note, however, that "[a] hospital is not an insurer of the skills of private physicians to whom staff privileges have been granted." Rather,

[i]n order to recover for a breach of this duty, a plaintiff injured by **the negligence of a staff physician** must demonstrate but for the lack of care in the selection or the retention of the physician, the

physician would not have been granted staff privileges, and the plaintiff would not have been injured.

*Id.* at 251-252, ¶ two of the syllabus. (Emphasis added). Despite the clear and plain language used by the Court in *Albain*, this rule was misinterpreted or simply ignored by the Court of Appeals in the proceedings below. As a result, Ohio hospitals need this Court to intervene and establish protection against non-ripe, fishing expeditions by claimants, where hospitals would be left to carry the burden of, and foot the bill for, defending against claims of physician-negligence on behalf of a non-employee physician, where there is no duty or right to control or direct the conduct of that physician. *Id.* at 259.

The Court of Appeals' reversal of the trial court's decision in this case was based primarily on a decision out of the Fourth Appellate District, *Dicks v. U.S. Healthcare*, (May 10, 1996), 4<sup>th</sup> Dist. No. 95 CA 2350, 1996 WL 263239, appeal not allowed, 77 Ohio St.3d 1480, which held that there is no "legal requirement to name the staff physician as a defendant and prove the negligence claim in the same complaint" as the negligent credentialing claim. *Schelling v. Humphrey* (Oct. 12, 2007), 6th Dist. No. WM-07-001, 2007-Ohio-5469, citing *Dicks*.

In reaching that conclusion, however, the Court of Appeals disregarded the fact that in this case, unlike *Dicks*, there was no prior finding, admission or direct stipulation of negligence against the physician. It made the same mistake in its analysis of the impact of *Browning*, *supra*, when it held that *Browning* "established a clear precedent that a negligent credentialing claim can be made without the doctor being named a party." *Schelling* at ¶ 14. As in *Dicks*, medical negligence on the part of the dismissed physician had already been established in *Browning*. In failing to recognize that distinction, the Appellate Court clearly erred by broadly interpreting the

mandate that physician negligence must be proven as a component of negligent credentialing, concluding that it could be proven at any time.

Of course, such a result would render *Albain* virtually meaningless, as it would be nonsensical to allow for adjudication of the professional negligence claim after proceeding, or even simultaneous with proceeding, on a negligent credentialing claim, particularly where, as here, the physician is not a party to the case. Indeed, to protect against such a manifest injustice, trial courts routinely entertain and grant motions to bifurcate and/or stay negligent credentialing claims, recognizing that they do not become ripe unless or until there is a finding of physician negligence, as the trial court did in this case. Rather than applauding the wisdom of that action, the Court of Appeals reversed and remanded, choosing to ignore common sense and the specific language used by this Court in *Albain*, and later discussed by Chief Justice Moyer in his dissenting opinion in *Browning*, supra. Ironically, in that dissent, Chief Justice Moyer admonished the majority for “underemphasizing” the *Albain* requirement that physician negligence be established first, fearing that Ohio courts would do exactly what the Sixth Appellate District did in this case.

Simply stated, the decision by the Court of Appeals below threatens and dilutes Ohio’s well-established negligent credentialing law, and leaves Ohio hospitals vulnerable to claims that are not ripe. Moreover, it will force hospitals to accept the burden of, and foot the bill for, defending against a claim of non-employee physician negligence, a duty which is not otherwise imposed by Ohio law. Moreover, upholding the decision of the Court of Appeals would create a dangerous precedent, allowing lower courts to misconstrue and disregard *Albain*, and to disrupt and/or ignore the legislative trend of insulating Ohio hospitals from premature and meritless negligent credentialing claims. It would also place an undue burden on Ohio hospitals to defend

against malpractice claims against physicians who have no stake in the outcome and no duty to cooperate or even participate in the defense of the case.

Take, for example, the underlying facts and circumstances of this case. Dr. Humphrey, the subject physician, no longer has any potential liability in that a claim for medical negligence against him is now time-barred. As a result, he would have no stake in the outcome of any claimed negligence brought within the context of a negligence credentialing claim.<sup>2</sup> Moreover, he is no longer practicing medicine and thus has no motivation to cooperate, much less actively participate, in the defense of such a claim. Accordingly, if left undisturbed, the ultimate result of the Court of Appeals' decision would be that the Defendant/Appellant will be left to expend resources and energy not just on the direct claim against it (negligent credentialing) but also on a claim against a physician who it did not employ, for whom it has no agency liability under *Clark v. Southview* (1994), 68 Ohio St.3d 435, 438, and from whom it has received no financial contribution for liability or indemnity coverage or the defense thereof. Such a result would be inconsistent with Supreme Court precedent and contrary to both common sense and fairness.

It is well-settled law in this State that in order to recover on a claim for negligent credentialing against an Ohio hospital, a plaintiff must demonstrate that she was injured by the negligence of a staff physician and that, but for the hospital's negligence in the selection or the retention of that physician, the injury would not have occurred. *Albain, supra*, at paragraph two of the syllabus. (Emphasis added). Indeed, it is undisputed among Ohio courts, including the Court of Appeals below, that a plaintiff must prove that the subject physician was negligent

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<sup>2</sup> Of course, if the Court of Appeals' decision is left to stand and the matter is remanded back to the trial court in this case, the Defendant/Appellant will assert, as an affirmative defense, that the Plaintiff/Appellee is unable, as a matter of law, to establish the negligence of Dr. Humphrey because such a claim is time-barred.

before recovery can be made for negligently credentialing that physician.<sup>3</sup> However, there continues to be some confusion or disagreement as to *when* the physician's negligence must be proven, with the Fifth Appellate District and most trial courts across the state utilizing bifurcation to avoid jury confusion and to protect hospitals against these unripe claims by preventing the unquestionable prejudice that hospitals and physicians alike would endure if evidence relating to credentialing issues were introduced during a jury trial on medical malpractice, and with the Sixth (and Fourth) Appellate Court holding to the contrary that such negligence can be proven at anytime, including during the course of a negligent credentialing case where the subject physician is not a party.

In order to clear up the confusion and remedy the erroneous interpretation of *Albain* by the Court of Appeals below, this Court must set forth, clearly and concisely, that the negligence of the subject physician must be established *before* a claim against a hospital for negligent credentialing becomes ripe, and before a hospital is forced to defend itself against such an unripe claim. To hold otherwise would fly in the face of the principle articulated in *Albain*, supra, that a "hospital is not an insurer of the skills of a private physician." *Id.* at 251. Moreover, the Court must remedy the consequential error created by the Court of Appeals' decision, by clearly establishing that a hospital should not, and cannot, be forced to defend a claim of negligence against a non-employee physician where it had no right or duty to direct or control his conduct. Allowing a plaintiff to prove the negligence of the physician during a case for negligent credentialing where, as here, the physician is not a party to the case would in effect force the hospital to take on the role of insurer to that physician. It also places the defense of such a claim

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<sup>3</sup> Based on the Plaintiff/Appellee's oral arguments in support of her appeal at the Court of Appeals below, however, it is anticipated that she will allege that it is not necessary to establish physician negligence at all, a proposition which would be contrary to all case law decided in this State on this issue.

at a distinct disadvantage, in that it is a difficult burden indeed to defend against claimed negligence on behalf of a physician who is not at the trial table, who has no duty to cooperate, and who is otherwise not engaged in the defense process.

As previously stated, the Proposition of Law presented in this appeal is not novel. Rather, as set forth above, Chief Justice Moyer urged this Court over 15 years ago to address this issue and to adopt the very Proposition of Law before the Court in this case in his dissenting opinion in *Browning*, supra. Although the discussion was contained in a dissent, it is important to note that Justice Moyer did not take issue with a mandate or rule of law articulated by the majority in *Browning*. Rather, he merely highlighted a rule of law previously established in *Albain*, which he felt was not being properly considered or addressed by the *Browning* majority. Thus, the Court of Appeals below was remiss in dismissing Chief Justice Moyer's concerns as merely a dissent, where his concerns were based on prior Ohio Supreme Court precedent. To be sure, the *Browning* majority did not *reject* the notion that a finding of negligence against a physician is a prerequisite to proceeding with a negligent credentialing claim, as the Sixth Appellate District did in this case. Rather, the *Browning* majority was silent on the issue altogether.

In fact, the *Browning* majority was narrowly focused on considering "whether the negligent credentialing causes of action against [the Hospital]... were timely filed pursuant to the applicable statute of limitations." *Browning*, supra at 553. The majority was not charged with the specific question of when the physician's negligence must be proven. Recognizing the importance of that timing, however, Chief Justice Moyer in his dissent (which notably was joined by both Justice Cook and Justice Wright) found it necessary to revisit and discuss the wording in *Albain*. In so doing, he took issue with the majority opinion in *Browning*, not

because it dispelled the notion that finding a physician negligent is a legal prerequisite to a negligent credentialing claim, but rather because the majority did not seem to consider or articulate that established rule of law in reaching its decision.

Thus, while the Sixth Appellate District in this case correctly noted that the *Browning* majority “did not hold that a finding of negligence is a legal prerequisite to negligent credentialing” (*Schelling*, supra at ¶ 18), it did not establish that it was not. This erroneous logic appears to be the entire point of Chief Justice Moyer’s *Browning* dissent. Clearly, there was concern that the majority decision in *Browning* would create the very confusion and result that was reached by the Court of Appeals below, a concern held not only by the Chief Justice, but by Justices Cook and Wright as well. Specifically, after quoting the relevant language in *Albain*, Chief Justice Moyer noted:

The above-emphasized language underscores a crucial point underemphasized by the majority’s opinion: under *Albain*, claims against a hospital for negligent retention or selection of a staff physician are dependent on an underlying medical malpractice claim against the staff physician.

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That is, *Albain* requires that the underlying malpractice of the physician be proven before the plaintiff can recover damages against the hospital for its own negligence. Without an underlying harm to the hospital’s patient through medical malpractice, an action against the hospital for negligent credentialing will never arise. Although medical malpractice claims against the doctor and negligent credentialing claims against the hospital are separate causes of action, with separate and distinct duties owed to a singular class of individuals, both causes of action fail without proof that the physician’s failure to abide by ordinary standards of care proximately caused the patient’s harm.

*Browning*, supra at 566 (Moyer, C.J., dissenting). (Emphasis added). Based on this language, the discussion in the *Browning* dissent appears to have been an attempt to emphasize that proof of

physician negligence is a prerequisite under *Albain*, and an effort to avoid the exact decision that the Court of Appeals reached here.

Overturing the lower court and reinstating the trial court's decision would also be consistent with the Fifth Appellate District, which embraced the position of Chief Justice Moyer in *Davis v. Immediate Medical Services, Inc.* (Dec. 15, 1995), 5<sup>th</sup> Dist. No. 94 CA 0253, 1995 WL 809478 (judgment affirmed in part, reversed in part on other grounds, 80 Ohio St. 3d 10, reconsideration denied, 80 Ohio St. 3d 1449). In *Davis*, the Court of Appeals held that negligent credentialing claims do "not become ripe... until and if medical negligence was found on behalf of (the physician)." *Id.* (Emphasis added). There, the Fifth Appellate District disagreed with the patient's position that the trial court erred in bifurcating the malpractice claim from the negligent credentialing claim, thus forcing him to try the issue of medical negligence first. *Id.* at page 6. Although the Fourth District in *Dicks*, *supra*, reached a different conclusion, as discussed above, in that the physician in *Dicks* acknowledged through his deposition testimony that he violated the standard of care. *Id.* at 2. Indeed, two years later in *Ratliff v. Morehead* (4<sup>th</sup> App. Dist.), 1998 Ohio App. LEXIS 2271, that same Court backtracked a bit, recognizing that "in order to prove negligent credentialing, [patients] must prove the underlying medical malpractice claim against [the physician]," and where there is a failure to establish such negligence, summary judgment is appropriate on a negligent credentialing claim). *Id.*

Although confusion appears to exist among Ohio courts as to the application of the *Albain* decision and the governing law in Ohio on this issue, the necessity of establishing the negligence of a physician prior to proceeding with a negligent credentialing claim against a hospital has been recognized, as a matter of law, in a number of other states. *See, e.g., Hiroms v. Scheffey*, 76 S.W.3d 486, 489 (Tx. App. 2002); *Trichel v. Claire*, 427 So.2d 1227, 1233 (La.

App. 1983); *Torres v. Kennecott Copper Corporation*, (1971) 15 Ariz. App. 272; *Winona Memorial Hospital v. Kuester* (Ind. App. 2000), 2000 Ind. App. Lexis 1712; and *Humana Medical Corporation of Alabama v. Traffanstedt* (Ala. App. 1992), 1992 Lexis 188. Each of these cases applies or recognizes the very Proposition of Law presented in this appeal.

In *Hiroms*, for example, a patient's estate brought an action against a surgeon for medical malpractice and against a hospital for negligent credentialing. The trial court granted the hospital's motion for summary judgment on the negligent credentialing claim prior to trial and a jury subsequently found that the physician was not negligent. On appeal, the plaintiff took issue with the granting of summary judgment in favor of the hospital. *Id.* at 489. The Texas Court of Appeals held that "there was no negligent credentialing claim against the hospital because the physician was [found] not negligent." *Id.* at 4. (See also, *Wolfington v. Wilson N. Jones Memorial Hosp.*, 2000 WL 1230764 (Tex. App. Dallas 2000), where a Texas Court of Appeals, without expressly affirming that a physician's negligence must be established before a jury can impose liability on a hospital for negligent credentialing, explained that the credentialing question did not go to the jury because the jury found that the injury was not the result of negligence by the subject physician). Similar conclusions were reached by the Louisiana Court of Appeals in *Trichel* (where the Court held that an adjudication in favor of the subject physician negated any viable claim of negligent credentialing against the defendant-hospital, in that causation could not be established) and by the Indiana Court of Appeals in *Kuester* (where the Court held that physician negligence must "first" be established before a patient can proceed against a hospital for negligent credentialing).

In *Torres*, supra, a case which is remarkably similar to the instant case, a doctor<sup>4</sup> was sued for medical negligence. A claim for negligent credentialing was also brought against the hospital. The physician was dismissed during the course of the case, which prompted the hospital to move for a dismissal of the credentialing claims against it. That motion was granted by the trial court and the plaintiff appealed. The Arizona Court of Appeals affirmed, stating:

We are also of the view that because of the dismissal of the claim against [the subject physician], plaintiffs are now collaterally estopped from litigating [the hospital's] liability under [the negligent credentialing count] of the complaint.

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[The hospital's] alleged negligence in selecting an employee with known negligent propensities could not have resulted in detrimental consequences to plaintiffs, in the absence of negligent conduct on the part of that employee – and here, by virtue of the dismissal with prejudice, there has been a determination That (sic) he was not negligent.

*Id.* at 274-275. (Emphasis added).

As in *Torres*, the Plaintiff/Appellee in this case voluntarily stipulated to the dismissal of Dr. Humphrey without a finding, admission, or stipulation of negligence, and is now time-barred from pursuing a claim of professional negligence against him. The legal effect of that voluntary decision is to consider the dismissal an adjudication in his favor – i.e., a determination that he was not negligent. Without the ability to first establish this essential element, this Court should conclude, as the Arizona Court of Appeals did in *Torres*, that the Plaintiff/Appellee cannot succeed on a negligent credentialing claim against the Defendant/Appellant.

Finally, consider the Supreme Court of Oklahoma's decision in *Strubhart v. Perry Memorial Hospital Trust Authority*, 1995 OK 10, 903 P.2d 263, 278. In discussing the doctrine

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<sup>4</sup> Note that in *Torres*, the subject physician was an employee of the defendant-hospital, which is not the case here.

of corporate negligence in the context of a hospital's duty to credential only competent, qualified physicians, the Court relied, in part, on this Court's decision in *Albain*, supra. In citing to *Albain*, the Oklahoma Supreme Court noted:

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...

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In short, the hospital is not the insurer of the skills of physicians to whom it has granted staff privilege.

Id. at 277, (Emphasis added) (citing *Albain*, as a "reasonable approach to the doctrine [of corporate negligence or responsibility]"). In order for these words to give any meaningful benefit to hospitals, it is only logical that physician negligence must be established before a patient can recover for the negligent credentialing of that physician. To hold otherwise would, contrary to the notion set forth in both *Albain* and *Strubhart*, force hospitals into the role of "insurer" for the physician, requiring it to defend against a claim of professional negligence on his behalf.

### CONCLUSION

There is no dispute in this case that the Plaintiff/Appellee voluntarily dismissed Dr. Humphrey without a finding of negligence against him. The legal effect of that voluntary decision must be to consider the dismissal as an adjudication in favor of Dr. Humphrey, who did not admit or stipulate to negligence in any way prior to the dismissal. Accordingly, the Plaintiff/Appellee is unable, as a matter of law, to establish causation in her negligent

credentialing claim against the Defendant/Appellant, in that she must first prove negligence on the part of the doctor involved in order to establish a causal relationship between the hospital's negligence in granting or continuing staff privileges and the Plaintiff's injuries. Adopting the Proposition of Law presented in this appeal will reverse the error created by the Sixth Appellate District, and clarify any lingering confusion on this issue for future cases.

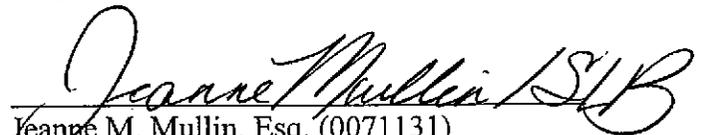
Considerations of public policy and judicial economy also support requiring a plaintiff to first prove that a subject physician was negligent, as this prevents the needless waste of time and expense for both parties, as well as unnecessary jury time and judicial resources. If a plaintiff is required to first establish the negligence of the subject physician, there may be no need for a trial against the Hospital on the negligent credentialing claim, thereby resulting in judicial economy and fairness to the parties and the Court. To hold otherwise places Ohio hospitals in the untenable position of defending a claim of negligence on behalf of a non-employee physician, over whom it has no control nor commitment of cooperation. While bifurcation and the granting of a stay generally serves this purpose, that is only true in cases where, unlike here, the claim of negligence against a party-physician is pending in the same case. In cases where the physician is not a party, the only effective course would be to order a stay or dismissal of the negligent credentialing case altogether, pending a finding of negligence against the physician in another action, as the trial court did below.

While the tort of negligent credentialing may well be a separate and distinct cause of action from medical malpractice, as Chief Justice Moyer and Justices Cook and Wright note in *Browning*, supra, there is certainly an interrelationship between the two, in that "every negligent credentialing claim will by necessity arise out of a malpractice claim." *Browning* at 572 (Wright's concurrence and dissent). To hold that a plaintiff does not have to establish the

negligence of the physician first would, in effect, force a hospital to defend against a claim of negligence by a non-employee, non-agent physician which is a burden this Court has refused to place on hospitals to date. Moreover, such a result would be contrary to this Court's decision in *Albain* (as is evidenced by Chief Justice Moyer's discussion of that case in his *Browning* dissent), and contrary to the intent of the Ohio General Assembly in creating a statutory presumption against a claim for negligent credentialing, as set forth in O.R.C. Section 2305.251.

In an era of tort reform designed to address the financial problems in the healthcare industry in Ohio and the related effort to cap non-economic damages that deal with these issues, it would clearly be contrary to public policy to force hospitals to spend their already limited resources on defending against medical negligence claims on behalf of non-employee physicians whose actions it did not have the right or duty to control. Accordingly, the Defendant/Appellant requests that this Court reverse the decision of the Court of Appeals, reinstating the decision of the trial court, and provide guidance to all courts in Ohio on this issue by adopting the Proposition of Law set forth herein.

Respectfully submitted,



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Counsel for Appellant, Community  
Hospitals of Williams County

**CERTIFICATE OF SERVICE**

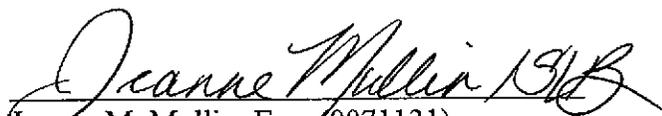
This is to certify that copy of the foregoing has been served by regular U.S. Mail with postage prepaid upon the following on this 6<sup>th</sup> day of May, 2008:

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Counsel for Amicus Curiae

  
Jeanne M. Mullin, Esq. (0071131)

Counsel for Appellant, Community  
Hospitals of Williams County

IN THE SUPREME COURT OF OHIO

07-2202

Loretta Schelling

Plaintiff/Appellee

v.

Community Hospitals  
Of Williams County

Defendant/Appellant.

Appeal From the Williams  
County Court of Appeals, Sixth  
Appellate District

Court of Appeals  
Case No. WM-07-001

---

NOTICE OF APPEAL OF APPELLANT  
COMMUNITY HOSPITALS OF WILLIAMS COUNTY

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Chad Tuschman, Esq. (0074534)  
Williams, DeClark, Tuschman Co., L.P.A.  
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COUNSEL FOR APPELLEE, LORETTA SCHELLING

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COUNSEL FOR APPELLANT, COMMUNITY  
HOSPITALS OF WILLIAMS COUNTY

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CLERK OF COURT  
SUPREME COURT OF OHIO

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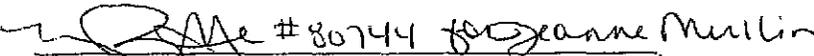
Notice of Appeal of Appellant Community Hospitals of Williams County

Appellant Community Hospitals of Williams County hereby gives notice of its appeal, pursuant to Rule II, Section 2 of the Rules of Practice of the Supreme Court of Ohio, to the Supreme Court of Ohio, from a Decision and Judgment Entry of the Sixth District Court of Appeals, entered on October 12, 2007, in Court of Appeals No. WM-07-001. Appellant was and is a party of record in Court of Appeals Case No. WM-07-001, and timely filed this Notice of Appeal.

The Appellant complains and alleges that the Sixth District Court of Appeals' October 12, 2007 Decision and Judgment Entry is unlawful, unjust and unreasonable in the following respect: the court of appeals erred in holding that a plaintiff need not prove that they were injured by a physician's negligence prior to establishing a claim against the hospital for the negligent credentialing of that physician.

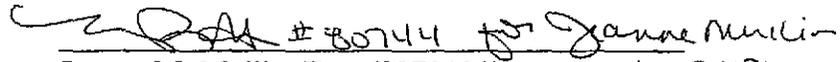
WHEREFORE, Appellant respectfully submits that the Sixth District Court of Appeals' October 12, 2007 Decision and Judgment Entry is contrary to law, unjust and unreasonable and should be reversed. The case should be remanded to the Sixth District Court of Appeals with instructions to correct the errors complained of herein.

Respectfully submitted,

 # 80744 for Jeanne Mullin  
Jeanne M. Mullin, Esq. (0071131) # 0071131  
COUNSEL FOR APPELLANT,  
Community Hospitals Of Williams County

Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for appellees, Chad Tuschman, Esq., Williams, DeClark, Tuschman Co., L.P.A., 416 North Erie Street, 500 Toledo Legal Building, Toledo, Ohio 43604-6301 on November 26, 2007.

 # 80744 for Jeanne Mullin  
Jeanne M. Mullin, Esq. (0071131) # 0071131  
COUNSEL FOR APPELLANT,  
Community Hospitals Of Williams County

FILED  
COURT OF APPEALS

OCT 12 2007

KIMBERLY HERMAN  
CLERK OF COURTS  
WILLIAMS CO. OHIO

CLERK OF COURTS  
WILLIAMS COUNTY OHIO

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FILED

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
WILLIAMS COUNTY

Loretta Schelling

Court of Appeals No. WM-07-001

Appellant

Trial Court No. 05 CI 000035

v.

Stephen Humphrey, M.D.

Defendant

[Community Hospitals  
of Williams County

DECISION AND JUDGMENT ENTRY

Appellee]

Decided: OCT 12 2007

\*\*\*\*\*

Chad M. Tuschman and Peter DeClark, for appellant.

Jeanne M. Mullin, for appellee.

\*\*\*\*\*

OSOWIK, J.



{¶ 1} This is an appeal from a judgment of the Williams County Court of Common Pleas, which dismissed appellant's case pursuant to Civ.R. 12(B)(6) for failure to state a claim upon which relief could be granted. For the reasons set forth below, this

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court reverses the judgment of the trial court and remands the case for further proceedings.

{¶ 2} Appellant, Loretta Schelling, sets forth the following single assignment of error:

{¶ 3} "The trial court erred as a matter of law in granting appellee's 12(B)(6) motion by holding that plaintiff must first prove negligence against the doctor before being able to bring a negligent credentialing claim against the hospital."

{¶ 4} The following undisputed facts are relevant to the issues raised on appeal. Appellant's initial complaint was filed on February 10, 2005. The complaint named both Dr. Stephen Humphrey and Community Hospitals of Williams County ("Community Hospitals") as defendants. On April 20, 2005, appellant filed an amended complaint. The amended complaint asserted a negligent credentialing claim solely against Community Hospitals.

{¶ 5} In 2003, Dr. Humphrey performed two podiatric surgeries on appellant at Community Hospitals. Dr. Humphrey was a licensed podiatrist by the state of Ohio. He had full staff privileges by Community Hospitals to perform surgeries such as those underlying this case. On January 23, 2003, Dr. Humphrey performed his first tarsal tunnel release surgery on appellant. The second tarsal tunnel release surgery was conducted on February 20, 2003. Both surgeries were performed on appellant's heels in an attempt to correct persistent foot pain. Appellant claims that Dr. Humphrey was

negligent in performing these surgeries. Appellant further claims that his negligence injured her, and she can no longer work as a result of the injury.

{¶ 6} Appellant's negligent credentialing claim against Community Hospitals stems from a history of criminal conduct by Dr. Humphrey. In 2001, Dr. Humphrey stole an air compressor and several power tools from Community Hospitals. His act of theft was confirmed by hospital security surveillance tapes. After initial denials, he confessed the crime to the investigating Bryan, Ohio police officer.

{¶ 7} After the theft, Dr. Humphrey continued to practice medicine. Unfortunately, he also continued to steal. Dr. Humphrey ultimately confessed to a Bryan Police Officer that he had also stolen several "back-hoes" and a utility trailer from a construction site. On May 3, 2004, Dr. Humphrey pled guilty in the Williams County Court of Common Pleas to seven felony offenses stemming from these thefts. On August 11, 2004, in response to these felony convictions, the state of Ohio suspended Dr. Humphrey's license to practice medicine.

{¶ 8} On August 11, 2005, the trial court granted Dr. Humphrey's motion to bifurcate the negligent credentialing claim against Community Hospitals from the negligence claim. Dr. Humphrey then filed bankruptcy. The trial court issued a stay on November 2, 2005, in response to the bankruptcy case.

{¶ 9} After reaching an agreement with Dr. Humphrey's bankruptcy trustee, appellant moved to dismiss the negligence case against Dr. Humphrey. The claim was dismissed without prejudice. Community Hospitals became the sole defendant.

Community Hospitals then filed a motion to dismiss pursuant to Civ.R. 12(B)(6) on the basis that the negligent credentialing claim could not stand given the dismissal of Dr. Humphrey from the case.

{¶ 10} On December 26, 2006, the trial court granted appellee's 12(B)(6) motion. The court reasoned that because Dr. Humphrey was voluntarily dismissed without a finding of negligence against him, appellant could not proceed with a negligent credentialing claim against the Community Hospitals. As a result of this ruling, appellant filed a timely motion of appeal.

{¶ 11} In her assignment of error, appellant claims that the trial court should not have granted appellee's Civ.R. 12(B)(6) motion to dismiss.

{¶ 12} Civ.R. 12(B)(6) established the basis to dismiss for failure to state a claim upon which relief can be granted. In order to warrant a Civ.R. 12(B)(6) dismissal, "it must appear beyond a reasonable doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief." *City of Cincinnati v. Beretta U.S.A Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, at ¶ 5. The Supreme Court of Ohio has defined the tort of negligent credentialing as when, "a plaintiff injured by the negligence of a staff physician must demonstrate that but for the lack of care in the selection or the retention of the physician, the physician would not have been granted staff privileges, and the plaintiff would not have been injured." *Albain v. Flower Hospital* (1990), 50 Ohio St.3d 251, 211. (overruled on other grounds by *Clark v. Southview Hosp. & Family Center* (1994), 68 Ohio St.3d 435). When ruling on a Civ.R. 12(B)(6) motion, the court must "presume all

factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party." *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192.

{¶ 13} In support of its Civ.R. 12(B)(6) motion, Community Hospitals argues that appellant cannot establish the requisite negligence of Dr. Humphrey necessary to the credentialing claim without including him as a party to the action. Appellee argues that without Dr. Humphrey as a party, the element of staff physician negligence cannot be addressed. The relevant issue on appeal is whether appellant can establish a staff physician's negligence, for purposes of a negligent credentialing claim, without the physician named as a party to the action.

{¶ 14} The Fourth District Court of Appeals has directly addressed this precise issue. In *Dicks v. U.S. Health Corp.* (May 10, 1996), 4th Dist. No. 95-CA-2350, the Fourth District Court of Appeals ruled, "Although appellant, in order to collect damages for negligent credentialing, must prove that she suffered injury at the hands of a negligently credentialed doctor, appellant need not join the doctor in the lawsuit against the hospital. Appellant may prove the negligence of the doctor without the doctor being present in the action." *Id.* The court in *Dicks* based its decision on the Ohio Supreme Court's ruling in *Browning v. Burt* (1993), 66 Ohio St.3d 544. When the *Browning* court resolved the negligent credentialing claim in that case, only one of the two allegedly negligent doctors was present in the action. This established a clear precedent that a negligent credentialing claim can be made without the doctor being a named party.

{¶ 15} We note that appellee admits that *Dicks* "held that a physician does not have to be joined in a negligent credentialing cause of action." Appellee attempts to distinguish the case by arguing that the doctor in *Dicks* admitted negligence while testifying. Appellee argues that, in the present case, the agreement reached between appellant and Dr. Humphrey's bankruptcy trustee did not involve a finding of negligence.

{¶ 16} We are not persuaded by appellee's efforts to distinguish and negate the impact of *Dicks*. We note that the Fourth District Court of Appeals in *Dicks* never made a finding on the negligence of the doctor. The only issue in this case is whether the trial court has the ability to find the element of staff physician negligence in a negligent credentialing claim when the negligent staffer is not a named party. We concur with the court in the *Dicks* case and answer in the affirmative.

{¶ 17} In *Browning v. Burt* (1993), 66 Ohio St.3d 544, the Ohio Supreme Court was faced with the issue of whether it should apply the same statute of limitations to a negligent credentialing claim that applies to a medical malpractice claim. The Ohio Supreme Court ruled, "While acts or omissions of a hospital in granting and/or continuing staff privileges to an incompetent physician may ultimately lead to an act of medical malpractice by the incompetent physician, the physician's ultimate act of medical malpractice is factually and legally severable and distinct from the hospital's acts or omissions in negligently credentialing him or her with staff membership or professional privileges." *Id.* at 557 (emphasis removed). The court made clear that medical malpractice and negligent credentialing, while they may be factually intertwined, are

distinct claims. The element of staff physician negligence as a component of a negligent credentialing claim can be proven without the allegedly negligent physician as a named party. *Dicks v. U.S. Health Corp.* (May 10, 1996), 4th Dist. No. 95-CA-2350 (citing *Browning v. Burt* (1993), 66 Ohio St.3d 544).

{¶ 18} Appellee argues that Chief Justice Moyer's concurring opinion clarifies the *Browning* decision. The Chief Justice stated that a "finding or admission of negligence is a legal prerequisite to a negligent credentialing claim." In making this argument, appellee incorrectly classifies this part of the Chief Justice's opinion. The concurring portion of Chief Justice Moyer's opinion addressed the loss of consortium claim in the *Browning* case, but it is actually the dissenting portion of his opinion that addressed the issue of negligent credentialing. This dissent was not adopted by the majority in *Browning*. The majority did not hold that a finding of negligence is a legal prerequisite to negligent credentialing. Determining that staff physician negligence must be proven as an element of a negligent credentialing claim against an employer does not interpose a legal requirement to name the staff physician as a defendant and prove the negligence claim in the same complaint. They are separate causes of action. The trial court erred in imposing such a requirement.

{¶ 19} Wherefore, for the reasons stated herein, we find appellant's assignment of error well-taken. On consideration whereof, the judgment of the Williams County Court of Common Pleas is reversed and remanded to the trial court for further proceedings. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for

the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Williams County.

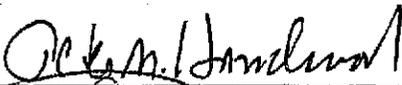
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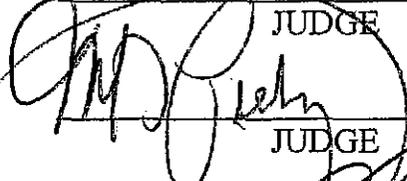
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

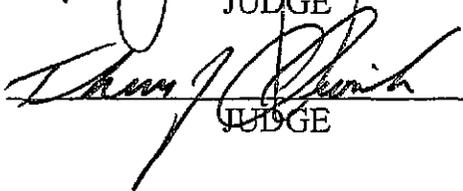
Peter M. Handwork, J.

Mark L. Pietrykowski, P.J.

Thomas J. Osowik, J.  
CONCUR.

  
\_\_\_\_\_  
JUDGE

  
\_\_\_\_\_  
JUDGE

  
\_\_\_\_\_  
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

FILED

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IN THE COURT OF COMMON PLEAS OF WILLIAMS COUNTY, OHIO

LORETTA SCHELLING, et al.	)	CASE NO.: 05 CI 000035
	)	
Plaintiffs,	)	JUDGE ANTHONY L. GRETICK
	)	
-vs-	)	<u>JUDGMENT ENTRY</u>
	)	
STEPHEN HUMPHREY, M.D., et al.	)	
	)	
Defendants.	)	
	)	

This matter came on for Hearing on Defendant, Community Hospitals of Williams County's Motion to Quash Discovery and Motion to Dismiss. After due consideration of the briefs in support of the Defendant's position as well as the opposition briefs and supporting case law submitted by the Plaintiffs, the Court hereby finds that the Motions of the Defendant are well taken.

Specifically, the Court finds that the Plaintiff has filed a voluntary dismissal of the physician involved in this case, Dr. Humphrey, without procuring either an admission of liability or a finding of negligence against him. Without that, this Court finds that the Plaintiff is unable to proceed on a negligent credentialing claim against the Community Hospitals of Williams County.

IT IS, THEREFORE, ORDERED, ADJUDGED, and DECREED, that the Motion for Protective Order and Motion to Quash Plaintiff's Discovery Requests is hereby granted.

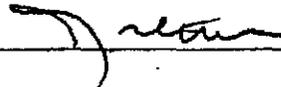
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IT IS FURTHER ORDERED that the Defendant's Motion to Dismiss pursuant to Rule 12(B)(6) of the Ohio Rules of Civil Procedure is hereby granted in that the Plaintiffs have failed to state a claim upon which relief can be granted by virtue of their failure to establish the legal prerequisite that Dr. Humphrey was negligent in his care and treatment of the Plaintiff, Loretta Schelling, which, in this Court's view, is a legal prerequisite to proceeding on a negligent credentialing claim against Community Hospitals of Williams County.

IT IS FURTHER ORDERED that all costs be paid by the Plaintiff.

IT IS SO ORDERED.



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JUDGE ANTHONY L. GRETICK

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CLERK OF COURTS  
WILLIAMS COUNTY OHIO

IN THE COURT OF COMMON PLEAS OF WILLIAMS COUNTY, OHIO

LORETTA SCHELLING, et al.,

Plaintiffs.

vs.

STEPHEN HUMPHREY, M.D., et al.,

Defendants.

Case No: 05CI000035

Judge Anthony L. Gretick

**ENTRY DENYING DEFENDANT'S MOTION  
FOR STAY OF PROCEEDINGS IN REGARD  
TO NEGLIGENT CREDENTIALING  
DISCOVERY AND GRANTING OF  
DEFENDANT'S MOTION FOR  
BIFURCATED TRIAL**

Trial Counsel:

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(419) 241-2122  
(419) 245-3849 (Facsimile)

Attorney for Plaintiffs

tabbies  
**EXHIBIT**  
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On August 2, 2005, this Honorable Court having reviewed Defendant's Motion for Stay of Proceedings in regard to Plaintiffs' negligent credentialing claim, Motions being filed, responsive pleadings being filed by Plaintiffs' counsel, and this Honorable Court having heard oral arguments in regard to Defendant's Motion hereby denies Defendant's Motion requesting stay of discovery. This Honorable Court does hereby grant Defendant's Motion in part to bifurcate the trial in this matter in terms of Plaintiffs' allegation of negligent credentialing herein.

APPROVED BY:

*August 11, 2005*

Date

Anthony L. Gretick

*[Signature]*

AUG 16 2005

JOURNALIZED DATE 8/12/05

**WILLIAMS, JILEK,  
LAFFERTY, GALLAGHER  
& SCOTT CO., L.P.A.**  
ATTORNEYS  
AND COUNSELORS  
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**CERTIFICATION**

This is to certify that a copy of the foregoing document was mailed by Ordinary  
U.S. Mail this \_\_\_\_\_ day of August, 2005 to:

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Jeanne Mullin, Esquire  
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237 West Washington Row, Second Floor  
Sandusky, Ohio 44870

Attorney for Defendant Community Hospital of Williams County, Inc.

WILLIAMS, JILEK, LAFFERTY,  
GALLAGHER & SCOTT CO., L.P.A.

By \_\_\_\_\_  
Chad M. Tuschman  
Attorney for Plaintiffs

**WILLIAMS, JILEK,  
LAFFERTY, GALLAGHER  
& SCOTT CO., L.P.A.**

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## R.C. § 2305.251



Baldwin's Ohio Revised Code Annotated Currentness

Title XXIII. Courts--Common Pleas

Chapter 2305. Jurisdiction; Limitation of Actions (Refs &amp; Annos)

Miscellaneous Provisions

**→ 2305.251 Immunity from liability of members of certain professional review organizations; presumption of no negligence in credentialing**

(A) No health care entity shall be liable in damages to any person for any acts, omissions, decisions, or other conduct within the scope of the functions of a peer review committee of the health care entity. No individual who is a member of or works for or on behalf of a peer review committee of a health care entity shall be liable in damages to any person for any acts, omissions, decisions, or other conduct within the scope of the functions of the peer review committee.

(B)(1) A hospital shall be presumed to not be negligent in the credentialing of an individual who has, or has applied for, staff membership or professional privileges at the hospital pursuant to section 3701.351 of the Revised Code, and a health insuring corporation or sickness and accident insurer shall be presumed to not be negligent in the credentialing of an individual who is, or has applied to be, a participating provider with the health insuring corporation or sickness and accident insurer, if the hospital, health insuring corporation, or sickness and accident insurer proves by a preponderance of the evidence that, at the time of the alleged negligent credentialing of the individual, the hospital, health insuring corporation, or sickness and accident insurer was accredited by one of the following:

- (a) The joint commission on accreditation of healthcare organizations;
- (b) The American osteopathic association;
- (c) The national committee for quality assurance;
- (d) The utilization review accreditation commission.

(2) The presumption that a hospital, health insuring corporation, or sickness and accident insurer is not negligent as provided in division (B)(1) of this section may be rebutted only by proof, by a preponderance of the evidence, of any of the following:

- (a) The credentialing and review requirements of the accrediting organization did not apply to the hospital, health insuring corporation, sickness and accident insurer, the individual, or the type of professional care that is the basis of the claim against the hospital, health insuring corporation, or sickness and accident insurer.
- (b) The hospital, health insuring corporation, or sickness and accident insurer failed to comply with all material credentialing and review requirements of the accrediting organization that applied to the individual.
- (c) The hospital, health insuring corporation, or sickness and accident insurer, through its medical staff executive committee or its governing body and sufficiently in advance to take appropriate action, knew that a previously competent individual had developed a pattern of incompetence or otherwise inappropriate behavior, either



## R.C. § 2305.251

of which indicated that the individual's staff membership, professional privileges, or participation as a provider should have been limited or terminated prior to the individual's provision of professional care to the plaintiff.

(d) The hospital, health insuring corporation, or sickness and accident insurer, through its medical staff executive committee or its governing body and sufficiently in advance to take appropriate action, knew that a previously competent individual would provide fraudulent medical treatment but failed to limit or terminate the individual's staff membership, professional privileges, or participation as a provider prior to the individual's provision of professional care to the plaintiff.

(3) If the plaintiff fails to rebut the presumption provided in division (B)(1) of this section, upon the motion of the hospital, health insuring corporation, or sickness and accident insurer, the court shall enter judgment in favor of the hospital, health insuring corporation, or sickness and accident insurer on the claim of negligent credentialing.

(C) Nothing in this section otherwise shall relieve any individual or health care entity from liability arising from treatment of an individual. Nothing in this section shall be construed as creating an exception to section 2305.252 of the Revised Code.

(D) No person who provides information under this section without malice and in the reasonable belief that the information is warranted by the facts known to the person shall be subject to suit for civil damages as a result of providing the information.

(2002 S 179, eff. 4-9-03)

## UNCODIFIED LAW

2001 S 108, § 1, eff. 7-6-01, reads:

It is the intent of this act (1) to repeal the Tort Reform Act, Am. Sub. H.B. 350 of the 121st General Assembly, 146 Ohio Laws 3867, in conformity with the Supreme Court of Ohio's decision in *State, ex rel. Ohio Academy of Trial Lawyers, v. Sheward* (1999), 86 Ohio St.3d 451; (2) to clarify the status of the law; and (3) to revive the law as it existed prior to the Tort Reform Act.

2001 S 108, § 3, eff. 7-6-01, reads, in part:

(A) In Section 2.01 of this act:

(1) Sections 1701.95, 1707.01, 2305.25, 2305.251, 2305.37, 2307.60, 2307.61, 2743.18, 2743.19, 2744.01, 2744.02, 2744.03, 2744.05, 3123.17, 4112.02, 4507.07, 4513.263, 4582.27, and 5111.81 of the Revised Code, which have been amended by acts subsequent to their amendment by Am. Sub. H.B. 350 of the 121st General Assembly, are amended to remove matter inserted by, or to revive matter removed by, Am. Sub. H.B. 350. Amendments made by Am. Sub. H.B. 350 or the subsequent acts that are independent of the purposes of Am. Sub. H.B. 350 are retained.

## HISTORICAL AND STATUTORY NOTES

**Ed. Note:** 2305.251 is former 2305.25, amended and recodified by 2002 S 179, eff. 4-9-03; 2001 S 108, § 2.01, eff. 7-6-01; 2000 H 511, eff. 4-10-01; 1998 S 66, eff. 7-22-98; 1997 S 111, eff. 3-17-98; 1997 S 67, eff. 6-4-97;

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1996 H 350, eff. 1-27-97 [FN1]; 1995 H 117, eff. 9-29-95; 1992 H 478, eff. 1-14-93; 1991 H 259; 1990 H 347; 1987 S 122; 1986 H 769; 1982 H 317; 1981 H 51; 1976 H 690; 1975 H 682; 1972 S 496; 132 v H 801.

**Ed. Note:** Former 2305.251 amended and recodified as 2305.252 by 2002 S 179, eff. 4-9-03; 2001 S 108, § 2.01, eff. 7-6-01; 2000 H 511, eff. 4-10-01; 1997 S 111, eff. 3-17-98; 1996 H 350, eff. 1-27-97 [FN2]; 1995 H 117, eff. 9-29-95; 1990 H 347, eff. 7-18-90; 1975 H 682.

**Amendment Note:** 2002 S 179 rewrote this section, which prior thereto read:

"No hospital, no state or local society, and no individual who is a member or employee of any of the following committees shall be liable in damages to any person for any acts, omissions, decisions, or other conduct within the scope of the functions of the committee:

"(A) A utilization review committee, quality assurance, or tissue committee of a hospital or long-term care facility, a nonprofit health care corporation which is a member of the hospital or long-term care facility or of which the hospital or facility is a member, or a community mental health center;

"(B) A board or committee of a hospital or long-term care facility or of a nonprofit health care corporation which is a member of the hospital or long-term care facility or of which the hospital or long-term care facility is a member reviewing professional qualifications or activities of the medical staff of the hospital or long-term care facility or applicants for admission to the medical staff;

"(C) A utilization committee of a state or local society composed of doctors of medicine, doctors of osteopathic medicine, or doctors of podiatric medicine;

"(D) A peer review committee, professional standards review committee, or arbitration committee of a state or local society composed of doctors of medicine, doctors of osteopathic medicine, doctors of dentistry, doctors of optometry, doctors of podiatric medicine, psychologists, or pharmacists;

"(E) A peer review committee of a health insuring corporation that has at least a two-thirds majority of member physicians in active practice and that conducts professional credentialing and quality review activities involving the competence or professional conduct of health care providers, which conduct adversely affects, or could adversely affect, the health or welfare of any patient. For purposes of this division, "health insuring corporation" includes wholly owned subsidiaries of a health insuring corporation.

"(F) A peer review committee of any insurer authorized under Title XXXIX of the Revised Code to do the business of sickness and accident insurance in this state that has at least a two-thirds majority of physicians in active practice and that conducts professional credentialing and quality review activities involving the competence or professional conduct of health care providers, which conduct adversely affects, or could adversely affect, the health or welfare of any patient;

"(G) A peer review committee of any insurer authorized under Title XXXIX of the Revised Code to do the business of sickness and accident insurance in this state that has at least a two-thirds majority of physicians in active practice and that conducts professional credentialing and quality review activities involving the competence or professional conduct of a health care facility that has contracted with the insurer to provide health care services to insureds, which conduct adversely affects, or could adversely affect, the health or welfare of any patient;

"Nothing in this section shall relieve any individual or hospital from liability arising from treatment of a patient

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or resident.

"This section shall also apply to any member or employee of a nonprofit corporation engaged in performing the functions of a peer review committee of nursing home providers or administrators or of a peer review or professional standards review committee.

"No person who provides information under this section without malice and in the reasonable belief that the information is warranted by the facts known to the person shall be subject to suit for civil damages as a result of providing the information."

**Amendment Note:** 2000 H 511 added references to long-term care facilities in divisions (A)(1) and (A)(2); deleted former division (A)(4); redesignated former divisions (A)(5) through (A)(10) as new divisions (A)(4) through (A)(9); and inserted "or resident" in division (C). Prior to deletion, former division (A)(4) read:

"(4) A peer review committee of nursing home providers or administrators, including a corporation engaged in performing the functions of a peer review committee of nursing home providers or administrators, or a corporation engaged in the functions of another type of peer review or professional standards review committee;"

**Amendment Note:** 1998 S 66 deleted "and surgery" after "doctors of osteopathic medicine" in divisions (A)(3) and (A)(5); deleted "registered" before "pharmacists" in division (A)(5); and made other nonsubstantive changes.

**Amendment Note:** 1997 S 111 deleted former divisions (A)(9) and (A)(10); redesignated former divisions (A)(11) and (A)(12) as new divisions (A)(9) and (A)(10); and substituted "As used in" for "For purposes of" in the first paragraph in division (E). Prior to deletion, former divisions (A)(9) and (A)(10) read:

"(9) A quality assurance committee of a state correctional institution operated by the department of rehabilitation and correction;

**Amendment Note:** 1997 S 67 replaced references to health maintenance organizations with references to health insuring corporations in division (A)(6); and made other nonsubstantive changes.

"(10) A quality assurance committee of the central office of the department of rehabilitation and correction or department of mental health [.]"

**Amendment Note:** 1996 H 350 rewrote this section, which prior thereto read:

"No hospital, no state or local society, and no individual who is a member or employee of any of the following committees shall be liable in damages to any person for any acts, omissions, decisions, or other conduct within the scope of the functions of the committee:

"(A) A utilization review committee, quality assurance committee, or tissue committee of a hospital, a not-for-profit health care corporation which is a member of the hospital or of which the hospital is a member, or a community mental health center;

"(B) A board or committee of a hospital or of a not-for-profit health care corporation which is a member of the hospital or of which the hospital is a member reviewing professional qualifications or activities of the hospital medical staff or applicants for admission to the medical staff;

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"(C) A utilization committee of a state or local society composed of doctors of medicine or doctors of osteopathic medicine and surgery or doctors of podiatric medicine;

"(D) A peer review committee of nursing home providers or administrators;

"(E) A peer review committee, professional standards review committee, or arbitration committee of a state or local society composed of doctors of medicine, doctors of osteopathic medicine and surgery, doctors of dentistry, doctors of optometry, doctors of podiatric medicine, psychologists, or registered pharmacists;

"(F) A peer review committee of a health maintenance organization that has at least a two-thirds majority of member physicians in active practice and that conducts professional credentialing and quality review activities involving the competence or professional conduct of health care providers, which conduct adversely affects, or could adversely affect, the health or welfare of any patient. For purposes of this division, 'health maintenance organization' includes wholly owned subsidiaries of a health maintenance organization.

"(G) A peer review committee of any insurer authorized under Title XXXIX of the Revised Code to do the business of sickness and accident insurance in this state that has at least a two-thirds majority of physicians in active practice and that conducts professional credentialing and quality review activities involving the competence or professional conduct of health care providers, which conduct adversely affects, or could adversely affect, the health or welfare of any patient;

"(H) A peer review committee of any insurer authorized under Title XXXIX of the Revised Code to do the business of sickness and accident insurance in this state that has at least a two-thirds majority of physicians in active practice and that conducts professional credentialing and quality review activities involving the competence or professional conduct of a health care facility that has contracted with the insurer to provide health care services to insureds, which conduct adversely affects, or could adversely affect, the health or welfare of any patient;

"(I) A quality assurance committee of a state correctional institution operated by the department of rehabilitation and correction;

"(J) A quality assurance committee of the central office of the department of rehabilitation and correction or department of mental health.

"Nothing in this section shall relieve any individual or hospital from liability arising from treatment of a patient.

"This section shall also apply to any member or employee of a nonprofit corporation engaged in performing the functions of a peer review committee of nursing home providers or administrators or of a peer review or professional standards review committee. No person who provides information under this section and provides such information without malice and in the reasonable belief that such information is warranted by the facts known to him shall be subject to suit for civil damages as a result thereof."

**Amendment Note:** 1995 H 117 added divisions (I) and (J).

[FN1] See Notes of Decisions, *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (Ohio 1999), 86 Ohio St.3d 451, 715 N.E.2d 1062.

[FN2] See Notes of Decisions, *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (Ohio 1999), 86 Ohio St.3d 451, 715 N.E.2d 1062.

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#### CROSS REFERENCES

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OH Jur. 3d Malpractice § 141, Proceedings and Records of Peer Review Boards, Committees, or Corporations.

OH Jur. 3d Malpractice § 142, Incident or Risk Management Reports.

OH Jur. 3d Malpractice § 146, Review Committee Proceedings and Records.

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**NOTES OF DECISIONS**

<Ed. Note: This section contains some annotations from former RC 2305.25.>

**In general 2****Constitutional issues 1****Evidence 5****Federal claims 3****Scope 4**

## 1. Constitutional issues

1996 H 350, which amended more than 100 statutes and a variety of rules relating to tort and other civil actions, and which was an attempt to reenact provisions of law previously held unconstitutional by the Supreme Court of Ohio, is an act of usurpation of judicial power in violation of the doctrine of separation of powers; for that reason, and because of violation of the one-subject rule of the Ohio Constitution, 1996 H 350 is unconstitutional. State ex rel. Ohio Academy of Trial Lawyers v. Sheward (Ohio, 08-16-1999) 86 Ohio St.3d 451, 715 N.E.2d 1062, 1999-Ohio-123, reconsideration denied 87 Ohio St.3d 1409, 716 N.E.2d 1170.

RC 2305.25 does not violate the Equal Protection or Due Process Clauses of US Const Am 14, nor the equal protection standards of O Const Art I §2. Gates v. Brewer (Franklin 1981) 2 Ohio App.3d 347, 442 N.E.2d 72, 2 O.B.R. 392.

## 2. In general

Hospital waived any privilege it had under statute setting forth quality assurance privilege, which provided confidentiality protection for information provided to hospital quality assurance committees, with respect to hospital's legionella laboratory report, in patient's medical malpractice action, in which patient alleged that his contraction of Legionnaires' disease following successful kidney transplant had been caused by negligence of hospital's nurse; hospital's witness testified that showerhead in patient's room had been tested and laboratory results were negative for presence of legionella, hospital failed to object to testimony, and hospital could not continue to assert privilege during discovery as to certain documents and testimony, but then permit such to be divulged at trial without objection. Akers v. Ohio State Univ. Med. Ctr. (Ohio App. 10 Dist., Franklin, 09-29-2005) No. 04AP-575, 2005- Ohio-5160, 2005 WL 2387615, Unreported. Witnesses Ⓢ 219(1)

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Trial court abused its discretion in granting hospital's request for broad protective order without first conducting an in camera inspection of information that hospital claimed was subject to protection under statutory quality assurance privilege, which provided confidentiality protection for information and documents provided to hospital quality assurance committees, in medical malpractice action; the most reasonable method of assuring that only evidence and information that was specifically covered by privilege was barred from discovery was to hold an in camera inspection. *Akers v. Ohio State Univ. Med. Ctr.* (Ohio App. 10 Dist., Franklin, 09-29-2005) No. 04AP-575, 2005-Ohio-5160, 2005 WL 2387615, Unreported. Pretrial Procedure ↪ 411

Trial court had authority to conduct an in camera inspection to determine if hospital documents, including physicians credentialing file and complaint filed against physician, were privileged in patient's action against hospital for negligent credentialing; most appropriate way to determine if privilege applied and to what documents it applied was to conduct an in camera inspection, and there was no compromise to the confidentiality of any information the trial court found to be privileged. *Doe v. Mount Carmel Health Systems* (Ohio App. 10 Dist., Franklin, 03-23-2004) No. 03AP-413, 2004-Ohio-1407, 2004 WL 557333, Unreported, appeal not allowed 103 Ohio St.3d 1406, 812 N.E.2d 1288, 2004-Ohio-3980, on remand 2005 WL 4934097. Witnesses ↪ 223

University waived for appellate review its claim of privilege as to report prepared by nurse regarding patient's surgery, for transmittal to attorneys in office of risk management for purposes of quality assurance and legal counsel, under the privileges related to confidentiality and immunity for information furnished to a quality-assurance or utilization committee or peer-review committees, in medical malpractice action against university, where the university failed to raise the privileges in the trial court. *Flynn v. Univ. Hosp., Inc.* (Ohio App. 1 Dist., 08-31-2007) 2007-Ohio-4468, 2007 WL 2458119. Appeal And Error ↪ 203.3

Remand was required to allow trial court, which conducted in camera review of documents contained in hospital's credentialing file for doctor, to set forth a general identification of all documents it reviewed and state its reasons for applying the statutory peer review privilege and/or the "original source" exception to such privilege which existed under statute in effect prior to 2003. *Tenan v. Huston* (Ohio App. 11 Dist., 01-13-2006) 165 Ohio App.3d 185, 845 N.E.2d 549, 2006-Ohio-131. Appeal And Error ↪ 1178(1)

Statutory amendment which took away third parties' limited right of access to documents in a hospital's peer review records was substantive, prohibiting retroactive application of change, and thus trial court properly applied the in camera review standard, which was the law when patient filed medical malpractice action, in considering patient's motion to discover documents contained in hospital's credentialing file for doctor. *Tenan v. Huston* (Ohio App. 11 Dist., 01-13-2006) 165 Ohio App.3d 185, 845 N.E.2d 549, 2006-Ohio-131. Witnesses ↪ 184(2)

Peer review committee of physicians' professional corporation that had contracted to provide services to non-profit health maintenance organization (HMO) was "peer review committee of a health maintenance organization" entitled to statutory privilege against discovery of peer review materials. *Wall v. Ohio Permanente Medical Group, Inc.* (Ohio App. 8 Dist., 06-16-1997) 119 Ohio App.3d 654, 695 N.E.2d 1233, dismissed, appeal not allowed 80 Ohio St.3d 1431, 685 N.E.2d 543. Witnesses ↪ 184(1)

Record in medical malpractice actions against hospital and physician was inadequate to allow determination of whether protective orders granted by trial court were issued on ground that plaintiffs, in seeking information from various review boards, were improperly attempting to circumvent peer review statute in effort to establish negligent credentialing on part of hospital. *Kalb v. Morehead* (Ohio App. 4 Dist., 01-26-1995) 100 Ohio App.3d

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696, 654 N.E.2d 1039. Appeal And Error ↪ 671(4)

Public policy concerns dictate that those who provide information to licensing boards pursuant to RC 2305.25 be given a qualified privilege in order to aid in the dissemination of information to those boards, thereby improving the quality of health care administered to the general public. *Jacobs v. Frank* (Ohio 1991) 60 Ohio St.3d 111, 573 N.E.2d 609. Libel And Slander ↪ 43

When a defendant possesses a qualified privilege regarding statements contained in a published communication, that privilege can be defeated only by a clear and convincing showing that the communication was made with actual malice; in a qualified privilege case, "actual malice" is defined as acting with knowledge that the statements are false or acting with reckless disregard as to their truth or falsity. *Jacobs v. Frank* (Ohio 1991) 60 Ohio St.3d 111, 573 N.E.2d 609. Libel And Slander ↪ 112(2)

A physician in a private hospital whose employment and/or hospital privileges have been terminated must exhaust all internal administrative remedies prior to seeking judicial review. *Nemazee v. Mt. Sinai Medical Center* (Ohio 1990) 56 Ohio St.3d 109, 564 N.E.2d 477. Health ↪ 266; Health ↪ 275

Records of a public hospital are public records unless privileged under RC 2305.25. *State ex rel. Fostoria Daily Review Co. v. Fostoria Hosp. Ass'n* (Ohio 1989) 44 Ohio St.3d 111, 541 N.E.2d 587.

Hospital department directors were immune from liability for any damages resulting from hospital's summary suspension of doctor's staff privileges, under statute providing qualified privilege for actions taken during professional review proceedings, as doctor presented no evidence that directors acted with actual malice. *Gureasko v. Bethesda Hosp.* (Ohio App. 1 Dist. 1996) 116 Ohio App.3d 724, 689 N.E.2d 76, appeal not allowed 78 Ohio St.3d 1467, 678 N.E.2d 223.

By placing blanket of confidentiality over medical disciplinary and review proceedings, legislature provided for manner in which hospital may take remedial measures for improvement of care and treatment of patients. *Brooks v. Ohio State Univ* (Franklin 1996) 111 Ohio App.3d 342, 676 N.E.2d 162, appeal not allowed 77 Ohio St.3d 1480, 673 N.E.2d 142.

Since medical disciplinary and review proceedings are not subject to discovery, candid and conscientious opinions or evaluations necessary to success of peer review are available without fear that civil action could be brought against colleague or hospital; this permits hospital and medical review committees to evaluate practitioner or clinical method for disciplinary measures or improvement, end result of which is legitimate purpose of improving quality of health care to public. *Brooks v. Ohio State Univ.* (Franklin 1996) 111 Ohio App.3d 342, 676 N.E.2d 162, appeal not allowed 77 Ohio St.3d 1480, 673 N.E.2d 142.

Employee's acts are within scope of his employment unless act is so divergent that very nature of it severed relationship between employer and employee. *Brooks v. Ohio State Univ.* (Franklin 1996) 111 Ohio App.3d 342, 676 N.E.2d 162, appeal not allowed 77 Ohio St.3d 1480, 673 N.E.2d 142.

Statute governing medical peer review privilege applied to prohibit discovery of proceedings and records involving hospital's change in reference ranges for troponin levels subsequent to patient's death by heart attack, in medical malpractice action brought by administrator of patient's estate against hospital and treating physicians. *Germanoff v Aultman Hosp.*, No. 2001CA00306, 2002-Ohio-5054, 2002 WL 31116696 (5th Dist Ct App, 9-23-02).

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Simply because employee acts wrongfully, it does not automatically take act outside scope of employment, even if act is unnecessary, unjustified, excessive or improper. *Brooks v. Ohio State Univ.* (Franklin 1996) 111 Ohio App.3d 342, 676 N.E.2d 162, appeal not allowed 77 Ohio St.3d 1480, 673 N.E.2d 142.

## 3. Federal claims

Under Ohio law, a credentials manual created no contractual entitlement on the part of a surgeon to notice of a hospital's investigation into quality of care concerns prior to the time he was invited to interview with investigators. *Talwar v. Catholic Healthcare Partners* (C.A.6 (Ohio), 12-20-2007) No. 07- 3156, 2007 WL 4532820, Unreported. Health ⚡ 273

Under Ohio law, the alleged initiation of two different investigations into quality of care concerns regarding a surgeon did not breach hospital bylaws, so as to support surgeon's breach of contract claim; credentials manual authorized a medical executive committee (MEC) to take "any and all other action deemed appropriate under the circumstances" upon the conclusion of an investigation. *Talwar v. Catholic Healthcare Partners* (C.A.6 (Ohio), 12-20-2007) No. 07- 3156, 2007 WL 4532820, Unreported. Health ⚡ 270

Under Ohio law, a hospital did not undertake two different investigations into quality of care concerns regarding a surgeon, as would allegedly have breached contractual terms reflected in a credentials manual specifying investigation procedures; consideration of a quality of care complaint prior to the commencement of a formal investigative committee by seeking additional information was not a separate investigation. *Talwar v. Catholic Healthcare Partners* (C.A.6 (Ohio), 12-20-2007) No. 07-3156, 2007 WL 4532820, Unreported. Health ⚡ 270

Under Ohio law, members of a medical executive committee (MEC) did not act with actual malice toward a surgeon in connection with an investigation of quality of care concerns, during which he was requested to refrain from exercising his surgical privileges at a hospital, and thus, the MEC members were entitled to peer review immunity from liability on the surgeon's breach of contract claims; the members' statement that the surgeon would be reported to a national practitioner's database if he did not voluntarily give up his surgical privileges was not made with knowledge or reckless disregard of its falsity. *Talwar v. Catholic Healthcare Partners* (C.A.6 (Ohio), 12-20-2007) No. 07- 3156, 2007 WL 4532820, Unreported. Health ⚡ 274

Physician failed to rebut presumption that hospital and chairperson of hospital's surgery department were entitled to immunity pursuant to HCQIA from tortious interference with business relationships claim related to actions of hospital and chairperson during peer review; although physician alleged that actions were taken in bad faith, motives of hospital and chairperson were irrelevant as objective test applies in determining whether actions were taken in furtherance of quality health care, actions were taken to further quality health care following death of child caused by physician's negligent treatment and physician's continued high mortality rate, reasonable effort was made to obtain facts, physician was provided with adequate notice and hearing, and peer review actions were taken in reasonable belief that actions were warranted by facts as known. *Moore v. Rubin* (Ohio App. 11 Dist., Trumbull, 09-17-2004) No. 2001-T-0150, 2004-Ohio-5013, 2004 WL 2803237, Unreported. Torts ⚡ 257

Actions of hospital and chairperson of hospital's surgery department were taken or made in conduct of professional review activity and were based on competence or professional conduct of physician, and thus, actions were covered by HCQIA such that hospital and chairperson could be entitled to immunity pursuant to HCQIA from tortious interference with business relationships claim related to such actions, where actions at issue occurred while physician was either under peer review for specific instances of conduct or was being closely mon-

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itored by chairperson, as required by numerous letters of reprimand stemming from physician's conduct. *Moore v. Rubin* (Ohio App. 11 Dist., Trumbull, 09-17- 2004) No. 2001-T-0150, 2004-Ohio-5013, 2004 WL 2803237, Unreported. Torts ☞ 245

Peer Review Act, which creates privilege for certain records within scope of hospital's peer review in civil action against hospital arising out of matters that are subject of evaluation and review by review board, does not protect entire peer review file from discovery; if all materials viewed and utilized by peer review committees were deemed undiscoverable, a hospital could never be held accountable for its choice in staffing by truly independent third parties. *Wilson v. Barnesville Hosp.* (Ohio App. 7 Dist., 09-27-2002) 151 Ohio App.3d 55, 783 N.E.2d 554, 2002-Ohio-5186. Pretrial Procedure ☞ 382

Health Care Quality Improvement Act (HCQIA) did not bar discovery of peer review file in action against hospital based on negligent credentialing of physician; information protected by HCQIA only remained confidential unless state law permitted disclosure, and state Peer Review Act permitted disclosure of information. *Wilson v. Barnesville Hosp.* (Ohio App. 7 Dist., 09-27-2002) 151 Ohio App.3d 55, 783 N.E.2d 554, 2002-Ohio-5186. Pretrial Procedure ☞ 382

Some documents in physician's credentialing file, held by hospital, were protected from discovery by plaintiff in claim of negligent credentialing against hospital, where not all documents could be obtained from their original sources, but were generated by peer review committee. *Wilson v. Barnesville Hosp.* (Ohio App. 7 Dist., 09-27-2002) 151 Ohio App.3d 55, 783 N.E.2d 554, 2002- Ohio-5186. Pretrial Procedure ☞ 382

Trial court's failure to conduct in-camera inspection of requested information, documents, and records, prior to granting patient's motion in negligent credentialing action to compel hospital to provide complete set of responses to a set of discovery requests relating to process by which physician was appointed, was abuse of discretion; such an inspection was necessary to determine which materials were discoverable and which were protected under statutory peer review privilege. *Trangle v. Rojas* (Ohio App. 8 Dist., 11- 27-2002) 150 Ohio App.3d 549, 782 N.E.2d 617, 2002-Ohio-6510. Witnesses ☞ 223

Names of individuals who participated in process of appointing physician to hospital staff or investigated his qualifications and applications for staff privileges were not discoverable in negligent credentialing action asserted by patient against hospital following an allegedly negligent procedure performed by physician; identities of those individuals could not lead to discovery of admissible evidence because statutory peer review privilege precluded those individuals from testifying as to matters produced or presented during proceedings of peer review committee. *Trangle v. Rojas* (Ohio App. 8 Dist., 11-27-2002) 150 Ohio App.3d 549, 782 N.E.2d 617, 2002-Ohio-6510. Witnesses ☞ 184(1)

The claim that a congressionally mandated peer review process was the subject of a conspiracy by a hospital and its staff to exclude a physician from the ophthalmology market in Los Angeles has a sufficient relation to interstate commerce to invoke federal jurisdiction under the Sherman Act, 15 USC 1. *Summit Health, Ltd. v. Pinhas* (U.S.Cal. 1991) 111 S.Ct. 1842, 500 U.S. 322, 114 L.Ed.2d 366.

The facts that (1) a state agency has general supervisory power over health matters and licenses hospitals, (2) that hospitals in the state must provide for peer review of practitioners, and (3) that the agency can revoke licenses for statutory violations, do not show an "active state supervision" of peer review decisions that would protect the state's physicians from federal antitrust liability for their acts on peer review committees. (Ed. note: Oregon statutes construed in light of federal statute.) *Patrick v. Burget* (U.S.Or. 1988) 108 S.Ct. 1658, 486 U.S.

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94, 100 L.Ed.2d 83, rehearing denied 108 S.Ct. 2921, 487 U.S. 1243, 101 L.Ed.2d 952, on remand 852 F.2d 1241.

Hospital reasonably believed its denial of physician's application for staff privileges was warranted after making a reasonable effort to obtain facts, and the hospital satisfied adequate notice and hearing requirements in doing so, as an element to establishing hospital's presumptive entitlement to qualified immunity under Health Care Quality Improvement Act (HCQIA) provision imposing standards upon professional review; hospital reasonably believed physician was not completely forthright in application for privileges, possessing concerns about potential misrepresentations regarding professional liability actions brought against physician, and final decision to deny the physician's application was supported by a hearing officer's report and recommendation. *Talwar v. Mercer County Joint Tp. Community Hosp.* (N.D. Ohio, 11-08-2007) 2007 WL 3306611. Health  271

Hospital provided sufficient notice to physician regarding hearing request following recommended denial of physician's application for staff privileges, as an element to establishing that adequate notice and hearing procedures were afforded to physician, and that hospital was presumptively entitled to qualified immunity under Health Care Quality Improvement Act (HCQIA); hospital provided physician with notice of hearing date, time, and place, the appointed hearing officer, physician's right to object to the hearing officer, and the witnesses the hospital expected to call at the hearing. *Talwar v. Mercer County Joint Tp. Community Hosp.* (N.D. Ohio, 11-08-2007) 2007 WL 3306611. Health  275

Hospital possessed reasonable concerns about physician's ability to provide quality health care and to behave in a professionally acceptable manner, and thus medical staff executive committee's recommendation that hospital deny application for staff privileges was taken in the furtherance of quality health care, as an element to establishing hospital's presumptive entitlement to qualified immunity under provision of Health Care Quality Improvement Act (HCQIA) imposing standards upon professional review, even if hospital acted with actual malice of bad faith toward physician; review committees were concerned that physician was not completely truthful regarding his status with another hospital, and committees had discovered that physician had misrepresented the total number of professional liability action brought against him. *Talwar v. Mercer County Joint Tp. Community Hosp.* (N.D. Ohio, 11-08-2007) 2007 WL 3306611.

Provision of Health Care Quality Improvement Act (HCQIA) governing standards for professional review applied to defendant hospital board's decision to deny staff privileges to physician; hospital was a health care entity licensed to provide medical services, hospital's credentials committee, medical staff executive committee, and the board were professional review bodies, and hospital engaged in professional review activity when it determined whether to extend staff privileges to physician. *Talwar v. Mercer County Joint Tp. Community Hosp.* (N.D. Ohio, 11-08-2007) 2007 WL 3306611. Health  271

Actual malice necessary to overcome a claim to immunity under the Ohio professional review statute requires proof that the defendant made statements in connection with a peer review process with knowledge the statements were false or with reckless disregard for whether they were true or false; consequently, the party seeking relief must present evidence that the defendants knew the statements were false, entertained serious doubts about whether they were false, or disregarded a high probability that they were false. *Vistein v. American Registry of Radiologic Technologists* (N.D. Ohio, 09-13-2007) 509 F.Supp.2d 666. Health  274

National credentialing and registry organization did not act with actual malice when it reported ethical violations of registrant to her employers, and thus Ohio professional review immunity statute applied to registrant's inten-

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tional tortious interference with contractual and/or business relationships claim, although organization did not investigate registrant's motives for her conduct and it appeared that organization's conduct was improper, consideration of motive was not required by organization's inquiry, registrant's conduct was prohibited by organization, and report was not made with knowledge of falsity or reckless disregard for truth. *Vistein v. American Registry of Radiologic Technologists* (N.D. Ohio, 09-13-2007) 509 F.Supp.2d 666. Health  274

A showing of actual malice can overcome a claim to immunity under the Ohio professional review statute. *Vistein v. American Registry of Radiologic Technologists* (N.D. Ohio, 09-13-2007) 509 F.Supp.2d 666. Health  274

Claims for permanent injunction and declaratory judgment were not precluded by Ohio professional review statute, since immunity extended only to claims for damages. *Vistein v. American Registry of Radiologic Technologists* (N.D. Ohio, 09-13-2007) 509 F.Supp.2d 666. Injunction  99

Under statutes that provide immunity to peer review/quality assurance committee members, and which preclude discovery and admissibility of proceedings and records of peer review committees and of testimony concerning actions of peer review committees and their members, physician who sued her former employer and coemployees for alleged violations of 1983, Title 42, U.S. Code, and Federal and State Constitutions could not introduce evidence of any quality assurance committee proceedings, medical staff administrative committee proceedings, special review committee proceedings, or reports of law school professor who evaluated medical staff administrative committee proceedings, even if exclusion of such evidence prevented plaintiff from showing that her coemployees were not entitled to immunity. (Annotation from former RC 2305.25.) *Brooks v. Ohio State Univ.* (Franklin 1996) 111 Ohio App.3d 342, 676 N.E.2d 162, appeal not allowed 77 Ohio St.3d 1480, 673 N.E.2d 142.

Action of board of trustees of private, nonprofit hospital, in voting to approve temporary suspension of doctor's clinical privileges, was not "fairly attributable" to state, and did not constitute "state action" of kind required for doctor to maintain civil rights action based on board's alleged violation of his due process for equal protection rights, where only two members on hospital's boards were public employees, and city held only a contingent interest in hospital properties and assets, which was completely unrelated to questions raised by doctor's lawsuit. *Black v. Barberton Citizens Hosp.* (N.D. Ohio 1998) 8 F.Supp.2d 697.

Doctor's claim that hospital and chairman of its medical staff credentials committee violated restraint of trade provision of the Sherman Act, in conspiring to restrict his surgical privileges through the formal peer review process, was barred by the "intracorporate conspiracy" doctrine, pursuant to which corporate agent is incapable of conspiring with corporation for purposes of the Act. *Alba v. Marietta Memorial Hosp.* (S.D. Ohio 1998) 184 F.R.D. 280, affirmed 202 F.3d 267.

## 4. Scope

Under Health Care Quality Improvement Act (HCQIA), those who take action in professional review committees which adversely affects a doctor's clinical privileges are protected from suit under both state and federal law so long as the action is taken in accordance with statutory standards. *Wilson v. Barnesville Hosp.* (Ohio App. 7 Dist., 09-27-2002) 151 Ohio App.3d 55, 783 N.E.2d 554, 2002-Ohio-5186. Health  274

Statutory peer review privilege would not prohibit individuals who happened to be on hospital peer review committee from testifying, in action against hospital for negligent credentialing of physician who performed al-

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legedly negligent procedure, as to matters other than committee's investigation into physician's qualifications and applications. *Trangle v. Rojas* (Ohio App. 8 Dist., 11-27-2002) 150 Ohio App.3d 549, 782 N.E.2d 617, 2002-Ohio-6510. Witnesses ↪ 184(1)

Documents of utilization review and quality assurance committees of hospital, and of members and employees of such committees, are within scope of statute providing that physician peer review records are not discoverable. *Wall v. Ohio Permanente Medical Group, Inc.* (Ohio App. 8 Dist., 06-16-1997) 119 Ohio App.3d 654, 695 N.E.2d 1233, dismissed, appeal not allowed 80 Ohio St.3d 1431, 685 N.E.2d 543. Health ↪ 270

Trial court did not abuse its discretion in refusing to compel discovery of hospital morbidity and mortality conference reports in physician's action alleging abuse of peer review process by hospital and its chief of surgery; conferences were part of peer review process, documents addressed care or treatment rendered to particular patients, and documents were provided to hospital's quality assurance department. *Wall v. Ohio Permanente Medical Group, Inc.* (Ohio App. 8 Dist., 06-16-1997) 119 Ohio App.3d 654, 695 N.E.2d 1233, dismissed, appeal not allowed 80 Ohio St.3d 1431, 685 N.E.2d 543. Health ↪ 275

Trial court did not abuse its discretion in refusing to compel discovery of names of members of hospital's peer review committees, in physician's action alleging abuse of peer review process by hospital and its chief of surgery; physician failed to show that names were relevant to any issue or to provide evidence of actual malice required to defeat privilege applicable to peer review documents. *Wall v. Ohio Permanente Medical Group, Inc.* (Ohio App. 8 Dist., 06-16-1997) 119 Ohio App.3d 654, 695 N.E.2d 1233, dismissed, appeal not allowed 80 Ohio St.3d 1431, 685 N.E.2d 543. Witnesses ↪ 184(1); Pretrial Procedure ↪ 40

In physician's action alleging abuse of peer review process, trial court did not abuse its discretion in determining that hospital and physicians' professional corporation did not waive privilege applicable to peer review documents when hospital's chief of surgery allegedly spoke with professional corporation's official regarding physician's surgical complication rates; physician failed to provide details concerning exact nature or timing of alleged communications. *Wall v. Ohio Permanente Medical Group, Inc.* (Ohio App. 8 Dist., 06-16-1997) 119 Ohio App.3d 654, 695 N.E.2d 1233, dismissed, appeal not allowed 80 Ohio St.3d 1431, 685 N.E.2d 543. Witnesses ↪ 219(1)

Letter from institution of physician's residency, disseminated to hospitals that are conducting assessment on whether to grant physician hospital privileges, is protected by qualified privilege. *Ostasz v. Medical College of Ohio* (Ohio Ct.Cl., 07-09-1997) 88 Ohio Misc.2d 6, 691 N.E.2d 371. Colleges And Universities ↪ 8(1)

State medical college did not act with malice when it sent letter to hospital at which its former resident sought staff privileges, in which college expressed reservations about resident's qualifications, and thus, college was protected by statutory immunity applicable to health care entities involved in credentialing with respect to defamation and emotional distress claims by resident. *Ostasz v. Medical College of Ohio* (Ohio Ct.Cl., 07-09-1997) 88 Ohio Misc.2d 6, 691 N.E.2d 371. Damages ↪ 57.49; Libel And Slander ↪ 44(1)

While peer review statute shielded from disclosure records of review boards, those serving on such boards, and those providing information to such boards, it did not provide hospital with immunity for negligence in granting or continuing staff privileges to incompetent physician and shield from disclosure in malpractice action against hospital information that might show that hospital knew or had reason to know that physician under contract with it was allegedly incompetent. (Annotation from former RC 2305.25.) *Kalb v. Morehead* (Ohio App. 4 Dist., 01-26-1995) 100 Ohio App.3d 696, 654 N.E.2d 1039. Health ↪ 274

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A health maintenance organization cannot maintain an appeal from an order of discovery made under a RC 2317.48 action for discovery in a case because the order does not affect a "substantial right," and is thus not a final appealable order; the pre-1991 statutory shield from discovery of RC 2305.25 does not create a substantial right in the organization. *Lomano v. Cigna Healthplan of Columbus, Inc.* (Franklin 1992) 83 Ohio App.3d 40, 613 N.E.2d 1075.

RC 2305.25 does not provide a hospital with immunity from liability for the hospital's negligence in granting and/or continuing the staff privileges of an incompetent physician. *Browning v. Burt* (Ohio 1993) 66 Ohio St.3d 544, 613 N.E.2d 993, rehearing denied 67 Ohio St.3d 1439, 617 N.E.2d 688, certiorari denied 114 S.Ct. 1054, 510 U.S. 1111, 127 L.Ed.2d 375.

Discovery of the records of a certified health maintenance organization's medical review committee under RC 2317.48 by a physician who claims that the HMO's denial of his membership request constitutes tortious interference with business is not precluded by the protections afforded by RC 2305.251, as neither RC 2305.251 nor 2305.25 mentions HMOs as one of the persons or institutions immunized. *Lomano v. Cigna Healthplan of Columbus, Inc.* (Franklin 1990) 64 Ohio App.3d 824, 582 N.E.2d 1150.

Hospital morbidity and mortality records that consist of mere summaries of patients and contain no discussion of treatments are not confidential and privileged materials. *Winters v. Lutheran Medical Center* (Cuyahoga 1989) 43 Ohio App.3d 119, 539 N.E.2d 715.

The following records are protected from discovery by RC 2305.251: (1) any records or transcript of proceedings of a review committee defined in 2305.25 which considered the conduct of the defendant; (2) any evidence produced or presented at such proceedings, unless said evidence (information, documents, or records) became available to the subpoenaed witness in any other capacity besides as a member of said committee; and (3) any finding, recommendation, evaluation, opinion, or other action of said committee. *Gates v. Brewer* (Franklin 1981) 2 Ohio App.3d 347, 442 N.E.2d 72, 2 O.B.R. 392. Witnesses ↪ 196.4

In an action for libel by a doctor seeking staff privileges at a hospital against another doctor, who was on the committee screening applicants for staff privileges at the hospital, for sending an allegedly libelous letter to the chief of staff of the hospital concerning the qualifications of the applicant, RC 2305.251 does not bar the plaintiff-applicant from pursuing his cause of action. *Atkins v. Walker* (Erie 1979) 65 Ohio App.2d 136, 416 N.E.2d 651, 19 O.O.3d 95. Judgment ↪ 181(33)

RC 2305.251 is an explicit bar to the discovery of the proceedings of an Ohio committee reviewing an application for hospital staff privileges. *Samuelson v. Susen* (C.A.3 (Pa.) 1978) 576 F.2d 546.

RC 2305.25 and 2305.251 render confidential the proceedings and records of a "hospital board or committee reviewing professional qualifications or activities of its medical staff or applicants for admission to its medical staff." *State ex rel. Fostoria Daily Review Co. v. Fostoria Hosp. Ass'n* (Ohio 1989) 44 Ohio St.3d 111, 541 N.E.2d 587.

**5. Evidence**

In order to overcome qualified privilege, plaintiff must present clear and convincing evidence that defendant acted with actual malice. *Ostasz v. Medical College of Ohio* (Ohio Ct.Cl., 07-09-1997) 88 Ohio Misc.2d 6, 691 N.E.2d 371. Libel And Slander ↪ 112(2)

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Incident report describing patient's fall from table while undergoing imaging scan was subject to disclosure in negligence action to the extent it described fall, because events which gave rise to incident report were not included in the patient's medical record; while several entries were made by the various practitioners regarding the patient's medical course while attempting the scan, there were no signed and dated entries documenting that the patient had fallen from the scan table. *Johnson v. Univ. Hosp. of Cleveland* (Ohio App. 8 Dist. 11-21-2002) 2002-Ohio-6338, 2002 WL 31619030.

In order for an incident report to remain privileged under statutes governing admissibility of peer review/quality assurance records in a medical malpractice action, the events giving rise to the incident report must be included in the medical record. *Johnson v. Univ. Hosp. of Cleveland* (Ohio App. 8 Dist. 11-21-2002) 2002-Ohio-6338, 2002 WL 31619030.

Requirement that a medical record must also properly describe an incident in order to exempt an incident report from disclosure under statutes governing admissibility of peer review/quality assurance records does not require a qualitative comparison between the incident report and the medical record. *Johnson v. Univ. Hosp. of Cleveland* (Ohio App. 8 Dist. 11-21-2002) 2002-Ohio-6338, 2002 WL 31619030.

Disclosure of an incident report under statutes governing admissibility of peer review/quality assurance records is not mandated merely because the incident report is easier to read because it includes typewritten statements as opposed to handwritten medical notes. *Johnson v. Univ. Hosp. of Cleveland* (Ohio App. 8 Dist. 11-21-2002) 2002-Ohio-6338, 2002 WL 31619030.

Requirement that a medical record must also properly describe an incident in order to exempt an incident report from disclosure under statutes governing admissibility of peer review/quality assurance records does not require an incident report be qualitatively compared to the deposition testimony of those individuals providing statements for the incident report. *Johnson v. Univ. Hosp. of Cleveland* (Ohio App. 8 Dist. 11-21-2002) 2002-Ohio-6338, 2002 WL 31619030.

A trial court determining whether a medical incident report is subject to disclosure under statutes governing admissibility of peer review/quality assurance records is not called upon to provide subjective commentary on any perceived evidentiary quality that disclosure of the incident report may hold; to the contrary, a court is to determine whether the events giving rise to the incident report were included in the medical record in the same fashion and manner that all clinical notations are made. *Johnson v. Univ. Hosp. of Cleveland* (Ohio App. 8 Dist. 11-21-2002) 2002-Ohio-6338, 2002 WL 31619030.

As long as the events giving rise to an incident report are notated and included in the patient's medical record, an incident report is not subject to disclosure under statutes governing admissibility of peer review/quality assurance records; it is not required that the individuals involved in the incident must make a notation as to these events. *Johnson v. Univ. Hosp. of Cleveland* (Ohio App. 8 Dist. 11-21-2002) 2002-Ohio-6338, 2002 WL 31619030.

Report made by member of State Medical Board to American Board of Internal Medicine (ABIM), criticizing physician's ethics and accusing him of fraud, did not show actual malice required to defeat Medical Board's claim of privilege in physician's action for defamation and intentional interference with business relationship, although member had formerly written a job recommendation for physician, where report was supported by finding of Medical Board. *Rizvi v. St. Elizabeth Hosp. Med. Ctr.* (Ohio App. 7 Dist. 2001) 146 Ohio App.3d 103, 765 N.E.2d 395, 2001 -Ohio- 3412.

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Order for imaging scan was not subject to disclosure under statutes governing admissibility of peer review/quality assurance records as part of incident report describing patient's fall from table while undergoing scan, where order did not contain any information describing the events surrounding patient's fall from the scan table. Johnson v. Univ. Hosp. of Cleveland (Ohio App. 8 Dist. 11-21-2002) 2002-Ohio-6338, 2002 WL 31619030.

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apv. by 4/30/08, and filed with the Secretary of State by 4/30/08.

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Hirons v. Scheffey  
 Tex.App.-Houston [14 Dist.],2002.

Court of Appeals of Texas,Houston (14th Dist.).  
 Linda **HIROMS**, Individually and as Executrix of  
 the Estate of Ancel (Bud) Freeman, Deceased,  
 Francis Freeman, Aubrey Freeman, Jimmy Free-  
 man, Barbara Alford, Thelma Freeman, Appellants,  
 v.  
 Eric H. **SCHEFFEY**, M.D. and Westbury Hospital,  
 Inc. d/b/a Westbury Hospital, Appellees.  
**No. 14-00-00424-CV.**

Feb. 21, 2002.

Patient's estate brought action against surgeon for medical malpractice and against hospital for negligent credentialing. The 164th District Court, Harris County, Louis Moore, J., granted partial summary judgment in favor of hospital and entered judgment on jury verdict in favor of surgeon. Estate appealed. The Court of Appeals, Wanda McKee Fowler, J., held that: (1) estate's failure to have trial proceedings transcribed precluded appellate review of jury charge; (2) there was no negligent credentialing claim against the hospital because the physician was not negligent; and (3) trial court's granting of motion in limine did not preserve error for review.

Affirmed.

West Headnotes

**[1] Appeal and Error 30 ↪969**

30 Appeal and Error  
 30XVI Review  
 30XVI(H) Discretion of Lower Court  
 30k969 k. Conduct of Trial or Hearing in  
 General. Most Cited Cases  
 The appellate court reviews the court's jury charge under an abuse of discretion standard; a trial court abuses its discretion if it acts without reference to any guiding rules or principles.

**[2] Trial 388 ↪295(2)**

388 Trial  
 388VII Instructions to Jury  
 388VII(G) Construction and Operation  
 388k295 Construction and Effect of  
 Charge as a Whole  
 388k295(2) k. Errors in General. Most  
 Cited Cases  
 In determining whether an alleged error in the jury charge is reversible, an appeals court considers the record as a whole, including the pleadings of the parties, the evidence introduced at trial, and the charge in its entirety.

**[3] Appeal and Error 30 ↪1026**

30 Appeal and Error  
 30XVI Review  
 30XVI(J) Harmless Error  
 30XVI(J)1 In General  
 30k1025 Prejudice to Rights of Party  
 as Ground of Review  
 30k1026 k. In General. Most Cited  
 Cases  
 Reversal for a new trial is the appropriate remedy for an error that probably caused the rendition of an improper judgment; harmful error must be shown. Rules App.Proc., Rule 44.1(a)(2); Rule 81(b)(1) (1997).

**[4] Health 198H ↪624**

198H Health  
 198HV Malpractice, Negligence, or Breach of  
 Duty  
 198HV(B) Duties and Liabilities in General  
 198Hk622 Breach of Duty  
 198Hk624 k. Medical Judgment. Most  
 Cited Cases  
 (Formerly 299k14(4) Physicians and Surgeons)  
 The standard of care in medical malpractice cases requires a determination of whether the physician-defendant has undertaken a mode or form of treat-



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ment which a reasonable and prudent member of the medical profession would not have undertaken under the same or similar circumstances.

**[5] Appeal and Error 30 ↪497(1)**

30 Appeal and Error

30X Record

30X(A) Matters to Be Shown

30k497 Grounds of Review

30k497(1) k. In General. Most Cited

Cases

The burden is on the complaining party to present a sufficient record to the appellate court to show error requiring reversal.

**[6] Appeal and Error 30 ↪611**

30 Appeal and Error

30X Record

30X(F) Making, Form, and Requisites of Transcript or Return

30k611 k. Effect of Failure to Make Transcript or Return. Most Cited Cases

Appellant's failure to have trial proceedings transcribed, resulting in insufficient trial record, precluded appellate review of whether jury was given improper instruction.

**[7] Health 198H ↪660**

198H Health

198HV Malpractice, Negligence, or Breach of Duty

198HV(C) Particular Procedures

198Hk655 Hospitals in General

198Hk660 k. Negligent Hiring or Supervision. Most Cited Cases

(Formerly 204k7 Hospitals)

If the physician is determined to be not negligent in trial for medical malpractice, there can be no negligent credentialing claim against the hospital.

**[8] Appeal and Error 30 ↪233(1)**

30 Appeal and Error

30V Presentation and Reservation in Lower

Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k233 Mode of Making Objection in General

30k233(1) k. In General. Most Cited

Cases

The granting of a motion in limine will not preserve error.

\*487 Les Cochran, Houston, for Appellants.

R. Harding Erwin, Jr., John S. Serpe, Richard A. Sheehy, Houston, for Appellees.

Panel consists of Chief Justice BRISTER and Justices FOWLER and SEYMORE.

**OPINION**

WANDA MCKEE FOWLER, Justice.

Appellants brought a medical malpractice claim against physician Eric H. Scheffey and a negligent credentialing claim against Westbury Hospital, Inc. ("Westbury"). Appellants appeal the granting of partial summary judgment in favor of Westbury and a final judgment entered in a jury trial in favor of Scheffey. We affirm the judgment of the trial court.

**FACTUAL BACKGROUND**

The relevant facts are undisputed. In September 1990, decedent, Ancel (Bud) Freeman injured his back and sought treatment from Scheffey. At that time, Scheffey ordered extensive diagnostic testing: an MRI which showed degenerative disease but no evidence of herniation, a myelogram, and a post myelogram CT. As a result of these tests, Scheffey recommended extensive back surgery that took place on November 27, 1990 at Doctor's Hospital-East Loop. A number of surgical procedures were performed.

After Freeman was discharged from the hospital, Scheffey ordered more tests and diagnostic procedures that did not reveal any apparent problems with

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Freeman's back. Nonetheless, Freeman still experienced pain and discomfort from 1991 to April 1994, when Scheffey ordered further diagnostic tests and performed a second back surgery. This surgery was very similar to the first surgery. In November of the same year, Scheffey performed a third surgery on Freeman at Westbury, conducting many of the same procedures used in the two prior back surgeries. The third surgery took over seven hours. Scheffey did not request an assisting surgeon, even though he knew decedent was an elderly, insulin-dependent diabetic and a heavy smoker. During the surgery, Freeman lost 3800cc (about four quarts) of blood. Freeman died the next day. No autopsy was performed.

### DISCUSSION

Appellants raise three issues on appeal: the trial court erred (1) in granting summary judgment in favor of Westbury; (2) in excluding factual findings from the Texas State Board of Medical Examiners dated May 25, 1995, purportedly showing that (a) Scheffey had performed unnecessary surgery in the past and (b) stating that pain alone is not an adequate indication for surgery; and (3) in refusing appellants' proposed jury instruction on the definitions of "negligence" and "ordinary care."

We address appellants' third issue first. Appellant complains that the definition of negligence in the court's charge is a lower standard than that enunciated by the Texas Supreme Court in *Hood v. Phillips*.

### STANDARD OF REVIEW

[1][2][3] We review the court's charge under an abuse of discretion standard. *Riddick v. Quail Harbor Condominium Ass'n, Inc.*, 7 S.W.3d 663, 673 (Tex.App.-Houston [14th Dist.] 1999, no writ). A trial court abuses its discretion if it acts without reference to any guiding rules or principles. *Tex. Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex.1990). In determining whether an alleged er-

ror in the charge is reversible, an appeals court considers \*488 the record as a whole, including the pleadings of the parties, the evidence introduced at trial, and the charge in its entirety. *Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n*, 710 S.W.2d 551, 555 (Tex.1986) (op. on reh'g). Reversal for a new trial is the appropriate remedy for an error that probably caused the rendition of an improper judgment. TEX.R.APP. P. 44.1(a)(2). Harmful error must be shown. TEX.R.APP. P. 81(b)(1). Using the definitions of "negligence" and "ordinary care" from the Texas Pattern Jury Charges, the court's charge in this case defined "negligence" and "ordinary care" as follows:

"Negligence," when used with respect to the conduct of DR. ERIC H. SCHEFFEY, means failure to use ordinary care, that is, failing to do that which an orthopedic surgeon of ordinary prudence would have done under the same or similar circumstances or doing that which an orthopedic surgeon of ordinary prudence would not have done under the same or similar circumstances.

"Ordinary care," when used with respect to the conduct of DR. ERIC H. SCHEFFEY, means that degree of care that an orthopedic surgeon of ordinary prudence would use under the same or similar circumstances.

*Malpractice, Premises, Products, TEXAS PATTERN JURY CHARGES*, No. 50.1 (2000).

[4] Appellants maintain that these definitions resulted in the jury applying a lower standard because the degree of care required was only that of an orthopedic surgeon of "ordinary prudence." Appellants' complaint is not entirely without merit. The Texas Supreme Court has established the standard of care in medical malpractice cases as follows: "the physician-defendant has undertaken a mode or form of treatment which a *reasonable and prudent* member of the medical profession would not have undertaken under the same or similar circumstances." *Hood v. Phillips*, 554 S.W.2d 160, 165 (Tex.1977) (emphasis added). And, not surpris-

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ingly, the language "reasonable and prudent" physician has been uniformly cited by this Court and other courts of appeals in this state. *Martin v. Durden*, 965 S.W.2d 562, 566 (Tex.App.-Houston [14th Dist.] 1997, pet. denied); *Penick v. Christensen*, 912 S.W.2d 276, 284 (Tex.App.-Houston [14th Dist.] 1995, writ denied); *Bradley v. Rogers*, 879 S.W.2d 947, 953 (Tex.App.-Houston [14th Dist.] 1994, writ denied); *Guidry v. Phillips*, 580 S.W.2d 883, 887 (Tex.App.-Houston [14th Dist.] 1979, writ ref'd n.r.e.); *Tilotta v. Goodall*, 752 S.W.2d 160, 164 (Tex.App.-Houston [1st Dist.] 1988, writ denied); *Webster v. Johnson*, 737 S.W.2d 884, 886 (Tex.App.-Houston [1st Dist.] 1987, writ denied); *Wheeler v. Aldama-Luebbert*, 707 S.W.2d 213, 217 (Tex.App.-Houston [1st Dist.] 1986, no writ); *Beal v. Hamilton*, 712 S.W.2d 873, 876 (Tex.App.-Houston [1st Dist.] 1986, no writ); *Henderson v. Heyer-Schulte Corp. of Santa Barbara*, 600 S.W.2d 844, 847 (Tex.Civ.App.-Houston [1st Dist.] 1980, writ ref'd n.r.e.); *Hickson v. Martinez*, 707 S.W.2d 919 (Tex.App.-Dallas 1985, writ ref'd n.r.e.). Thus, the case law sets the level of care required as that of a "reasonable and prudent physician." Therefore, it is unclear whether this is a different standard than "ordinary care."<sup>FN1</sup> See also Darrell L. \*489 Keith, *The Court's Charge in Texas Medical Malpractice Cases*, 48 BAYLOR L.REV. 675, 701-03 (1996) (arguing that the use of "ordinary" instead of "reasonable" in the Pattern Jury Charges' definition of negligence is inaccurate).

FN1. A strong argument can be made that the standard evoked by "ordinary prudence" is the same as "reasonable and prudent" because "prudence" incorporates the concept of a person acting carefully to avoid unwanted consequences. THE OXFORD ENCYCLOPEDIA OF ENGLISH LINGUISTICS 1165(1st ed.1991); see also RESTATEMENT (SECOND) OF TORTS § 283 cmt. c. (1965) (stating that the standard of the "reasonable man" is sometimes called "a reasonable man of ordinary

prudence, or an ordinarily prudent man, or a man of average prudence or a man of reasonable sense exercising ordinary care").

[5][6] However, we are unable to address the merits of this claim because appellants did not ask the court reporter to type the trial proceedings transcribed. "The burden is on the complaining party to present a sufficient record to the appellate court to show error requiring reversal." *Melendez v. Exxon Corp.*, 998 S.W.2d 266, 278 (Tex.App.-Houston [14th Dist.] 1999, no pet.). Because we do not have the trial record before us and none has been prepared, we are unable to address whether the Pattern Jury Charges' definition of negligence is inconsistent with Texas law or whether it enunciates a lower standard of care. For example, we cannot tell if defense counsel argued to the jury that the doctor had to exhibit only ordinary care. Moreover, we do not know what the evidence showed. Therefore, we cannot consider "the record as a whole" and the "evidence presented," as we must, to determine whether harm was shown. *Island Recreational Dev. Corp.*, 710 S.W.2d at 555. Accordingly, appellants' third issue on appeal is overruled.

[7] We now address appellants' first issue on appeal, specifically, that the trial court erred in granting Westbury's motion for summary judgment against appellants' negligent credentialing claim. Because the jury found that Scheffey was not negligent, and because we are affirming that finding, there can be no negligent credentialing claim against Westbury. See *Schneider v. Esperanza Transmission Co.*, 744 S.W.2d 595, 596 (Tex.1987). If the physician is not negligent, there is no negligent credentialing claim against the hospital. We therefore overrule appellants' first point of error as moot.

[8] Lastly, appellants complain that the trial court erred in granting appellee's motion in limine that required appellants to address outside the presence of the jury the evidence regarding Scheffey from the Texas Board of Medical Examiners. The grant-

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ing of a motion in limine will not preserve error. *Owens-Corning Fiberglas Corp. v. Malone*, 916 S.W.2d 551, 557 (Tex.App.-Houston [1st Dist.] 1996), *aff'd*, 972 S.W.2d 35 (Tex.1998). Consequently, we overrule appellants' second issue on appeal and affirm the judgment of the trial court in all respects.

Tex.App.-Houston [14 Dist.], 2002.  
*Hirons v. Scheffey*  
76 S.W.3d 486

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**H**

Trichel v. Caire  
 La.App. 2 Cir.,1983.

Court of Appeal of Louisiana, Second Circuit.  
 Jan TRICHEL, Plaintiff-Appellant,

v.

Dr. Michael CAIRE, et al, Defendants-Appellees.  
 No. 15072-CA.

Feb. 22, 1983.  
 Rehearing Denied April 7, 1983.

Woman brought suit against doctor who performed postpartal hysterectomy alleging that doctor was negligent in failing to anticipate poor wound healing, in attempting to perform surgical procedure beyond his capability, in failing to complete procedure by removing cervix, and in removing her fallopian tubes and ovary without consent. Woman also alleged that second doctor was negligent in premature removal of sutures and that hospital was negligent in allowing first physician to perform surgery beyond his capability and in failing to keep adequate records of her condition. The Fourth Judicial District Court, Parish of Ouachita, Robert T. Farr, J., entered judgment on jury verdict finding doctors were not negligent in their treatment of plaintiff, and further finding that although hospital was negligent, its negligence was not cause of woman's damages, and woman appealed. The Court of Appeal, Price, J., held that: (1) doctrine of res ipsa loquitur was not applicable; (2) doctor's performance of surgery was not substandard on grounds that he was not specialist; (3) evidence did not establish that doctor failed to possess required skill or failed to use reasonable care in applying it; (4) doctors were not negligent in connection with wound evisceration; and (5) hospital's negligence played no part in causing problems suffered by woman.

Affirmed.

West Headnotes

[1] Health 198H 818

198H Health

198HV Malpractice, Negligence, or Breach of Duty

198HV(G) Actions and Proceedings  
 198Hk815 Evidence

198Hk818 k. Res Ipsa Loquitur. Most Cited Cases

(Formerly 299k18.60 Physicians and Surgeons)  
 Evidence in medical malpractice case brought against physician to recover damages which arose when wound from surgery reopened including expert testimony from four obstetrician-gynecologist specialists that wound dehiscence depends on healing quality of patient, not type of suture used by surgeon, and that although wound dehiscence is unusual, it can and does occur without negligence, was sufficient to support finding that injuries sustained by woman were not such as do not ordinarily occur in absence of negligence, and thus, doctrine of res ipsa loquitur was inapplicable.

[2] Health 198H 818

198H Health

198HV Malpractice, Negligence, or Breach of Duty

198HV(G) Actions and Proceedings  
 198Hk815 Evidence

198Hk818 k. Res Ipsa Loquitur. Most Cited Cases

(Formerly 299k18.60 Physicians and Surgeons)  
 Evidence in patient's malpractice action against doctor based upon doctor's failure to complete hysterectomy by removing cervix, including testimony of obstetrician-gynecologist experts that postpartal hysterectomy is more difficult than elective hysterectomy because of abnormal size of female organs, and testimony that it is difficult to detect whether entire uterus, fundus and cervix has been successfully removed in postpartal hysterectomy, was insufficient to establish inference of negligence from failure to remove cervix, and consequently, doc-

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trine of *res ipsa loquitur* was inapplicable in woman's malpractice action.

**[3] Health 198H ⚡684**

198H Health  
 198HV Malpractice, Negligence, or Breach of Duty

198HV(C) Particular Procedures  
 198Hk683 Obstetrics, Gynecology, and Reproductive Health

198Hk684 k. In General. Most Cited Cases

(Formerly 299k15(12) Physicians and Surgeons)  
 Even though doctor was not specialist in his field, where doctor had spent the greater percentage of his time practicing obstetrics and gynecology, had performed average of 13 to 14 hysterectomies a year, three or four of which were postpartal emergencies, and physicians who worked with doctor testified that he was considered competent in his field, doctor's performance of postpartal hysterectomy was not substandard conduct on grounds that he was not obstetrician-gynecologist specialist.

**[4] Health 198H ⚡823(9)**

198H Health  
 198HV Malpractice, Negligence, or Breach of Duty

198HV(G) Actions and Proceedings  
 198Hk815 Evidence  
 198Hk823 Weight and Sufficiency, Particular Cases

198Hk823(9) k. Obstetrics, Gynecology, and Reproductive Health. Most Cited Cases

(Formerly 299k18.80(3) Physicians and Surgeons)  
 Evidence in woman's medical malpractice action brought against physician for failure to completely remove cervix during postpartal hysterectomy, including testimony of experts that it was very difficult to detect cervix under best conditions and that due to uterine eversion through cervix, woman's organs were even larger than is usual in most post-

partal hysterectomies, and therefore virtually undistinguishable from vagina by feel, which was only way to identify it in abdominal surgery woman underwent, was insufficient to establish that doctor failed to possess required skill or to use reasonable care in applying it. LSA-R.S. 9:2794.

**[5] Health 198H ⚡669**

198H Health  
 198HV Malpractice, Negligence, or Breach of Duty

198HV(C) Particular Procedures  
 198Hk669 k. Infections and Infectious Diseases. Most Cited Cases

(Formerly 299k15(12) Physicians and Surgeons)  
 Where doctors stated they did not expect poor healing of woman who underwent postpartal hysterectomy, did not consider woman's overweight condition extreme enough to require retention sutures, and would not have used drains because there was no active infection at time of surgery and wound was not bleeding at time of closure, and removal of stitches was not premature, no negligence was shown on part of doctor who had performed surgery by not anticipating that woman would be poor healer who would require interrupted sutures, on part of doctor who removed stitches.

**[6] Health 198H ⚡684**

198H Health  
 198HV Malpractice, Negligence, or Breach of Duty

198HV(C) Particular Procedures  
 198Hk683 Obstetrics, Gynecology, and Reproductive Health

198Hk684 k. In General. Most Cited Cases

(Formerly 299k18.110 Physicians and Surgeons)  
 Woman who brought medical malpractice claim on grounds that doctor negligently removed her fallopian tubes and at least one ovary during course of postpartal hysterectomy not only failed to establish her claim, but also failed to show any damage.

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[7] Health 198H ↪684

198H Health

198HV Malpractice, Negligence, or Breach of Duty

198HV(C) Particular Procedures

198Hk683 Obstetrics, Gynecology, and Reproductive Health

198Hk684 k. In General. Most Cited Cases

(Formerly 204k7 Hospitals)

Where there was no negligence on part of doctor who performed postpartal hysterectomy on woman, hospital was not liable to woman for injuries allegedly sustained from operation on grounds that hospital improperly granted doctor privileges to perform instant surgical procedure.

[8] Health 198H ↪684

198H Health

198HV Malpractice, Negligence, or Breach of Duty

198HV(C) Particular Procedures

198Hk683 Obstetrics, Gynecology, and Reproductive Health

198Hk684 k. In General. Most Cited Cases

(Formerly 204k7 Hospitals)

Although hospital's charts with respect to vital signs concerning woman who underwent postpartal hysterectomy were obviously incomplete and poorly kept when measured against hospital regulations, where those deficiencies played no part in causing problems suffered by woman after postpartal hysterectomy, hospital was not liable to woman for damages.

\*1229 Chris J. Roy, Alexandria, for plaintiff-appellant.

Hayes, Harkey, Smith & Cascio by Thomas M. Hayes, III, Monroe, for defendants-appellees.

Before PRICE, HALL and SEXTON, JJ.

PRICE, Judge.

This is a medical malpractice action against plaintiff's treating physician and one of his partners, their medical partnership, Glenwood Hospital and the medical malpractice insurer. Plaintiff appeals the trial court judgment dismissing her claim, raising the following substantial issues: (1) is the doctrine of res ipsa loquitur applicable to this set of facts? (2) if res ipsa loquitur is not applicable, did plaintiff prove actionable negligence on the part of Dr. Donald, Dr. Caire and/or Glenwood Hospital? (3) if res ipsa loquitur is applicable, did the defendants show an absence of negligence sufficient to negate liability? and (4) what amount of damages will adequately compensate plaintiff for her injuries if defendants are liable therefor?

#### FACTS

Plaintiff, Mrs. Trichel, entered Glenwood Hospital on July 21, 1978, for delivery of her second child. Her attending physician was Dr. Donald, the general practitioner who had provided her prenatal care. He is a member of the defendant medical partnership, Donald, Caire & Watson, which also includes defendant Caire, an obstetrician-gynecologist (Ob-Gyn). The other partner, Dr. Watson, is a general practitioner and is not an individual defendant herein.

The baby was delivered without incident and Dr. Donald left the hospital a short time later. Then, approximately an hour later, Mrs. Trichel began hemorrhaging severely due to an everted uterus, i.e., one which is turned inside out. Dr. Watson and Dr. Truly, an Ob-Gyn, both of whom happened to be at the hospital at the time, responded to the emergency and attempted unsuccessfully to revert the uterus by manually pushing it back to its original position. Dr. Donald was recalled to the hospital and performed an emergency postpartal hysterectomy with the consent of plaintiff's husband. A day or two later, he went out of town on vacation, leaving Mrs. Trichel in the care of his partner, Dr. Caire. Seven days after the surgery, Dr. Caire ordered the stitches removed, which was three days sooner than

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Dr. Donald had instructed before leaving. On the day of her anticipated discharge, the wound from the surgery reopened through the several layers of skin and tissue. Plaintiff was rushed to surgery and Dr. Caire performed a second closure. Three days later she was discharged from the hospital.

Although she had undergone a total hysterectomy, i.e., complete removal of the uterus, Mrs. Trichel continued to have light monthly bleeding and it was discovered that part of her cervix, which is the neck of the uterus, and some endometrial cells of the uterus had not been removed. She subsequently developed cervicitis (infection of the cervix) and underwent surgery for removal\*1230 of the remainder of the cervix in October, 1981.

Plaintiff brought suit alleging that Dr. Donald was negligent in failing to anticipate poor wound healing, in attempting to perform a surgical procedure beyond his capability, in failing to complete the procedure by removing the cervix, and in removing her Fallopian tubes and an ovary without her consent. She further alleged that Dr. Caire was negligent in premature removal of sutures and Glenwood Hospital was negligent in allowing Dr. Donald to perform surgery beyond his capability and in failing to keep adequate records of her condition.

After trial on the merits, the jury found both Dr. Donald and Dr. Caire were not negligent in their treatment of plaintiff. They also found Glenwood negligent, but its negligence was not a cause of Mrs. Trichel's damage.

In addition to the issues outlined at the beginning of this opinion, plaintiff cites various assignments of error in the conduct of the trial by the lower court and in the charges given to the jury. We pretermit a discussion of these assignments and address only the substantial issues summarized above inasmuch as our review of the record reveals that the judgment rendered is correct.

#### RES IPSA LOQUITUR

The initial inquiry is whether the trial judge should have instructed the jury to apply the doctrine of *res ipsa loquitur*. The resolution of this issue determined the burden of proof to be borne by each party.

The plaintiff's burden of proof in a malpractice action is set forth in LSA-R.S. 9:2794, which provides in pertinent part:

"A. In a malpractice action based on the negligence of a physician licensed under R.S. 37:1261 et seq, or a dentist licensed under R.S. 37:751 et seq, the plaintiff shall have the burden of proving:

(1) The degree of knowledge or skill possessed or the degree of care ordinarily exercised by physicians or dentists licensed to practice in the state of Louisiana and actively practicing in a similar community or locale and under similar circumstances; and where the defendant practices in a particular specialty and where the alleged acts of medical negligence raise issues peculiar to the particular medical specialty involved, then the plaintiff has the burden of proving the degree of care ordinarily practiced by physicians or dentists within the involved medical specialty,

(2) That the defendant either lacked this degree of knowledge or skill or failed to use reasonable care and diligence, along with his best judgment in the application of that skill, and

(3) That as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care the plaintiff suffered injuries that would not otherwise have been incurred.

B. \* \* \*

C. In medical malpractice actions the jury shall be instructed that the plaintiff has the burden of proving by a preponderance of the evidence, the negligence of the physician or dentist. The jury shall be further instructed that injury alone does not raise a presumption of the physician's or dentist's negligence. *The provisions of this Section*

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*shall not apply to situations where the doctrine of res ipsa loquitur is found by the court to be applicable.*" (emphasis added).

The application of res ipsa loquitur in malpractice cases was explained by this court in the recent case of *Rogers v. Brown*, 416 So.2d 624 (La.App. 2d Cir.1982):

"The doctrine of res ipsa loquitur becomes applicable when the circumstances surrounding the incident in question ... are of such an unusual character as to justify, in the absence of other evidence bearing on the subject, the inference that the injury was due to the negligence of the person ... having control of the thing involved in the injury. In essence, this inference of negligence may be drawn because all of the circumstances surrounding the injury are of such a character\*1231 that, unless an explanation can be given, the only fair and reasonable conclusion is that the injury was due to some breach of the defendant's (physician's) duty. See *Larkin v. State Farm Mutual Automobile Ins. Co.*, 233 La. 544, 97 So.2d 389 (1957); *White v. McCool*, 395 So.2d 774 (La.1981).

In reality, the doctrine of res ipsa loquitur is simply another formulation of plaintiff's burden in a tort action to prove that, more probably than not, his injury was caused by defendant's negligence. However, before charging the jury on the propriety of drawing this inference of negligence from the circumstances, it is the function of the trial judge in a medical malpractice case to decide the applicability of the doctrine by addressing these threshold questions: (1) Did the injury occur while plaintiff's body was in the exclusive custody of the defendant physician and (2) was the injury one that does not ordinarily occur in the absence of negligence...?" *Id.* at 628.

It is obvious that plaintiff's injuries were incurred while her body was in the exclusive custody of the defendant. Therefore, the trial court must have concluded that the injuries were not such as do not or-

dinarily occur in the absence of negligence. We find this conclusion amply supported by the record.

[1] The evisceration of Mrs. Trichel's incision was the direct result of poor wound healing. Considerable expert testimony was heard from four Ob-Gyn specialists-Dr. Blanchard Texada, Dr. Richard Vines, Dr. Robert Jarrell and Dr. James Truly-in addition to that of the defendant, Dr. Caire. There was further testimony from Dr. George Sartor, a general surgeon. It was generally agreed that wound dehiscence depends on the healing quality of the patient, not the type of suture used by the surgeon. It was also agreed that the healing quality of the patient may be affected by several different factors. Among those mentioned were prior incision, debilitation of the patient by chronic illness, long-term administration of steroids, old age, nutritional deficiency, obesity, infection, and hematoma (accumulation of blood in the wound).

The only testimony with respect to a specific cause for Mrs. Trichel's wound evisceration was given by Dr. Texada, who opined that it resulted from a hematoma. His opinion was based on Mrs. Trichel's deposition testimony that she saw blood on her hospital gown.<sup>FN1</sup> However, he also stated that, while the incidence of such events is less than one in one thousand, a wound dehiscence can happen to anybody. Thus, it is evident that, although this is an unusual occurrence, it can and does occur without negligence.

FN1. He was under the impression that plaintiff had stated there was a gush of blood, but it was demonstrated at trial that she actually said, "... I looked down and there was a spot of blood on my gown..."

[2] The evidence with regard to the failure of Dr. Donald to completely remove the cervix in the emergency hysterectomy showed that it is difficult, at best, to detect whether the entire uterus, fundus (body) and cervix (neck), has been successfully removed in a postpartal hysterectomy. The cervix is normally much smaller and thicker than the body of

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the uterus, but becomes stretched and very thin during the vaginal delivery of a baby. Therefore, it is difficult to distinguish from the fundus and the vagina. Removal of the cervix is further complicated by the fact that it is not visible during abdominal surgery. It was testified that a postpartal hysterectomy is not a common operation, and is more difficult than an elective hysterectomy because of the abnormal size of the female organs, especially after a vaginal delivery. Three of the Ob-Gyn specialists who testified stated that they had also failed to completely remove the cervix under similar circumstances. We do not imply that such a failure may not be negligent in some cases. We simply hold that in the instant case it does not warrant an inference of negligence. For these reasons, we hold that the doctrine of *res ipsa loquitur* is inapplicable here. Thus, the plaintiff's burden of proof here is governed by LSA-R.S. 9:2794(A), quoted above.

#### \*1232 PERFORMANCE OF SURGERY

[3] Mrs. Trichel first maintains that Dr. Donald's performance of the surgery himself was substandard conduct because he was not an Ob-Gyn specialist. Dr. Texada testified that he felt Dr. Donald should have asked Dr. Truly to perform the operation since he was the only board certified Ob-Gyn specialist present at the time. However, it was shown that, while Dr. Donald is not a specialist in this field, he has spent the greater percentage of his time practicing obstetrics and gynecology since beginning the private practice of medicine in Monroe in 1962. He testified that he performed an average of thirteen to fourteen hysterectomies a year and three or four of these were postpartal emergencies. The physicians who had worked with him before testified that he was considered competent in this field.

While Dr. Donald was not board certified as an Ob-Gyn specialist, the preponderance of the evidence in the record shows he possessed the necessary skill and experience to be competent to perform this emergency surgical procedure in the care of his pa-

tient.

#### FAILURE TO REMOVE CERVIX

With respect to the claim of negligence in failing to completely remove the cervix, plaintiff's expert, Dr. Texada, did testify he felt he could have detected the cervix although he conceded that it would be difficult. The other specialists, including plaintiff's witness Dr. Vines, stated it was very difficult to detect in such instances and that they themselves had failed in some cases to successfully complete removal. In the instant case, Mrs. Trichel's female organs were significantly larger than normal. In fact, because of the uterine eversion through the cervix, they were even larger than is usual in most postpartal hysterectomies, and thus virtually undistinguishable from the vagina by feel, which is the only way to identify it in abdominal surgery of this nature.

Furthermore, Dr. Donald testified that he believed he had removed all of the cervix and did not want to prolong the surgery any longer at that point because of plaintiff's substantial loss of blood.

[4] The plaintiff must show the degree of care ordinarily practiced by the Ob-Gyn specialists and that Dr. Donald either lacked the degree of knowledge and skill required or failed to use reasonable care and diligence in applying the knowledge and skill in her treatment. See LSA-R.S. 9:2794, *supra*, and *Ardoin v. Hartford Accident & Indemnity Co.*, 360 So.2d 1331 (La.1978). The evidence in the record does not bear out her claim that Dr. Donald failed to possess the required skill or to use reasonable care in applying it.

#### WOUND EVISCERATION

[5] Plaintiff-appellant further contends that Dr. Donald breached his physician's duty by not anticipating that she would be a poor healer and thereby caused her wound evisceration. She argues he should have used interrupted sutures to close the

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peritoneal and fascial layers of her abdomen, put drains in the wound, and used large retention sutures around the incision to hold it together. Dr. Texada is the only witness who testified he would have used these measures because of the possibility of infection, her substantial loss of blood, and obesity. The other doctors testified they would not have expected poor healing, did not consider her overweight condition extreme enough to require retention sutures (which involve some discomfort), and would not have used drains because there was no active infection at the time of the surgery and the wound was not bleeding at the time of closure. Nor was there any infection when the wound reopened. None of the other factors which would lead one to expect poor wound healing were present.

Additionally, it was generally agreed by all except Dr. Texada that there is no particular advantage in using interrupted sutures over running sutures. Her incision would have failed to heal anyway.

It was not established that there was any discernible reason for plaintiff's failure to heal and there was no significant proof of a \*1233 particular cause, such as hematoma or infection. The outer stitches were removed seven days after the surgery, which was shown to be an average length of time to allow the skin to heal (testimony indicated four to five days is the usual length of time). It was agreed, even by Dr. Texada, that Dr. Caire's removal of the stitches was not premature. Therefore, no negligence has been shown on the part of either Dr. Donald or Dr. Caire in connection with the wound evisceration.

#### FALLOPIAN TUBES AND OVARY

[6] As for the claim with respect to the alleged removal of the Fallopian tubes and ovary(ies), the record shows that Dr. Donald did remove the Fallopian tubes. There was testimony to the effect that, in some cases, removal of the tubes without removing the ovaries may have an adverse effect on the blood supply to the ovaries. Dr. Donald testified he re-

moved the tubes because he had been taught that removal of the uterus was facilitated by their prior removal and, without the uterus, they served no purpose. There was no evidence that plaintiff's ovaries had been affected by the removal.

The only evidence to show that either ovary had been removed was plaintiff's statement to Dr. Vines that Dr. Donald had removed an ovary. The report on Dr. Donald's hysterectomy made no mention of such a procedure and neither Dr. Donald nor Dr. Watson, who assisted in the surgery, was questioned on this subject at trial.

Dr. Vines, Mrs. Trichel's present gynecologist, testified she still has at least one of her ovaries. He stated he saw one of her ovaries while performing a vaginal cervicectomy, but both are not always visible vaginally. The only way to tell if she has both is by laparoscopic examination in which one views the pelvic area through a small tube, or perhaps by an ultrasound procedure in which it might or might not be detected. In addition to plaintiff's failure to prove the facts of this claim, she also failed to show any damage in terms of hormonal imbalance since she still has at least one ovary. Therefore, this claim was properly denied.

#### CLAIM AGAINST GLENWOOD HOSPITAL

[7][8] Mrs. Trichel complains that Glenwood Hospital is also liable for her injuries because it improperly granted Dr. Donald privileges to perform the instant surgical procedure when he was not qualified to do so, and because they kept incomplete records of her condition. Inasmuch as we find no negligence on the part of Dr. Donald, the hospital's granting of such privileges to Dr. Donald did not cause her complications. The same holds true in the case of the record-keeping. While the charts with respect to vital signs were obviously incomplete and poorly kept when measured against hospital regulations, their deficiency played no part in causing the problems suffered by Mrs. Trichel. For these reasons, the hospital bears no liability to her.

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For the reasons assigned, the judgment appealed is AFFIRMED. All costs of this appeal are assessed against plaintiff-appellant.

AFFIRMED.

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**H**

Strubhart v. Perry Memorial Hosp. Trust Authority  
 Okl., 1995.

Supreme Court of Oklahoma.

Kristi L. STRUBHART, Personal Representative of  
 the Estate of Geoffrey B. Tearney, Deceased, Ap-  
 pellant,

v.

PERRY MEMORIAL HOSPITAL TRUST AU-  
 THORITY, Appellee.  
 No. 73929.

Feb. 14, 1995.

Partial Concurrence and Dissent by Justice Simms  
 Changed Feb. 23, 1995.

Rehearing Denied Sept. 20, 1995.

Negligence action was brought against hospital to recover for death of newborn infant, based primarily on alleged negligence of hospital personnel to take action when infant showed signs of distress and private attending physician failed to act. After jury returned verdict against hospital in amount of \$800,000, the District Court of Noble County, Lowell Doggett, J., granted new trial upon plaintiff's refusal to remit \$500,000 of verdict. Appeal was taken. The Court of Appeals affirmed, and further review was sought. The Supreme Court, Lavender, J., held that: (1) trial court was not justified in granting remittitur; (2) evidence of attending physician's alleged prior acts of misconduct in unrelated cases should not have been admitted; and (3) Oklahoma adopts doctrine of independent corporate responsibility to extent that doctrine imposes duty of ordinary care on hospitals to ensure that only competent physicians are granted staff privileges and, once staff privileges are granted, hospital takes reasonable steps to ensure patient safety when it knows or should know that physician has engaged in pattern of incompetent behavior.

Opinion of Court of Appeals vacated; judgment of trial court affirmed in part, reversed in part, and

matter remanded for new trial.

Simms, Hargrave, Watt, JJ., concurred in part and dissented in part.

Hodges, J., dissented and filed opinion.

## West Headnotes

**[1] New Trial 275** ⤴⤵6

275 New Trial

275I Nature and Scope of Remedy

275k6 k. Discretion of Court. Most Cited Cases  
 Trial court has wide discretion in granting new tri- al.

**[2] Appeal and Error 30** ⤴⤵933(1)

30 Appeal and Error

30XVI Review

30XVI(G) Presumptions

30k933 Order Granting or Refusing New

Trial

30k933(1) k. In General. Most Cited

Cases

**Appeal and Error 30** ⤴⤵977(3)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k976 New Trial or Rehearing

30k977 In General

30k977(3) k. Grant of New Trial in

General. Most Cited Cases

Normally, appellate court will indulge every presumption in favor of correctness of ruling of trial judge in sustaining motion for new trial, and such order will not be reversed on appeal unless record clearly shows that trial court erred on pure and un-mixed question of law, or acted arbitrarily or capriciously.

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**[3] Appeal and Error 30 ⚡977(3)**

30 Appeal and Error  
 30XVI Review  
 30XVI(H) Discretion of Lower Court  
 30k976 New Trial or Rehearing  
 30k977 In General  
 30k977(3) k. Grant of New Trial in  
 General. Most Cited Cases  
 When new trial is granted by same judge who tried  
 case, much stronger showing of error or abuse of  
 discretion is required than if party was appealing  
 refusal to grant new trial.

**[4] Appeal and Error 30 ⚡1015(1)**

30 Appeal and Error  
 30XVI Review  
 30XVI(I) Questions of Fact, Verdicts, and  
 Findings  
 30XVI(I)3 Findings of Court  
 30k1015 Decision on Motion for New  
 Trial  
 30k1015(1) k. In General. Most  
 Cited Cases  
 Decision to grant new trial will not be reversed un-  
 less it is shown beyond all reasonable doubt that tri-  
 al court materially and manifestly erred.

**[5] New Trial 275 ⚡6**

275 New Trial  
 275I Nature and Scope of Remedy  
 275k6 k. Discretion of Court. Most Cited Cases  
 Trial court's exercise of discretion on motion for  
 new trial must be sound legal discretion in accord-  
 ance with recognized principles of law, rather than  
 exercise of arbitrary discretion exercised at will.

**[6] Appeal and Error 30 ⚡977(3)**

30 Appeal and Error  
 30XVI Review  
 30XVI(H) Discretion of Lower Court  
 30k976 New Trial or Rehearing  
 30k977 In General

30k977(3) k. Grant of New Trial in  
 General. Most Cited Cases  
 Where issues raised necessitate examination of en-  
 tire lower court record, appellate court will examine  
 such record to determine if trial court, in granting  
 new trial, abused its discretion, acted arbitrarily, or  
 erred on some unmixed question of law.

**[7] Appeal and Error 30 ⚡1015(1)**

30 Appeal and Error  
 30XVI Review  
 30XVI(I) Questions of Fact, Verdicts, and  
 Findings  
 30XVI(I)3 Findings of Court  
 30k1015 Decision on Motion for New  
 Trial  
 30k1015(1) k. In General. Most  
 Cited Cases  
 On review, order granting new trial will be reversed  
 where it is based, to exclusion of all others, on  
 wrong, incorrect, or insufficient reason or ground  
 and there appears no tangible, substantial, or rea-  
 sonably certain basis for concluding that, if matter  
 were tried again, result would be different.

**[8] Appeal and Error 30 ⚡1072**

30 Appeal and Error  
 30XVI Review  
 30XVI(J) Harmless Error  
 30XVI(J)22 New Trial or Rehearing  
 30k1072 k. Decisions on Motion for  
 New Trial or Rehearing. Most Cited Cases  
 If appellate court can say with certainty that basis  
 of trial court's ruling did not, contrary to trial  
 court's opinion, constitute prejudice, order granting  
 new trial should be reversed.

**[9] New Trial 275 ⚡77(2)**

275 New Trial  
 275II Grounds  
 275II(F) Verdict or Findings Contrary to Law  
 or Evidence  
 275k77 Mistake, Passion, or Prejudice of

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## Jurors

275k77(2) k. Excessive Damages in General. Most Cited Cases  
 (Formerly 115k128)

General rule is that issue of damages in personal injury action is left to jury after hearing all evidence; verdict of 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.

## [10] Appeal and Error 30 ↪979(5)

## 30 Appeal and Error

## 30XVI Review

## 30XVI(H) Discretion of Lower Court

## 30k976 New Trial or Rehearing

## 30k979 For Insufficiency of Evidence

30k979(5) k. Inadequate or Excessive Damages. Most Cited Cases  
 Granting of remittitur by trial court may be reversed for abuse of discretion or because trial court acted arbitrarily or capriciously.

## [11] Health 198H ↪834(2)

## 198H Health

198HV Malpractice, Negligence, or Breach of Duty

## 198HV(G) Actions and Proceedings

## 198Hk828 Damages

198Hk834 Statutory Limits on Damages Awards

198Hk834(2) k. Wrongful Death. Most Cited Cases

## (Formerly 204k8 Hospitals)

In negligence action against hospital arising out of death of newborn infant, trial court was not justified in granting remittitur of \$500,000 from jury's \$800,000 verdict; amount of verdict was not outrageous or wholly unreasonable for wrongful death of newborn infant, and any errors occurring with respect to issue of liability could not be used to support remittitur.

## [12] New Trial 275 ↪162(1)

## 275 New Trial

## 275III Proceedings to Procure New Trial

275k162 Remission or Reduction of Excess of Recovery

275k162(1) k. In General. Most Cited Cases  
 Errors associated solely with liability issues in personal injury or wrongful death case may not be used to support remittitur; remittitur is incapable of curing errors associated solely with liability issues.

## [13] Health 198H ↪656

## 198H Health

198HV Malpractice, Negligence, or Breach of Duty

## 198HV(C) Particular Procedures

## 198Hk655 Hospitals in General

198Hk656 k. In General. Most Cited Cases  
 (Formerly 204k7 Hospitals)

## Health 198H ↪696

## 198H Health

198HV Malpractice, Negligence, or Breach of Duty

## 198HV(C) Particular Procedures

## 198Hk695 Mental Health

198Hk696 k. In General. Most Cited Cases  
 (Formerly 204k7 Hospitals)

Hospital receives patients under 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 physical and mental ailments of patient.

## [14] Evidence 157 ↪146

## 157 Evidence

## 157IV Admissibility in General

## 157IV(D) Materiality

157k146 k. Tendency to Mislead or Confuse. Most Cited Cases

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Probative value of evidence of private attending physician's prior actions or inactions in unrelated cases on issue of whether nurse should have known of allegedly incompetent treatment being provided by physician and should have taken action was outweighed by its prejudicial effect, particularly in view of fact that physician's prior conduct was main circumstance on which hospital's liability was premised. 12 Okl.St. Ann. § 2403.

**[15] Health 198H ◀820**

198H Health

198HV Malpractice, Negligence, or Breach of Duty

198HV(G) Actions and Proceedings

198Hk815 Evidence

198Hk820 k. Admissibility. Most Cited Cases

(Formerly 204k8 Hospitals)

In action against hospital under corporate liability theory, testimony about physician's prior conduct is admissible if hospital, through its personnel, knows or should know with exercise of ordinary care of prior conduct, and prior conduct is such that hospital exercising ordinary care would take some steps to either monitor or discipline physician.

**[16] Health 198H ◀821(5)**

198H Health

198HV Malpractice, Negligence, or Breach of Duty

198HV(G) Actions and Proceedings

198Hk815 Evidence

198Hk821 Necessity of Expert Testimony

198Hk821(5) k. Particular Procedures. Most Cited Cases

(Formerly 204k8 Hospitals)

In action against hospital under corporate liability theory, unless previous conduct of staff physician which is known or should be known by hospital is obviously incompetent conduct that would lead hospital exercising ordinary care to take some affirmative steps to monitor or discipline staff physi-

cian, expert testimony is necessary to show that conduct is of type that would lead hospital to take appropriate precautionary steps.

**[17] Evidence 157 ◀584(1)**

157 Evidence

157XIV Weight and Sufficiency

157k584 Weight and Conclusiveness in General

157k584(1) k. In General. Most Cited Cases  
 Expert testimony is required where fact in issue is not within realm of ordinary experience of man-kind.

**[18] Appeal and Error 30 ◀179(1)**

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(A) Issues and Questions in Lower Court

30k179 Sufficiency of Presentation of Questions

30k179(1) k. In General. Most Cited Cases

In negligence action against hospital, plaintiff's amended petition in error raising corporate negligence as theory of liability was adequate to preserve issue of viability of such theory for appellate review. Civil Appellate Procedure Rule 1.17(a), 12 O.S.A. Ch. 15, App. 2.

**[19] Health 198H ◀660**

198H Health

198HV Malpractice, Negligence, or Breach of Duty

198HV(C) Particular Procedures

198Hk655 Hospitals in General

198Hk660 k. Negligent Hiring or Supervision. Most Cited Cases

(Formerly 204k7 Hospitals)

Oklahoma adopts doctrine of independent corporate responsibility to extent that doctrine imposes duty of ordinary care on hospitals to ensure that: (1) only

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competent physicians are granted staff privileges, and (2) once staff privileges are granted to physician, hospital takes reasonable steps to ensure patient safety when it knows or should know that staff physician has engaged in pattern of incompetent behavior; however, doctrine does not place duty on hospitals to review privately employed staff physician's work as matter of course in all individual cases, does not make hospitals insurers of safety of all patients admitted to hospital by private physicians holding staff privileges with hospital, and does not impose strict duty on hospitals to cancel privileges in every case in which physician's qualifications or competence have been called into question.

[20] Health 198H ◀660

198H Health

198HV Malpractice, Negligence, or Breach of Duty

198HV(C) Particular Procedures

198Hk655 Hospitals in General

198Hk660 k. Negligent Hiring or Supervision. Most Cited Cases

(Formerly 204k7 Hospitals)

Single prior episode of physician misconduct may be sufficient to call into play duty of hospital to take reasonable steps to ensure patient safety when it knows or should know that staff physician has engaged in "pattern" of incompetent behavior.

[21] Health 198H ◀660

198H Health

198HV Malpractice, Negligence, or Breach of Duty

198HV(C) Particular Procedures

198Hk655 Hospitals in General

198Hk660 k. Negligent Hiring or Supervision. Most Cited Cases

(Formerly 204k7 Hospitals)

Hospital is not required to constantly supervise and second-guess activities of staff physicians and is not required to review staff physician's diagnosis or treatment in all individual cases; rather, hospital

should be required in individual cases where prior incompetence of staff physician is not in issue to take reasonable alternative action only in situations where hospital nurse or other hospital personnel (1) knows that staff physician's diagnosis or treatment is below acceptable medical standards, or (2) diagnosis or treatment is so obviously negligent as to lead any reasonable person to anticipate substantial injury would result to patient from following physician's course of treatment.

[22] Health 198H ◀660

198H Health

198HV Malpractice, Negligence, or Breach of Duty

198HV(C) Particular Procedures

198Hk655 Hospitals in General

198Hk660 k. Negligent Hiring or Supervision. Most Cited Cases

(Formerly 204k7 Hospitals)

Under Oklahoma doctrine of corporate liability, when breached duty is predicated on hospital's omission to act, i.e., failure to recommend some action be taken against allegedly incompetent staff physician, hospital can only be held liable if it had reason to know it should have acted; thus, knowledge, either actual or constructive, is essential factor in determining whether hospital exercised reasonable care or was negligent.

[23] Health 198H ◀660

198H Health

198HV Malpractice, Negligence, or Breach of Duty

198HV(C) Particular Procedures

198Hk655 Hospitals in General

198Hk660 k. Negligent Hiring or Supervision. Most Cited Cases

(Formerly 204k7 Hospitals)

To show causation in action against hospital under corporate liability theory, plaintiff must prove some negligence on part of physician involved to establish causal relation between hospital's negligence in granting or continuing staff privileges and

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plaintiff's injuries.

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

Personal representative of the estate of deceased newborn infant sued hospital for negligence in causing death. Following a jury verdict in favor of the estate the trial court granted a new trial upon the estate's refusal to remit \$500,000.00 of the \$800,000.00 jury verdict. Personal representative appealed, seeking reinstatement of the jury verdict. The Court of Appeals affirmed the trial court in a 2-1 decision. **HELD:** We hold, although the trial court erred in granting hospital's alternative motion for a remittitur, grounds existed supporting the trial court's grant of a new trial to hospital. We also adopt the doctrine of independent corporate responsibility and this theory of liability will be available to plaintiff on remand and retrial.

**CERTIORARI PREVIOUSLY GRANTED;  
 COURT OF APPEALS' OPINION VACATED;  
 TRIAL COURT JUDGMENT AFFIRMED IN  
 PART; REVERSED IN PART; AND MATTER  
 REMANDED FOR NEW TRIAL.**

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.<sup>FNI</sup> 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.

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FN1. Nurse Bowles was not the attending nurse for the delivery.

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.<sup>FN2</sup>

FN2. 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).

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<sup>FN3</sup>; 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.

FN3. 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.

The focus of plaintiff's case against the hospital

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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.<sup>FN4</sup> 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.

FN4. 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.

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.<sup>FN5</sup> 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.

FN5. 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

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& 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).

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 jurisdic-

tions 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.

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[1][2][3][4] 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).<sup>FN6</sup> 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.*

FN6. 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).

[5][6][7][8] 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.

[9][10] 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.

[11] 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

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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.

[12] 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 al-

lowed 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 un-mixed 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.

[13] 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.

[14] 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 situ-

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ation. 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 \*27212 O.S.1991, § 2403.<sup>FN7</sup> At trial, however, plaintiff convinced the trial court that this evidence was admissible under 12 O.S.1991, § 2404(B) <sup>FN8</sup> 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.<sup>FN9</sup> 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.<sup>FN10</sup>

FN7. § 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.

FN8. § 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.

FN9. 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.

FN10. 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,

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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.

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,

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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 unadmixed 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.

[15] 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).

[16][17] 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).

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## PART V. CORPORATE RESPONSIBILITY.

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

[18] 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.<sup>FN11</sup> The above allegation in the amended petition in error was sufficient to raise the issue of the propriety of corporate negligence or responsib-

ility in the appeal of this case. The Court of Appeals, thus, erred in failing to reach the issue and we proceed to decide it.

FN11. 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).

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

[19] A good discussion of the doctrine of independent corporate negligence or responsibility<sup>\*275</sup> 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 physi-

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cians 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).<sup>FN12</sup> 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.<sup>FN13</sup> We do not, however, be-

lieve 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.

FN12. 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.

FN13. 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,

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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).

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

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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 re-

strictions 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.

[20] 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).<sup>FN14</sup>

FN14. 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

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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.

[21] 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.<sup>FN15</sup>

FN15. 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).

[22][23] 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.<sup>FN16</sup> 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,

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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.

FN16. 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.

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.<sup>FN17</sup>

FN17. 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).

## 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 unmingled 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

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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 <sup>FN1</sup> and by the jury instructions at the close of the evidence.

FN1. 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.

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.

Okl., 1995.  
Strubhart v. Perry Memorial Hosp. Trust Authority  
903 P.2d 263, 1995 OK 10

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▶  
 Torres v. Kennecott Copper Corp.,  
 Ariz.App. 1971.

Court of Appeals of Arizona, Division 1, Department B.  
 Arthur TORRES and Josie Torres, his wife, Appellants,  
 v.  
 KENNECOTT COPPER CORPORATION, a New York corporation, Appellee.  
 No. 1 CA-CIV 1485.

Sept. 13, 1971.

Action against employer for aggravation of injuries while employee was being treated at hospital owned by employer. The Superior Court, Cause No. C-230322, Warren C. Ridge, J., granted summary judgment for employer and appeal was taken. The Court of Appeals, Haire, J., held that where employee who allegedly sustained injuries and aggravation of injuries while undergoing treatment in hospital owned by employer alleged's derivative liability under doctrine of respondeat superior, dismissal with prejudice of employee's claim against doctor on the hospital staff operated as an adjudication that doctor was not negligent and served to relieve employer from any liability which may have evolved therefrom under the doctrine of respondeat superior.

Appeal dismissed.

West Headnotes

[1] Appeal and Error 30 ⇨781(1)

30 Appeal and Error  
 30XIII Dismissal, Withdrawal, or Abandonment  
 30k779 Grounds for Dismissal  
 30k781 Want of Actual Controversy  
 30k781(1) k. In General. Most Cited Cases  
 Motion to dismiss appeal is proper procedure for

presenting issue of mootness. 17 A.R.S. Supreme Court Rules, rule 7.

[2] Judgment 228 ⇨630

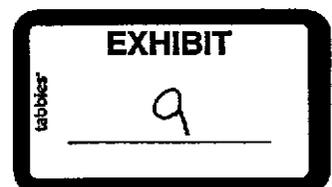
228 Judgment  
 228XIII Merger and Bar of Causes of Action and Defenses  
 228XIII(C) Persons Who May Take Advantage of the Bar  
 228k630 k. Joint Wrongdoers. Most Cited Cases  
 Where master's liability is based solely on the negligent acts of his servant, a judgment in favor of the servant relieves the master of any liability.

[3] Judgment 228 ⇨570(5)

228 Judgment  
 228XIII Merger and Bar of Causes of Action and Defenses  
 228XIII(A) Judgments Operative as Bar  
 228k570 Judgment on Discontinuance, Dismissal, or Nonsuit  
 228k570(5) k. Merits of Controversy in General. Most Cited Cases  
 A dismissal with prejudice is a judgment on the merits, and is therefore res judicata as to every issue reasonably framed by the pleadings.

[4] Judgment 228 ⇨630

228 Judgment  
 228XIII Merger and Bar of Causes of Action and Defenses  
 228XIII(C) Persons Who May Take Advantage of the Bar  
 228k630 k. Joint Wrongdoers. Most Cited Cases  
 (Formerly 228k30)  
 Where employee who allegedly sustained injuries and aggravation of injuries while undergoing treatment in hospital owned by employer alleged employer's derivative liability under doctrine of respondeat superior, dismissal with prejudice of em-



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ployee's claim against doctor on the hospital staff operated as an adjudication that doctor was not negligent and served to relieve employer from liability which may have evolved therefrom under the doctrine of respondeat superior. A.R.S. § 23-901 et seq.

**[5] Judgment 228 ↪630**

228 Judgment

228XIII Merger and Bar of Causes of Action and Defenses

228XIII(C) Persons Who May Take Advantage of the Bar

228k630 k. Joint Wrongoers. Most Cited Cases

Where employee suing employer for injuries and aggravation of injuries suffered while undergoing treatment in hospital owned by employer dismissed with prejudice claim against doctor on the hospital staff, employee was collaterally estopped from maintaining action against employer on theory that employer was negligent in failing to use due care in the selection of doctor.

**[6] Judgment 228 ↪630**

228 Judgment

228XIII Merger and Bar of Causes of Action and Defenses

228XIII(C) Persons Who May Take Advantage of the Bar

228k630 k. Joint Wrongoers. Most Cited Cases

**Labor and Employment 231H ↪3027**

231H Labor and Employment

231HXVIII Rights and Liabilities as to Third Parties

231HXVIII(B) Acts of Employee

231HXVIII(B)1 In General

231Hk3027 k. Theory and Purpose of Imposing Liability on Employer. Most Cited Cases

(Formerly 255k300 Master and Servant)

Where there is independent negligence on part of

master, the master may be liable, apart from his derivative liability, for his servant's wrongful acts, and in such a case, a judgment in favor of the servant will not ordinarily bar a recovery against the master.

**[7] Judgment 228 ↪630**

228 Judgment

228XIII Merger and Bar of Causes of Action and Defenses

228XIII(C) Persons Who May Take Advantage of the Bar

228k630 k. Joint Wrongoers. Most Cited Cases

In order for judgment in favor of servant not to bar recovery against master, the master must have been guilty of acts on which, independently of the acts of the servant, liability may be predicated.

\*273 \*\*478 Finn & Van Baalen, by Peter T. Van Baalen, Phoenix, for appellants.

O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, by Richard J. Woods and Ralph E. Mahowald, Jr., Phoenix, for appellee.

HAIRE, Judge.

On this appeal from a summary judgment in favor of defendant-appellee Kennecott Copper Corporation, plaintiffs-appellants Torres seek to challenge the trial court's conclusion that it lacked jurisdiction to entertain plaintiffs' suit for damages against Kennecott. The trial court held that plaintiffs' exclusive remedy was under the Workmen's Compensation Act. Kennecott has filed a motion to dismiss the appeal contending that the appeal has become moot by reason of the dismissal with prejudice of plaintiffs' action against Kennecott's employee, on whose alleged negligence Kennecott contends its liability can only be predicated. Appellee's motion to dismiss was heard simultaneously with oral argument on the merits of the appeal.

[1] First, we note that filing a motion to dismiss an appeal under Rule 7, Rules of the Supreme Court, 17 A.R.S., is the proper procedure for presenting the issue of mootness, and that an appeal can be

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dismissed when the issues on appeal have become moot. In re Estate of Henry, 6 Ariz.App. 183, 430 P.2d 937 (1967).

After reviewing the matter, we agree with defendant Kennecott that plaintiffs' appeal should be dismissed as moot.

The relevant facts are undisputed and as pertinent hereto are as follows. On July 24, 1968, plaintiff Arthur Torres sustained an industrial injury while in the employ of Kennecott Copper Corporation when he lost control of the truck he was driving. Thereafter, Torres was admitted to Kearney Hospital, which is solely owned and operated by Kennecott. There he was treated for his injuries by Dr. Norbert A. Ehrman, a doctor on the hospital staff, and other hospital personnel. While receiving this treatment plaintiff contends his injuries were aggravated and that he received additional injuries due to Dr. Ehrman's negligence and the negligence of other hospital personnel, designated in plaintiffs' complaint as John Does and Jane Does I through V.

Torres filed a claim for compensation with the Industrial Commission, and thereafter accepted compensation. On January 26, 1970, the Commission entered its Findings and Award for Continuing Benefits and Establishing Average Monthly Wage. Subsequently, Torres filed a Petition for Hearing dated February 11, 1970, claiming continuing disability arising from the truck mishap and seeking compensation at a greater rate than he was then receiving.

On January 12, 1970, Torres filed the present civil action for damages against Dr. Ehrman, the above-mentioned John Does and Kennecott. Count I of the complaint alleged negligence on the part of Dr. Ehrman, the John Does, and alleged Kennecott's derivative liability as their employer, under the doctrine of Respondeat superior. Count II alleged as a separate theory \*274 \*\*479 of liability that Kennecott 'was negligent in that it failed to use due care in the selection of its agents and employees, and was negligent in choosing a medical staff not

possessing the degree of knowledge and skill ordinarily exercised or possessed by others in the same profession.'

In due course Kennecott filed a motion for summary judgment and the trial court granted the motion on the basis that plaintiffs' exclusive remedy was under the provisions of the Workmen's Compensation Act. The plaintiffs then filed their appeal.

Thereafter plaintiffs dismissed with prejudice their claim against the defendant employee, Dr. Ehrman. Kennecott then filed its motion to dismiss this appeal. In the response to the motion to dismiss and in oral argument plaintiffs stated that they did not contend that any other employees or agents of Kennecott were negligent and further, that plaintiffs did not intend to amend their complaint so as to substitute other actual defendants for the fictional defendants originally named. Also, plaintiffs admit that their claim against Dr. Ehrman has been dismissed with prejudice.

[2][3][4] As previously stated herein Kennecott's liability under Count I of the complaint was predicated upon the principles of Respondeat superior. It is well established that where the master's liability is based solely on the negligent acts of his servant, a judgment in favor of the servant relieves the master of any liability. DeGraff v. Smith, 62 Ariz. 261, 157 P.2d 342 (1945); 53 Am.Jur.2d, Master and Servants 408 (1970). Moreover, a dismissal with prejudice is a judgment on the merits, DeGraff, Supra, and is therefore Res judicata as to every issue reasonably framed by the pleadings. Rousselle v. Jewett, 101 Ariz. 510, 421 P.2d 529 (1966); Roden v. Roden, 29 Ariz. 549, 243 P. 413 (1926). Here, the order of dismissal with prejudice entered against Dr. Ehrman operated as an adjudication that he was not negligent in the treatment of plaintiff, and this adjudication operates to relieve the master Kennecott from any liability which may have evolved therefrom under the doctrine of Respondeat superior.

[5][6][7] We are also of the view that because of

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the dismissal of the claim against Dr. Ehrman, plaintiffs are now collaterally estopped from litigating Kennecott's liability under Count II of the complaint. Under this count plaintiffs alleged that Kennecott was negligent in failing to use due care in the selection of Dr. Ehrman. We recognize that where there is independent negligence on the part of the master, the master may be liable, apart from his derivative liability for his servant's wrongful acts. *Siebrand v. Gosnell*, 234 F.2d 81 (9th Cir. 1956); *First National Bank v. Otis Elevator Co.*, 2 Ariz.App. 80, 406 P.2d 430 (1965), opinion on rehearing, 2 Ariz.App. 596, 411 P.2d 34 (1966). In such a case, a judgment in favor of the servant will not ordinarily bar a recovery against the master. However, the master must have "been guilty of acts on which independently of the acts of the servant, liability may be predicated." (Emphasis supplied). *DeGraff v. Smith*, 62 Ariz. 261, 266, 157 P.2d 342, 344 (1945). See also, *Siebrand*, *Supra*, 234 F.2d at 89. As stated in *Restatement Agency Second s 217 B, Comment d* (1958):

'd. If there is an independent ground for finding the principal liable, judgment can be entered against him and for the agent. Thus, if, in an action against master and servant for harm caused by an automobile driven by the servant, there is evidence that the vehicle was defective, and that the defect was a cause of the harm, it is possible to ascribe the entire fault to the master or to another servant.'

In this regard, plaintiffs allege that Kennecott was negligent in selecting Dr. Ehrman. However, under plaintiffs' Count II, as under Count I, the *Sine qua non* of damage to plaintiffs is proof of negligence on the part of Kennecott's employee, Dr. Ehrman. Kennecott's alleged negligence in selecting an employee with known negligent propensities could not have resulted in detrimental\*275 \*\*480 consequences to plaintiffs, in the absence of negligent conduct on the part of that employee-and here, by virtue of the dismissal with prejudice, there has been a determination That he was not negligent.

Dr. Ehrman's negligence being an essential element

to Kennecott's liability under Count II, and the issue of Dr. Ehrman's negligence having been adjudicated in his favor by the order of dismissal, we now hold that plaintiff is collaterally estopped from maintaining this action against Kennecott under this theory of liability.

The appeal is dismissed.

JACOBSON and EUBANK, JJ., concur.  
 Ariz.App. 1971.  
*Torres v. Kennecott Copper Corp.*  
 15 Ariz.App. 272, 488 P.2d 477

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**C**  
 Wolfington v. Wilson N. Jones Memorial Hosp.  
 Tex.App.-Dallas,2000.  
 Only the Westlaw citation is currently available.

NOTICE: NOT DESIGNATED FOR PUBLICA-  
 TION. UNDER TX R RAP RULE 47.7, UNPUB-  
 LISHED OPINIONS HAVE NO PRECEDENTIAL  
 VALUE BUT MAY BE CITED WITH THE  
 NOTATION "(not designated for publication)."

Court of Appeals of Texas, Dallas.  
 Anita WOLFINGTON, Individually and as Repres-  
 entative of the Estate of Carl Wolfington, De-  
 ceased, and William Hall, Wanda Owen, Barbara  
 Choate, Peggy Robb, Abbie Gregg, and Carl Daniel  
 Wolfington, each as heirs of the Estate of Carl  
 Wolfington, Appellants,  
 v.  
 WILSON N. JONES MEMORIAL HOSPITAL,  
 Appellee.  
 No. 05-98-00498-CV.

Aug. 31, 2000.

On Appeal from the 15th Judicial District Court,  
 Grayson County, Texas, Trial Court Cause No.  
 96-1003.

Before Justices LAGARDE, MOSELEY, and  
 FITZGERALD.

#### OPINION

##### MOSELEY

\*1 In this negligent credentialing case, Anita Wolf-  
 ington, Individually and as Representative of the  
 Estate of Carl Wolfington, Deceased, and William  
 Hall, Wanda Owen, Barbara Choate, Peggy Robb,  
 Abbie Gregg, and Carl Daniel Wolfington, as heirs  
 of the Estate of Carl Wolfington (collectively the  
 Wolfingtons) appeal a judgment in favor of Wilson  
 N. Jones Memorial Hospital (the Hospital) follow-  
 ing a jury trial. In four issues, the Wolfingtons gen-

erally contend the trial court erred in (1) excluding  
 certain evidence, and (2) denying the Wolfingtons'  
 motion for new trial based on newly discovered  
 evidence. We affirm the trial court's judgment.

#### BACKGROUND

On September 2, 1994, Carl Wolfington died while  
 he was a patient at the Hospital under the care of  
 Dr. A.G. Noaman. According to the Wolfingtons,  
 he died because of a heart attack caused by a re-  
 versible but untreated heart condition. The Wolf-  
 ingtons sued Noaman for medical malpractice and  
 the Hospital for negligent credentialing. The Wolf-  
 ingtons and Noaman settled the dispute before trial.  
 Following trial, the jury found that Noaman's negli-  
 gence, if any, did not cause Carl Wolfington's  
 death. Therefore, the jury did not reach the issue of  
 whether the Hospital was negligent in failing to  
 suspend Noaman's medical privileges. The trial  
 court entered judgment in favor of the Hospital  
 based on the jury verdict. The Wolfingtons appeal.

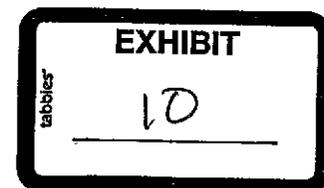
#### EVIDENTIARY ISSUES

##### 1. Agreed Order and Testimony Regarding Noa- man's Licensing

In the Wolfingtons' first issue, they claim the trial  
 court erred in excluding evidence that Noaman was  
 not a licensed medical doctor at the time he gave  
 his expert opinions. This evidence was offered in an  
 effort to impeach Noaman's credibility.

Evidence is only admissible when it is relevant.  
*See* TEX.R. EVID. 402. Evidence is relevant if it  
 has "any tendency to make the existence of any fact  
 that is of consequence to the determination of the  
 action more probable or less probable than it would  
 be without the evidence." TEX.R.EVID. 401. We  
 review a trial court's determination to exclude evi-  
 dence under the abuse of discretion standard. *See*

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*Oddo v. State*, 912 S.W.2d 831, 833  
 (Tex.App.-Dallas 1995, writ denied).

Noaman was not a party to the case at the time of trial and did not testify in person at trial. During their presentation of evidence to the jury, the Wolfingtons offered portions of Noaman's videotaped deposition, taken while Noaman was still a party to the case, in which he apparently testified as both an expert witness and a fact witness on his own behalf. The Hospital objected to the trial court showing certain portions of the deposition to the jury, specifically, testimony that Noaman was not licensed to practice medicine at the time he rendered his expert opinions. The trial court sustained the objection.

It appears from the record the Wolfingtons called Noaman at trial as a fact witness, not an expert witness. As a fact witness, Noaman's status as an unlicensed physician *after* he treated Carl Wolfington was irrelevant to the issue of whether Noaman proximately caused Carl Wolfington's death, the issue decided by the jury. *See* TEX.R.EVID. 401. Because this evidence was irrelevant, we conclude the trial court did not abuse its discretion in excluding the evidence. *See* TEX.R.EVID. 402.

\*2 However, even if the Wolfingtons called Noaman as an expert witness, we likewise conclude this evidence was irrelevant. As support for their argument that the evidence was admissible to show Noaman's lack of qualification to render an expert opinion, the Wolfingtons cite the Texas Medical Liability and Insurance Improvement Act (the Act). *See* TEX.REV.CIV.STAT. ANN. art. 4590i (Vernon Supp.2000). The Act, in part, states “[i]n a suit involving a health care liability claim against a physician for injury to or death of a patient, a person may qualify as an expert witness on the issue of whether the physician departed from accepted standards of medical care only if that person is a physician who is practicing medicine at the time such testimony is given *or was practicing medicine at the time the claim arose.*” TEX.REV.CIV.STAT. ANN. art. 4590i, § 14.01(a)(1) (Vernon Supp.2000)

(emphasis added). Although this case did not involve a suit “against a physician” at the time of trial, it was originally against a physician for the death of a patient and involved the liability of a physician. Therefore, although the statute is not strictly applicable to this case, we consider it persuasive as to whether evidence that Noaman was not a physician at the time he was deposed was relevant.

However, the policy set forth in the statute does not support the Wolfingtons' argument; rather, it supports the conclusion that whether Noaman was a licensed physician at the time of the testimony was irrelevant. Under the statute, an expert testifying on whether a physician departed from accepted standards of medical care must be a physician who: (a) is practicing medicine at the time such testimony is given; or (b) “*was practicing medicine at the time the claim arose.*” *Id.* The parties do not dispute that Noaman was a licensed physician at the time he treated Carl Wolfington, and thus was licensed “at the time the claim arose.” Therefore, we conclude evidence of Noaman's subsequent lack of a medical license is irrelevant to whether he could testify as an expert. *See* TEX.R.EVID. 402. As such, the trial court did not abuse its discretion in excluding this evidence. We overrule the Wolfingtons' first issue.

In the Wolfingtons' second issue, they contend the trial court erred in excluding portions of Noaman's deposition testimony and an agreed order between Noaman and the Texas Board of Medical Examiners (the Board). The Wolfingtons contend this evidence was admissible to impeach Noaman's truthfulness and veracity.

The Hospital read to the jury the following portion of Noaman's deposition testimony:

Q: Did you continue to do medical work in the Sherman, Grayson County community?

A: I restricted at that time my practice to office work only.

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Q: And would that be after your privileges were taken away at the Wilson N. Jones Hospital to do cardiology?

A: Yeah, I think. I don't remember the next date, whether it was before or after. See, I have intended not to ... from *the summer of '94*, not to continue in active practice.

\*3 Q: *What happened in the summer of 1994 that made you decide not to continue in active practice?*

A: *I .. I just ... I just reached a stage where I thought, you know, I want to slow down. I started slowing down sometime around that time....*

Q: Well, and I understand that. And I'm asking ... I'm trying to ... Without unduly trying to pry into your personal affairs, I'm just trying to find out what the reason for that slow down was, and whether or not it had to do with any particular part of the pressure ... Or the practice of medicine that you didn't like, or that you grew tired of, or burned out or just got ...

A: I really don't know. I was working very hard. I was ... I worked harder than anybody I know of. And I just maybe ... I just thought, I don't want to do that anymore.

(Emphasis added.)

In response, the Wolfingtons sought to introduce an agreed order of the Board, signed by Noaman on July 31, 1996 and entered by the Presiding Officer of the Board on August 17, 1996. The order stated that Noaman was requesting the voluntary and permanent surrender of his Texas medical license, and that “[w]hile not admitting that he has violated the Medical Practice Act ... [Noaman] has chosen to avoid the expense and difficulties associated with litigation” by entering into this agreed order. The Wolfingtons also sought to introduce Noaman's deposition testimony that he voluntarily surrendered his license in 1996; that there was no action pending at that time which was dropped in exchange for Noaman giving up his license; and that

he had not been threatened with the loss of his license if he did not voluntarily surrender it.

A threshold question is whether the Wolfingtons preserved their right to make this complaint on appeal. As a prerequisite to presenting a complaint on appeal, the record must show the complaint was made to the trial court by a timely request, objection, or motion and the trial court ruled on the request, objection, or motion, either expressly or implicitly, or refused to rule on the request, objection or motion, and the complaining party objected to the refusal. See TEX.R.APP.P. 33.1(a)(1).

The record shows that after the Hospital read the above deposition testimony to the jury, the Wolfingtons sought the admission of the agreed order. They argued that the deposition testimony introduced by the Hospital “open[ed] the door” to this evidence for purposes of impeachment. The Hospital responded that the order involved a settlement agreement and was therefore inadmissible. The trial court then stated: “Hold on a minute. We will argue that in a minute. I will recess the jury and then talk to you all about that.”

The next morning during trial, the Wolfingtons again brought up this request to introduce the evidence for impeachment purposes. The Wolfingtons also read into the record (outside the presence of the jury) deposition testimony by Noaman relating to the surrender of his license. The trial court initially stated this evidence was “probably admissible,” but then stated: “Frankly, this is something, Counsel, I could take up when I don't have twelve jurors sitting out in the jury room twiddling their thumbs.” The Wolfingtons then proceeded to call their next witness. Later in the trial, the Wolfingtons presented an offer of proof regarding the agreed order and Noaman's additional deposition testimony. However, the record is devoid of any ruling on the Wolfingtons' request to introduce this testimony and evidence, either before or after the offer of proof.

\*4 Based on these facts, we conclude the Wolfing-

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tons failed to obtain a ruling on their request to introduce this testimony and evidence for purposes of impeachment. Further, having reviewed the record, we cannot conclude the trial court implicitly ruled on this request. As such, the Wolfingtons may not now complain that the trial court erred in refusing to admit this evidence to impeach Noaman's truthfulness and veracity. *See id.*

Further, even assuming the trial court implicitly ruled on the request to admit the agreed order, we find the trial court did not err in excluding this evidence. The agreed order is dated in 1996. Noaman's deposition testimony introduced by the Hospital relates to the summer of 1994, approximately two years earlier. Therefore, Noaman's statement that he entered into the agreed order (and thus surrendered his license) "to avoid the expense and difficulties associated with litigation" in 1996 is not inconsistent with his subsequent deposition testimony, presented to the jury, as to why he decided to discontinue the active practice of medicine in 1994. Accordingly, the trial court correctly concluded the agreed order was not admissible for impeachment purposes.

Further, assuming the trial court implicitly denied the Wolfingtons' request to admit additional deposition testimony from Noaman, we likewise conclude the trial court did not abuse its discretion in excluding this evidence. The Wolfingtons sought to introduce Noaman's testimony that he did not surrender his medical license under the threat of litigation because it was inconsistent with his statement in the 1996 agreed order, and thus was admissible for impeachment purposes. However, the agreed order was not admitted into evidence; therefore, the additional deposition testimony was not admissible on the grounds it was inconsistent with the agreed order. Moreover, Noaman's statement that he did not surrender his medical license in 1996 to avoid litigation did not present any statement inconsistent with his prior testimony that he began slowing his medical practice down during the summer of 1994. Because Noaman's deposition testimony was not

relevant for impeachment purposes, we conclude the trial court did not abuse its discretion in excluding this evidence. We overrule the Wolfingtons' second issue.

## 2. Hospital Records

In the Wolfingtons' third issue, they contend the trial court erred in excluding copies of records reflecting Hospital complaints and investigations. These records include certified copies of two Hospital complaints and investigations. The first record involves a complaint of elderly neglect and the ensuing investigation of the Hospital's nursing staff. The second concerns an anonymous complaint about Noaman and the subsequent investigation of the complaint. Significant portions of these documents are redacted. As such, we are unable to determine if these documents present any facts relevant to this case. Based on our review of these documents as redacted, we conclude the trial court did not abuse its discretion in excluding these records. *See Oddo*, 912 S.W.2d at 833.

\*5 Furthermore, the records as redacted would be relevant only to whether the Hospital was negligent in credentialing Noaman. Because the jury determined Noaman was not negligent in connection with Carl Wolfington's death, the jury never reached the issue of whether the Hospital was negligent in credentialing Noaman. Thus, even if the documents at issue were improperly excluded from evidence, they did not probably cause the rendition of an improper verdict in this case. *See* TEX.R.APP.P. 44.1(a). Therefore, this issue does not present reversible error. We overrule the Wolfingtons' third issue.

## MOTION FOR NEW TRIAL

In the Wolfingtons' fourth issue, they contend the trial court erred in denying their motion for new trial based on newly discovered evidence. We disagree.

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A party seeking a new trial based on newly discovered evidence must show the trial court (1) the evidence has come to his knowledge since the trial; (2) the evidence could not have been discovered sooner; (3) the evidence is not cumulative; and (4) the evidence is so material that it would probably produce a different result if a new trial were granted. *See Jackson v. Van Winkle*, 660 S.W.2d 807, 809 (Tex.1983); *Keever v. Finlan*, 988 S.W.2d 300, 315 (Tex.App.-Dallas 1999, pet. dismiss'd). The decision to grant this type of motion is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of such discretion. *See Keever*, 988 S.W.2d at 315. The appropriate appellate inquiry is whether the refusal of a new trial involved the violation of a clear legal right or a manifest abuse of judicial discretion. *See id.* We make every reasonable presumption in favor of orders refusing new trials. *See id.*

The "newly discovered evidence" in this case was a Cardiolite film that showed the results of a stress test performed on Carl Wolfington. The Wolfingtons requested this evidence both informally and formally through a deposition and subpoena duces tecum. However, Noaman and the Hospital contended the requested evidence was not in their possession and was presumably lost. On the second day of trial, the Hospital produced the Cardiolite film to the Wolfingtons for the first time.

Although the Wolfingtons contend on appeal that this evidence and its interpretation was crucial to their case, they did not move for a continuance, introduce the film into evidence, or have an expert review the evidence prior to the conclusion of the trial. Further, the evidence was available during the trial. Based on these facts, we conclude the Wolfingtons can not meet the first criterion for a new trial based on newly discovered evidence that the evidence came to their knowledge "since the trial." We decline to extend the newly discovered evidence doctrine to evidence discovered during a trial. *See Ramirez v. Otis Elevator Co.*, 837 S.W.2d 405, 413 (Tex.App.-Dallas 1992, writ denied). We over-

rule the Wolfingtons' fourth issue.

\*6 Having overruled all of the Wolfingtons' issues, we need not address the Hospital's two cross appeal issues regarding whether the trial court erred in denying their motion for directed verdict. *See* TEX.R.APP.P. 47.1.

We affirm the trial court's judgment.

Tex.App.-Dallas,2000.  
 Wolfington v. Wilson N. Jones Memorial Hosp.  
 Not Reported in S.W.3d, 2000 WL 1230764  
 (Tex.App.-Dallas)

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▷  
 Winona Memorial Hosp., Ltd. Partnership v. Kuester  
 Ind.App.,2000.

Court of Appeals of Indiana.

WINONA MEMORIAL HOSPITAL, LIMITED  
 PARTNERSHIP, Republic Health Corporation of  
 Indianapolis, OrNda Health Initiatives, Inc., Tenet  
 Healthcare, Corp., and Tenet Regional Infusion  
 South, Inc., Appellants-Defendants,

v.

Sharon KUESTER and Daniel Kuester, Appellees-  
 Plaintiffs.

No. 49A02-0001-CV-19.

Oct. 24, 2000.

Patient brought suit against health care provider alleging that its negligent credentialing of doctor led to acts of malpractice committed against her. Health care provider moved to dismiss for failure to comply with requirement of Medical Malpractice Act that patient first obtain opinion from medical review panel. The Marion Superior Court, Gerald S. Zore, J., denied motion, and health care provider took interlocutory appeal. The Court of Appeals, Mathias, J., held, on issue of first impression, that a claim for negligent credentialing of a physician is an action for "malpractice" subject to requirements of Medical Malpractice Act.

Reversed and remanded.

West Headnotes

[1] Health 198H ↪ 806

198H Health  
 198HV Malpractice, Negligence, or Breach of  
 Duty  
 198HV(G) Actions and Proceedings  
 198Hk806 k. Malpractice Panels in Gen-  
 eral. Most Cited Cases  
 (Formerly 299k17.5 Physicians and Surgeons)

Submission of a proposed complaint to a medical review panel is a condition precedent to filing a medical malpractice claim. West's A.I.C. 34-18-8-4.

[2] Health 198H ↪ 800

198H Health  
 198HV Malpractice, Negligence, or Breach of  
 Duty  
 198HV(G) Actions and Proceedings  
 198Hk800 k. In General. Most Cited Cases  
 (Formerly 204k8 Hospitals)

Health 198H ↪ 806

198H Health  
 198HV Malpractice, Negligence, or Breach of  
 Duty  
 198HV(G) Actions and Proceedings  
 198Hk806 k. Malpractice Panels in Gen-  
 eral. Most Cited Cases  
 (Formerly 204k7, 204k8 Hospitals)  
 Claim for negligent credentialing of a physician is an action for "malpractice" subject to requirements of Medical Malpractice Act, including that an opinion must be obtained from a medical review panel before complaint may be filed with trial court. West's A.I.C. 34-18-2-18.

\*825 David D. Becsey, Lakshmi Reddy, Zeigler Co-  
 hen & Koch, Indianapolis, Indiana, Attorneys for  
 Appellant.  
 Morris L. Klapper, Klapper Isaac & Parish, Indi-  
 anapolis, Indiana, Attorney for Appellee.

OPINION

MATHIAS, Judge  
 This interlocutory appeal comes before us pursuant to the trial court's denial of the defendant health care providers' motion to dismiss Sharon Kuester's complaint alleging the negligent credentialing of a doctor whose malpractice allegedly caused injury to



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her. We accepted jurisdiction to address the following issue:

Whether a claim against a qualified health care provider for the negligent credentialing of a physician is an action for malpractice subject to the provisions of the Medical Malpractice Act? <sup>FN1</sup>

FN1. Oral argument in this cause was heard on August 8, 2000, in Indianapolis.

By all accounts, this is an issue of first impression in Indiana.

The defendant health care providers (collectively, Winona) contend that negligent credentialing is a tort covered under the Medical Malpractice Act (Act) and, as such, an opinion must be obtained from a medical review panel before a complaint may be filed with the trial court. See Ind.Code § 34-18-8-4 (1998). Consequently, Winona argues that Kuester's complaint should have been dismissed because she failed to obtain first an opinion from a medical review panel. Kuester, on the other hand, contends that negligent credentialing is administrative in nature and is, therefore, not subject to the requirements of the Act. We agree with Winona.

### The Language of the Act

The relevant standard of statutory interpretation concerning the Act was established more than fifteen years ago:

In determining the meaning of statutes[,] there are certain rules which we are bound to follow. It has been consistently held in Indiana that judicial construction of a statute is permissible only where the statute is ambiguous and of doubtful meaning. If the language of the statute is plain and unambiguous, judicial interpretation is inappropriate and the courts will adopt the meaning clearly expressed. If however, a statute is ambiguous and its meaning is not clear from the words used, judicial construction

is proper. In such cases, the purpose and goal of judicial construction \*826 is to give effect to the intention of the legislature. A statute should be construed to accomplish the end for which it was enacted.

*Winona Memorial Foundation of Indianapolis v. Lomax*, 465 N.E.2d 731, 735 (Ind.Ct.App.1984)(internal citations omitted).

Under the Act, malpractice is defined as a tort or breach of contract based on health care or professional services that were provided, or that should have been provided, by a health care provider, to a patient. Ind.Code § 34-18-2-18 (1998). The fact that Winona is a health care provider pursuant to the Act is undisputed.

Despite its general comprehensiveness, professional services is not defined in the Act. Winona argues that the act of credentialing is such a professional service, and, therefore, the tortious act of negligent credentialing falls within the meaning of malpractice.

On the other hand, Kuester maintains that in order for conduct to fall within the Act, it must occur in the course of a patient's medical care, treatment, or confinement, and that the Act does not extend to conduct outside this relatively circumscribed time-frame. *Id.* §§ 34-18-2-13 and -14. Kuester asserts that because the alleged negligent credentialing did not occur during her medical care, treatment, or confinement, it is not malpractice under the Act; rather, the alleged negligent credentialing would be more of an administrative act that does not involve health care or professional services.

To determine whether credentialing of a physician is subject to the Act, we are also guided by other relevant Indiana statutes. Under Indiana law, the credentialing of hospital medical staff is performed by each hospital's governing board:

The governing board of the hospital is the supreme authority in the hospital and is responsible for the

following:

(1) The management, operation, and control of the hospital.

(2) The appointment, reappointment, and assignment of privileges to members of the medical staff, with the advice and recommendations of the medical staff, consistent with the individual training, experience, and other qualifications of the medical staff.

(3) Establishing requirements for appointments to and continued service on the hospital's medical staff, consistent with the appointee's individual training, experience, and other qualifications, including the following requirements:

(A) Proof that a medical staff member has qualified as a health care provider under I.C. 16-18-2-163(a).

(B) The performance of patient care and related duties in a manner that is not disruptive to the delivery of quality medical care in the hospital setting.

(C) Standards of quality medical care that recognize the efficient and effective utilization of hospital resources, developed by the medical staff.

*Id.* § 16-21-2-5. As this statute makes clear, although the hospital governing board is the supreme authority in the hospital, it depends upon the medical staff for advice and recommendations during some portions of the credentialing process but not during others.

The medical staff's responsibilities are also defined by statute:

The medical staff of a hospital is responsible to the governing board for the following:

(1) The clinical and scientific work of the hospital.

(2) Advice regarding professional matters and policies.

(3) Review of the professional practices in the hos-

pital for the purpose of reducing morbidity and mortality and for the improvement of the care of patients in the hospital, including the following:

(A) The quality and necessity of care provided.

\*827 (B) The preventability of complications and deaths occurring in the hospital.

(4) Upon recommendation of the medical staff, establishing protocols within the requirements of this chapter and 410 I.A.C. 15-1.2-1 for the admission, treatment, and care of patients with extended lengths of stay.

Ind.Code § 16-21-2-7 (Supp.1999).

Upon review of the statutory responsibilities of the hospital governing board and the hospital medical staff, it is apparent that the credentialing process actually involves a blend of both medical and non-medical personnel and expertise. Credentialing, therefore, is neither clearly within the Act nor outside of it. For this reason, we hold that the Act is ambiguous with regard to whether the physician credentialing process is included within its ambit. We must therefore construe the Act in order to give effect to the intention of the General Assembly. *Lo-max*, 465 N.E.2d at 735.

#### The Common Law Interpretation of the Act

[1] Submission of a proposed complaint to a medical review panel is a condition precedent to filing a medical malpractice claim in Indiana. *Putnam County Hospital v. Sells*, 619 N.E.2d 968, 970 (Ind.Ct.App.1993) (citing *St. Anthony Medical Center, Inc. v. Smith*, 592 N.E.2d 732, 735 (Ind.Ct.App.1992)). This court noted in *Methodist Hospital of Indiana, Inc. v. Ray*, 551 N.E.2d 463, 468 (Ind.Ct.App.1990) *adopted on trans.*, 558 N.E.2d 829 (Ind.1990) that:

[t]his suggests an intent that the panel confine itself to matters of malpractice, where members of the medical profession are naturally qualified as ex-

perts. It suggests the reverse side of the coin as well: because they are not qualified as experts (as the term is legally defined) outside the healthcare arena, the panel, and the Malpractice Act by implication, are not equipped to deal with matters pertaining to ordinary negligence.

Accordingly, Indiana's courts of review have historically determined the applicability of the Act by examining whether the cause of action alleged sounds in medical malpractice or in ordinary negligence. *See generally Doe by Roe v. Madison Center Hospital*, 652 N.E.2d 101 (Ind.Ct.App.1995); *Sells*, 619 N.E.2d at 968; *Ray*, 551 N.E.2d at 463; *Lomax*, 465 N.E.2d at 731; *Methodist Hospital of Indiana, Inc. v. Rioux*, 438 N.E.2d 315 (Ind.Ct.App.1982). We have consistently held that we are guided by the substance of the claim as pleaded in cases such as this to determine the applicability of the Act. *Doe by Roe*, 652 N.E.2d at 104.

[2] In this regard, Kuester alleges in her amended complaint that:

1. At all times pertinent, defendants were engaged in the business of providing hospital care and services, for profit, in Indianapolis, Indiana.
2. At all times pertinent, defendants were under the duty to reasonably investigate the credentials of potential staff physicians and to reasonably inform themselves of the physical and mental conditions, past behavior and performance of those physicians who have requested staff privileges at defendants' hospital.
3. At all times pertinent, defendants were under the duty to grant staff privileges to only those physicians who were competent, sober and in reasonably good mental and physical health.
4. At all times pertinent, defendants were under the duty to retain on their staff of physicians only those physicians who were competent, sober and in reasonably good mental and physical health.
5. On July 30, 1997, Sharon Kuester was seriously

injured during the course of surgery at defendants' \*828 hospital, which injuries were caused, at least in part, by the actions of W. Michael Crosby, M.D., who was on the staff of the defendants' hospital.

6. The defendants were negligent in that they violated their duties set out above, which negligence proximately caused injuries to Sharon Kuester.

7. As the result of the negligence of the defendants, Sharon Kuester sustained serious and permanent injuries. She has suffered great pain and suffering, as well as extreme emotional distress, and she has incurred and will continue to incur substantial medical expenses and loss of earning capacity.

R. at 14-5.

Kuester's claim presents a new wrinkle in that she alleges that *two* negligent acts occurred to proximately cause her injury. As pleaded, in order for Kuester to prove the tort of negligent credentialing, she must first establish that a negligent act of Dr. Crosby proximately caused her injury before she can proceed against Winona. As a result, it is inappropriate to look only to the credentialing conduct alleged in the complaint to determine whether it sounds in malpractice or in an ordinary, common law cause of action. The credentialing process alleged must have resulted in a definable act of medical malpractice that proximately caused injury to Sharon Kuester or Kuester is without a basis to bring the suit for negligent credentialing.

When we base our determination on both alleged negligent acts required to recover (i.e., both the credentialing and the malpractice) we have very clear, twenty-year-old precedent that states the intent of the General Assembly. In *Sue Yee Lee v. Lafayette Home Hospital, Inc.*, this court reasoned that:

Viewed from the historical perspective we believe the conclusion is inescapable that *our General Assembly intended that all actions the underlying basis for which is alleged medical malpractice are subject to the act.* [T]he obvious purpose of the act

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is to provide some measure of protection to health care providers from malpractice claims, and to preserve the availability of the professional services of physicians and other health care providers in the communities and thereby protect the public health and well-being[.]

410 N.E.2d 1319, 1324 (Ind.Ct.App.1980)  
 (emphasis added).

The composition and function of medical review panels supports the inclusion of negligent credentialing within the purview of the Act. Indiana Code § 34-18-10-3 directs that medical review panels are to be composed of three health care providers and an attorney chairperson. The statutory definition of health care provider contained in Indiana Code § 34-18-2-14 includes an organization like Winona or a representative member of Winona's credentialing body. Because the act of credentialing and appointing licensed physicians to its medical staff is a service rendered by the hospital in its role as a health care provider, inclusion of negligent credentialing under the Act is consistent with use of the medical review panel to establish the standard of care owed by Winona in credentialing. *See Ray*, 551 N.E.2d at 463.

Further, we subscribe to the reasoning that, the Act applies to conduct, curative or salutary in nature, by a health care provider acting in his or her professional capacity, and is designed to exclude only conduct which is unrelated to the promotion of a patient's health or the provider's exercise of professional expertise, skill, or judgment. *Id.* at 466. We hold that credentialing is directly related to the provision of health care and is, therefore, not excluded from the Act.

For all of these reasons, we hold that a claim for negligent credentialing of a physician is an action for malpractice subject to the Act. In so doing, however, we are mindful of the increasingly strained nature \*829 of Indiana's common law in this area. Since the enactment of the Medical Malpractice Act in 1975, there have been radical

changes in the manner in which medical services are delivered to patients, not only in Indiana, but nationally. The rise of HMOs and a more profit-driven health care delivery system were likely not within the contemplation of the General Assembly in 1975. However, the General Assembly remains the appropriate policy-making body to consider the magnitude of this change and commensurate modification of the Act.

### Conclusion

Having accepted jurisdiction, we remand to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

FRIEDLANDER, J., and NAJAM, J., concur.  
 Ind.App.,2000.  
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▷  
 Humana Medical Corp. of Alabama v. Traffanstedt  
 Ala., 1992.

Supreme Court of Alabama.  
 HUMANA MEDICAL CORPORATION OF  
 ALABAMA d/b/a Humana Hospital Shoals

v.  
 Clakey V. TRAFFANSTEDT.  
 Clakey V. TRAFFANSTEDT

v.  
 Helen B. HOLMES, as Executrix of the Estate of  
 Thomas G. Holmes, Deceased.  
 1900270, 1900332.

March 6, 1992.

Patient brought medical malpractice action against hospital and executrix of operating physician's estate. The Colbert Circuit Court, No. CV-88-99, Inge Johnson, J., entered judgment on jury verdict in favor of estate but against hospital. Hospital appealed and patient cross-appealed. The Supreme Court, Steagall, J., on rehearing ex mero motu, held that hospital could not be held liable for patient's injuries absent negligence by operating physician.

Reversed and remanded.

#### West Headnotes

#### [1] Health 198H ↪782

198H Health  
 198HV Malpractice, Negligence, or Breach of Duty  
 198HV(F) Persons Liable  
 198Hk781 Hospitals or Clinics  
 198Hk782 k. In General. Most Cited Cases  
 (Formerly 204k7 Hospitals)  
 Physician was not employee or agent of hospital and, thus, hospital could not be liable for any negligence of physician under respondeat superior theory.

#### [2] Health 198H ↪660

198H Health  
 198HV Malpractice, Negligence, or Breach of Duty  
 198HV(C) Particular Procedures  
 198Hk655 Hospitals in General  
 198Hk660 k. Negligent Hiring or Supervision. Most Cited Cases  
 (Formerly 204k7 Hospitals)  
 Even under "corporate liability" theory, hospital could not be held liable for patient's injuries in connection with operation absent negligence by operating staff physician; claims against hospital alleged negligent and wanton failure to monitor and supervise physician.

\*667 Oakley Melton, Jr. of Melton, Espy, Williams & Hayes, Montgomery, and Stanley A. Cash and J. Allen Sydnor, Jr. of Huie, Fernambucq & Stewart, Birmingham, for appellant Humana Medical Corp. d/b/a Humana Hosp. Shoals.  
 Henry H. Self, Jr. and J. Barry Mansell of Self & Self, Florence, for appellee/cross-appellant Clakey V. Traffanstedt.  
 W. Stancil Starnes and Laura Howard Peck of Starnes & Atchison, Birmingham, for cross-appellee Helen B. Holmes, as ex'r, etc.

#### ON REHEARING EX MERO MOTU

STEAGALL, Justice.

The original opinion of November 8, 1991, is withdrawn and the following is substituted therefor.

\*668 Clakey V. Traffanstedt consulted Dr. Thomas G. Holmes, a board certified neurosurgeon practicing in Muscle Shoals, on August 18, 1987, after suffering back, shoulder, and neck pain for several years. After examining Traffanstedt and after having two diagnostic tests performed on him, Dr. Holmes concluded that Traffanstedt suffered from cervical nerve root compression on the left side of his body and recommended that Traffanstedt under-



go a delicate procedure known as an anterior cervical discectomy and fusion. Traffanstedt consented to the operation, which Dr. Holmes performed at Humana Hospital Shoals, where he had staff privileges, on September 2, 1987.

Immediately following the surgery, Traffanstedt experienced temporary paralysis and, for several months after the surgery, required physical therapy. According to his complaint, Traffanstedt continues to experience loss of feeling over his entire body, weakness in his limbs, and a "severe shocking sensation" throughout his entire body when he lowers his head.

Traffanstedt sued Humana, Inc.; Humana Medical Corporation of Alabama, doing business as Humana Hospital Shoals (hereinafter referred to as "Humana Hospital"); and Helen B. Holmes, executrix of the estate of Dr. Holmes, who had died on November 15, 1987.<sup>FN1</sup> Although Traffanstedt alleged several grounds in his complaint, as amended,<sup>FN2</sup> the case was submitted to the jury against Humana Hospital on the claims alleging negligent and wanton failure to monitor and supervise Dr. Holmes and the claims against Dr. Holmes's estate alleging negligent performance of the operation and negligent failure to obtain Traffanstedt's informed consent. The court had denied the defendants' motions for separate trials. The jury returned a verdict in favor of Dr. Holmes's estate but returned a verdict against Humana Hospital and awarded Traffanstedt \$3,485,000 in compensatory and punitive damages. Humana Hospital appeals, and Traffanstedt cross-appeals.

FN1. A summary judgment was entered for Humana, Inc., on August 6, 1990; it is not a party to this appeal.

FN2. In his amended complaint, Traffanstedt added Mutual Assurance, Inc., as a defendant, alleging negligent issuance of insurance to Dr. Holmes. A summary judgment was entered for Mutual Assurance, Inc., on July 30, 1990; it is not a party to

this appeal.

Humana Hospital argues, among other things, that the verdicts are inconsistent. In that regard, Humana Hospital argues that the following jury instruction was erroneous:

"The Court further charges the jury that you may return a verdict in favor of Helen Holmes as executrix of the estate of Dr. Thomas Holmes even though you decide to return a verdict in favor of the Plaintiff, Clakey Traffanstedt, against Humana Hospital Shoals."

Humana Hospital objected to the giving of this charge and later moved for a J.N.O.V. or, in the alternative, a new trial, alleging that the verdicts were inconsistent. Its objection was overruled and its later motion was denied.

[1][2] We begin by noting that Dr. Holmes was not an employee or agent of Humana; thus, Humana could not be liable under a respondeat superior theory. There is, however, a growing trend in other jurisdictions to hold hospitals liable in such situations under the "corporate liability" theory, which was enunciated in *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). See *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); *Elam v. College Park Hosp.*, 132 Cal.App.3d 332, 183 Cal.Rptr. 156 (1982); *Kitto v. Gilbert*, 39 Colo.App. 374, 570 P.2d 544 (1977); *Joiner v. Mitchell County Hosp. Auth.*, 125 Ga.App. 1, 186 S.E.2d 307 (1971), aff'd, 229 Ga. 140, 189 S.E.2d 412 (1972); *Ferguson v. Gonyaw*, 64 Mich.App. 685, 236 N.W.2d 543 (1975); *Gridley v. Johnson*, 476 S.W.2d 475 (Mo.1972); *Foley v. Bishop Clarkson Memorial Hosp.*, 185 Neb. 89, 173 N.W.2d 881 (1970); \*669 *Moore v. Board of Trustees of Carson-Tahoe Hosp.*, 88 Nev. 207, 495 P.2d 605, cert. denied, 409 U.S. 879, 93 S.Ct. 85, 34 L.Ed.2d 134 (1972); *Corleto v. Shore Memorial Hosp.*, 138 N.J.Super. 302,

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350 A.2d 534 (1975); *Felice v. St. Agnes Hosp.*, 65 A.D.2d 388, 411 N.Y.S.2d 901 (1978); *Bost v. Riley*, 44 N.C.App. 638, 262 S.E.2d 391, *disc. rev. denied*, 300 N.C. 194, 269 S.E.2d 621 (1980); *Utter v. United Hospital Center, Inc.*, 160 W.Va. 703, 236 S.E.2d 213 (1977); *Johnson v. Misericordia Community Hosp.*, 99 Wis.2d 708, 301 N.W.2d 156 (1981). See, also, Annot., 12 A.L.R.4th 57 (1982) and Note, 11 Wm. Mitchell L.Rev. 561 (1985).

That theory has been described as follows:

"The liability of the hospital is based on its independent negligence in appointing to its medical staff a physician who is incompetent or otherwise unfit, or in failing to properly supervise members of its medical staff. The action is not one in which the hospital is sought to be held vicariously liable for the negligence of a staff physician. The distinction between a hospital's negligence in selecting or supervising its medical staff ('corporate negligence' is the term commonly used) and vicarious liability for the negligence of its employees is important because, typically, physicians on the staff of a hospital are considered independent contractors rather than employees. Therefore, vicarious liability does not attach to a hospital for the negligent acts of medical staff members."

8 Causes of Action 427, 431 (1985).

Implicit in those cases applying the corporate liability theory is the requirement that *some underlying negligent act*, either that of the physician whose treatment of the patient caused the injury or that of another staff member, be established before the hospital can be held liable. See, e.g., *Elam v. College Park Hospital*, *supra* (hospital is liable to patient under doctrine of corporate negligence for negligent conduct of independent physicians and surgeons even though they are neither employees nor agents of hospital); *Johnson v. Misericordia Community Hospital*, *supra* (although doctor, after settling with plaintiff, was no longer party to action, question of whether he was negligent in performance of operation remained an issue at trial be-

cause "it was incumbent upon the plaintiff to prove that [the doctor] was negligent ... to establish a causal relation between the hospital's alleged negligence ... and [the plaintiff's] injuries," 99 Wis.2d at 711, 301 N.W.2d at 158); and *Crumley v. Memorial Hospital, Inc.*, 509 F.Supp. 531 (E.D.Tenn.1978), *affirmed*, 647 F.2d 164 (6th Cir.1981) (if health care provider does not use due care in selection of physician, such provider is liable for subsequent negligence or malpractice of physician chosen).

Applying that theory to this case, it is apparent that the verdicts are inherently inconsistent from a proximate cause standpoint. Before Humana may be held liable, a jury must find that Dr. Holmes was negligent when he operated on Traffanstedt. We hold, therefore, that the trial court erred in charging the jury that it could simultaneously return a verdict in favor of Dr. Holmes's estate and against Humana Hospital. Thus, the judgment is reversed and the cause is remanded for a new trial with regard to both defendants. See *Barnes v. Oswald*, 579 So.2d 1319 (Ala.1991), and *Underwriters National Assurance Co. v. Posey*, 333 So.2d 815 (Ala.1976). Discussion of the other issues raised on appeal is, therefore, pretermitted.

ORIGINAL OPINION WITHDRAWN; OPINION  
 SUBSTITUTED; REVERSED AND REMANDED.

MADDOX, SHORES, ADAMS, HOUSTON,  
 KENNEDY and INGRAM, JJ., concur.  
 Ala., 1992.

Humana Medical Corp. of Alabama v. Traffanstedt  
 597 So.2d 667

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