

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Randall L. McNeilan, Executor,
of the Estate of Harley Emerson Nutt,
Deceased,

:

:

Plaintiff-Appellant,

:

v.

:

The Ohio State University Medical Center,

:

Defendant-Appellee.

:

No. 10AP-472
(C.C. No. 2006-07449)

(REGULAR CALENDAR)

D E C I S I O N

Rendered on February 15, 2011

Leigh-Ann M. Sims, for appellant.

Michael DeWine, Attorney General, and *Kegler, Brown, Hill & Ritter*, *Traci A. McGuire* and *Timothy T. Tullis*, special counsel for appellee.

APPEAL from the Court of Claims of Ohio.

DORRIAN, J.

{¶1} Plaintiff-appellant, Randall L. McNeilan ("appellant"), executor of the estate of Harley Emerson Nutt, appeals from a decision of the Court of Claims of Ohio overruling appellant's objections and adopting a magistrate's decision in favor of defendant-

appellee, The Ohio State University Medical Center ("appellee"), on wrongful death and medical malpractice claims. For the reasons that follow, we affirm.

{¶2} In autumn 2003, Mr. Nutt sought treatment for a recurrence of tongue cancer. In preparation for this treatment, Mr. Nutt underwent a cardiac evaluation that identified severe blockage in the arteries of his heart. Mr. Nutt was referred to Dr. Robert Michler, an employee of appellee, for surgery to eliminate the blockage. Immediately prior to the bypass surgery, Dr. Michler determined that Mr. Nutt also needed an aortic valve replacement. After consulting with Mr. Nutt's family regarding the valve replacement, Dr. Michler performed the bypass surgery and valve replacement. The surgery was completed successfully, and three days after surgery, on January 26, 2004, Mr. Nutt was discharged from the hospital. The post-discharge treatment plan included consultations with home healthcare nurses and a physical therapist.

{¶3} After discharge from the hospital, Mr. Nutt experienced pain and vomiting. Because of the vomiting, Mr. Nutt's daughter called 911 on the day after he returned home from the hospital. The emergency squad assessed Mr. Nutt, but he declined to be taken to the hospital. Two days after discharge, Mr. Nutt's daughter called Dr. Michler's office and spoke to the on-call physician. The on-call physician, Dr. Michael Firstenberg, instructed her that, if the condition persisted, Mr. Nutt should go to the emergency room or schedule an appointment with Dr. Michler's office. Mr. Nutt was also visited by a home healthcare nurse that day. Over the next two days, Mr. Nutt was seen by a physical therapist and a home healthcare nurse, both of whom observed his condition. The home healthcare nurse contacted Dr. Michler's office to report that Mr. Nutt had a "sluggish bowel," and an over-the-counter laxative was prescribed. On January 31, 2004, five days

after discharge, Mr. Nutt complained of severe stomach pain, and his family again called 911. Mr. Nutt was transported to appellee's emergency department where he later died. Subsequent examination determined that Mr. Nutt suffered an ischemic bowel, leading to a perforation of the distal jejunum and peritonitis resulting in death.

{¶4} Appellant filed medical malpractice and wrongful death claims in the Court of Claims, and a magistrate conducted a trial on the issue of liability. On November 23, 2009, the magistrate ruled in favor of appellee, finding that appellee did not violate the standard of care, that discharging Mr. Nutt from the hospital was not the proximate cause of his death, and that appellant failed to prove his claim by a preponderance of the evidence. Appellant filed objections to the magistrate's decision on January 4, 2010. On April 16, 2010, the Court of Claims overruled appellant's objections and adopted the magistrate's decision and recommendation, including the findings of fact and conclusions of law contained in the magistrate's decision.

{¶5} Appellant appeals from the Court of Claims' decision, setting forth the following nine assignments of error for this court's review:

Assignment of Error #1

After a civil trial, the trial court commits prejudicial error when the court finds the negligent treatment of Dr. Michler, specifically his premature discharge and failure to monitor the patient in the hospital and after discharge, did not proximately cause the death of the decedent when expert testimony was presented that Dr. Michler's negligence proximately caused the death of Mr. Nutt and this testimony was never refuted, therefore the judgment of the trial court must be reversed.

Assignment of Error #2

After a civil trial, the trial court commits prejudicial error when the court finds the Plaintiff failed to prove his claim by the preponderance of evidence when it relies on expert testimony of Dr. Michler when Dr. Michler testified he was not an expert

on ischemic injuries, perforations of the intestinal tract, peritonitis or what ultimately caused Mr. Nutt's demise, therefore the judgment of the trial court must be reversed.

Assignment of Error #3

After a civil trial, the trial court commits prejudicial error when the court finds the Plaintiff failed to prove his claim by the preponderance of evidence and finds the testimony of Defendants' expert witness Dr. Murphy more persuasive than Plaintiff's expert Dr. Balke, despite Dr. Murphy neither testifying to the issue of proximate cause in the death of Mr. Nutt, nor refuting Dr. Balke's testimony as to proximate cause, therefore the judgment of the trial court must be reversed.

Assignment of Error #4

After a civil trial, the trial court commits prejudicial error when the court finds Dr. Michler did not fall below the standard of care when direct evidence supports Dr. Michler's failure to meet the standard of care and the "physical facts rule" requires the testimony of a witness which is positively contradicted by the established physical facts is of no probative value, therefore the judgment of the trial court must be reversed.

Assignment of Error #5

After a civil trial, a trial court commits prejudicial error when it fails to make any conclusion of law on the theory of *res ipsa loquitur*, despite a request by Plaintiff and evidence at trial supporting such finding, therefore the judgment of the trial court must be reversed.

Assignment of Error #6

After a civil trial, a trial court commits prejudicial error when it fails to make any conclusions of law on the theory of loss of chance despite a request by Plaintiff and evidence at trial supporting such finding, therefore the judgment of the trial court must be reversed.

Assignment of Error #7

After a civil trial, a trial court commits prejudicial error when it fails to make any finding of facts or conclusion of law regarding Dr. Michler's negligence when he failed to follow-up Mr. Nutt's complaints of vomiting on Tuesday, therefore the judgment of the trial court must be reversed.

Assignment of Error #8

After a civil trial, a trial court commits reversible error when it excludes Plaintiffs' expert report, but admits Defendants' expert reports, therefore the judgment of the trial court must be reversed.

Assignment of Error #9

After a civil trial, a trial court commits prejudicial error when it fails to find the Defendants liable for negligence when the Plaintiffs prove their case by a preponderance of the evidence and the Defendants fail to rebut all expert testimony regarding proximate cause, therefore the judgment of the trial court must be reversed.

{¶6} As an initial matter, three of appellant's assignments of error fail to meet the requirements of the Ohio Rules of Appellate Procedure and are not properly before this court. The appellate rules provide that a reviewing court may disregard an assignment of error when a party "fails to argue the assignment separately in the brief." App.R. 12(A)(2).

{¶7} Appellant's brief contains no legal argument for the fifth and ninth assignments of error, only statements that appellant incorporates by reference certain filings made in the trial court below. "The Rules of Appellate Procedure do not permit parties to 'incorporate by reference' arguments from other sources." *Curtin v. Mabin*, 8th Dist. No. 89993, 2008-Ohio-2040, ¶9, quoting *Kulikowski v. State Farm Mut. Auto. Ins. Co.*, 8th Dist. No. 80102, 2002-Ohio-5460. Because the rules do not allow incorporation by reference, appellant's brief contains no legal argument for the fifth and ninth assignments of error. Furthermore, as to the fifth and ninth assignments of error, appellant's attempt to incorporate by reference filings from the trial court would result in his exceeding the page limit under Loc. R. 7(B) of the Tenth District Court of Appeals.

Additionally, appellant's brief contains no legal argument for the seventh assignment of error but merely a one-paragraph recitation of certain alleged facts.

{¶8} This court has previously declined to address assignments of error not separately argued in the briefs. *Thompson v. Ghee* (2000), 139 Ohio App.3d 195, 200; *Riss & Co. v. Bowers* (1961), 114 Ohio App. 429, 438 (decided under an analogous section of the Ohio Revised Code prior to adoption of the Rules of Appellate Procedure). It would be appropriate for this court to overrule the fifth, seventh, and ninth assignments of error due to appellant's failure to argue them separately in his brief, but in the interest of judicial economy the court will consider the merits of these three assignments of error in the context of its discussion regarding the remaining assignments of error.

{¶9} Appellant's assignments of error can be logically grouped into three issues: (1) the magistrate erred in excluding certain evidence; (2) the trial court erred in finding no violation of the standard of care; and (3) the trial court erred in finding that the discharge and post-discharge treatment of Mr. Nutt were not the proximate cause of his death. Although this analytic structure differs from appellant's own numbering of his assignments of error, it is appropriate to deal with the evidentiary issue before turning to analysis of the elements of appellant's claim. Likewise, it is appropriate to address the standard of care before examining questions of causation. For these reasons, we will consider appellant's assignments of error out of numerical order.

{¶10} First, we will address appellant's claim that the magistrate made an erroneous evidentiary ruling. Appellant's eighth assignment of error contends that the magistrate erred by excluding the report of appellant's expert witness while admitting the report of one of appellee's expert witnesses.

{¶11} " 'The trial court has broad discretion in the admission of evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, an appellate court should not disturb the decision of the trial court.' " *Columbus v. Block*, 10th Dist. No. 02AP-519, 2002-Ohio-6974, ¶16, quoting *State v. Joseph* (1995), 73 Ohio St.3d 450, 460. Abuse of discretion implies that the court's attitude is "unreasonable, arbitrary or unconscionable." *State v. Filiaggi*, 86 Ohio St.3d 230, 241, 1999-Ohio-99, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶12} Appellant has not established that the magistrate's exclusion of the expert witness report was unreasonable, arbitrary or unconscionable. The report of appellant's expert, Dr. William Balke, consists of a two-page document setting forth seven opinions regarding the standard of care and proximate cause, along with Dr. Balke's seven-page curriculum vitae. In declining to admit the expert report into evidence, the magistrate noted that Dr. Balke's opinions were introduced through live testimony by telephone.

{¶13} Appellant argues it was improper for the magistrate to exclude Dr. Balke's report on the basis that his opinions were introduced via testimony when the magistrate admitted the report of one of appellee's expert witnesses, Dr. James Murphy, who also provided live testimony. However, it was the appellant who moved to admit both expert reports as evidence. Appellee objected to the introduction of Dr. Balke's report, and the magistrate sustained that objection. After refusing to admit Dr. Balke's report, the magistrate offered appellant an opportunity to object to the admission of Dr. Murphy's report—and appellant declined. Any prejudice to appellant resulting from the admission of Dr. Murphy's report was brought on by the appellant himself. The magistrate did not

act in an unreasonable, arbitrary or unconscionable manner in excluding Dr. Balke's report while admitting Dr. Murphy's report.

{¶14} Moreover, any error in excluding the report was harmless because Dr. Balke provided live testimony regarding the matters contained in his report. *Filiaggi* at 241-42; *Columbus v. Taylor* (1988), 39 Ohio St.3d 162, 164-65.

{¶15} In *Filiaggi*, the Supreme Court of Ohio concluded that any error in refusing to admit reports from the defendant's expert witnesses was harmless when "[t]he court had the opportunity to hear all the witnesses testify in person and, therefore, the information given by the experts was conveyed to the trial court and the reports were merely cumulative." *Id.* at 241-42. Likewise, in *Taylor*, the Supreme Court of Ohio held that there was no prejudice in excluding an expert witness report when "[t]he combined effect of [the defendant's] testimony * * * and the expert's testimony * * * presented essentially the same facts to the jury * * * as the excluded report would have presented." *Id.* at 164-65.

{¶16} As in *Filiaggi* and *Taylor*, the trial court permitted the expert witness in this case to give live testimony as to both his qualifications and his opinions, the same matters contained in his expert report. Although appellant claims that counsel was not permitted to directly examine Dr. Balke about the opinions in his report, this mischaracterizes the proceedings below. Appellant's counsel was not permitted to use the expert report as an exhibit, but counsel questioned Dr. Balke extensively about his qualifications, his review of the medical records in the case, and the opinions and conclusions he drew from reviewing those records. Further, the magistrate explicitly noted that, if the report was needed to refresh Dr. Balke's recollection, counsel would be permitted to lay a foundation

and use the report for that purpose. Dr. Balke was subsequently able to testify as to his opinions without relying on his expert report. There was no prejudice to appellant in excluding Dr. Balke's report because it contained the same opinions and conclusions he gave to the court through live testimony.

{¶17} Appellant's eighth assignment of error is without merit and is overruled.

{¶18} Second, we will address appellant's claims related to violation of the standard of care, made in the fourth, fifth and seventh assignments of error.

{¶19} If objections are filed, a trial court undertakes a de novo review of a magistrate's decision. See *Mayle v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-541, 2010-Ohio-2774, ¶15. "However, the appellate standard of review when reviewing a trial court's adoption of a magistrate's decision is an abuse of discretion." *Id.* Therefore, we will only reverse a trial court's adoption of a magistrate's report if the trial court acted in an unreasonable or arbitrary manner. *Id.* The trial court adopted the magistrate's decision that neither the decision to discharge Mr. Nutt from the hospital nor the treatment during the post-discharge period violated the standard of care. We review the trial court's adoption of this decision for abuse of discretion.

{¶20} In adopting the magistrate's decision, the trial court overruled appellant's objections related to the magistrate's findings and conclusions regarding the standard of care. "When reviewing a trial court's disposition of objections to a magistrate's report, we will not reverse the trial court's decision if it is supported by some competent, credible evidence." *O'Connor v. O'Connor*, 10th Dist. No. 07AP-248, 2008-Ohio-2276, ¶16, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶21} To establish a claim of medical malpractice, a plaintiff must demonstrate the existence of a standard of care within the medical community, a violation of that standard of care by the defendant, and that the violation of the standard of care was the proximate cause of the injury. *Young-Hatten v. Taylor*, 10th Dist. No. 08AP-511, 2009-Ohio-1185, ¶29. Failure to establish any of these elements is fatal to a medical malpractice claim. *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, 130-31.

{¶22} Appellant's fourth assignment of error claims that the trial court erred in finding that discharging Mr. Nutt from the hospital did not violate the standard of care. Appellant also argues in this assignment of error that the "physical facts rule" required the trial court to reject the testimony of appellee's expert witnesses on this issue.

{¶23} As noted, appellant objected to the magistrate's finding that there was no violation of the standard of care. We review the trial court's overruling of that objection to determine whether there was competent, credible evidence supporting the trial court's action. *O'Connor* at ¶16.

{¶24} A review of the record below demonstrates that there was competent, credible evidence supporting the trial court's decision to overrule appellant's objection and adopt the magistrate's finding that the standard of care was not violated. The evidence presented at trial demonstrated that prior to discharge Mr. Nutt's vital signs were within acceptable ranges, that he was able to eat, that he had bowel and urinary function, and that he was able to walk. Appellee's experts testified that Mr. Nutt met the criteria for discharge, particularly in light of his medical history and other conditions. One of appellee's experts, Dr. Murphy, testified that he had been responsible for evaluating the discharge decision for four-to-five thousand cardiac surgical patients over the course of

his 20-plus year career. Based on his experience, Dr. Murphy testified that the decision to discharge Mr. Nutt met the standard of care. Both the magistrate and the trial court concluded that appellee's expert witnesses were more persuasive on this issue than appellant's expert. We find that the totality of the evidence presented constitutes competent, credible evidence to support the trial court's rejection of appellant's objection and adoption of the magistrate's decision.

{¶25} Appellant seeks to discredit Dr. Murphy's testimony by arguing that he gave only brief, conclusory responses when questioned about the standard of care. However, a review of the transcript reveals that the responses cited by appellant were preceded and followed by detailed questioning about the specific criteria for discharge and the post-discharge treatment, and opinions from Dr. Murphy about whether the criteria for discharge were met and whether the post-discharge treatment was appropriate. Further, the treating physician, Dr. Michler, and another expert witness, Dr. Nussbaum, whose deposition testimony was introduced via videotape and transcript, testified that discharging Mr. Nutt from the hospital met the standard of care. We find that there was additional evidence supporting the trial court's decision beyond the brief answers from Dr. Murphy cited in the appellant's brief.

{¶26} Appellant further argues that the "physical facts rule" requires rejection of the testimony of appellee's expert witnesses. Under this rule, "neither a court nor jury can give probative value to any testimony positively contradicted by the physical facts." *Ellinger v. Ho*, 10th Dist. No. 08AP-1079, 2010-Ohio-553, ¶75, citing *McDonald v. Ford Motor Co.* (1975), 42 Ohio St.2d 8, 12.

{¶27} *Ellinger* involved a malpractice claim asserting, inter alia, that the defendant failed to properly diagnose the stage of a patient's bladder cancer. The plaintiff argued that the physical facts rule required the court to discredit the treating physician's testimony that he had properly diagnosed the stage of the cancer because a subsequent pathologic evaluation demonstrated that the cancer was more advanced than the treating physician's diagnosis indicated. This court held that the physical facts rule did not require rejection of the treating physician's testimony, stating that the results of a post-surgical pathological test did not necessarily contradict a pre-surgical clinical diagnosis because the two assessments were made at different times using different information. *Id.* at ¶77.

{¶28} Similarly, in this case, the issue of whether appellee violated the standard of care depends on a physician's interpretation of the facts available at the time of discharge, rather than the facts themselves. The testimony of both appellant's and appellee's expert witnesses reveals general agreement as to the facts related to Mr. Nutt's condition prior to discharge from the hospital—e.g., the levels of Mr. Nutt's vital signs, the number of bowel movements in the hospital, and whether Mr. Nutt was able to walk. The expert witnesses differ, however, on whether discharge was appropriate given those facts. For example, appellant's expert testified that Mr. Nutt's oxygen saturation level did not support the decision to discharge him from the hospital. By contrast, appellee's experts testified that, given Mr. Nutt's pre-surgery baseline and history as a smoker, his oxygen saturation level was appropriate to permit him to be discharged. Importantly, the parties do not disagree about the oxygen saturation data and other vital signs but, rather, about what treatment decisions should have been made in light of that information. None of the witnesses' testimony contradicted these established facts; they

simply reached different conclusions as to the proper application of those facts. Thus, the testimony of appellee's expert witnesses is not "positively contradicted by the physical facts," and the physical facts rule would not apply to discredit that testimony. *Id.* at ¶75.

{¶29} Appellant's fourth assignment of error is without merit and is overruled.

{¶30} Appellant's fifth assignment of error states that the trial court erred by not making a conclusion of law on the doctrine of *res ipsa loquitur*. As discussed below, *res ipsa loquitur* is a legal doctrine relating to whether there was negligence, or a violation of the standard of care.

{¶31} Appellant raised this objection to the magistrate's decision and the trial court overruled the objection. The trial court's determination will not be reversed if there is competent, credible evidence supporting the decision to overrule the objection. *O'Connor* at ¶16.

{¶32} "*Res ipsa loquitur*" is a Latin term meaning "the thing speaks for itself." Black's Law Dictionary (9th ed. 2009). "The doctrine of *res ipsa loquitur* permits a plaintiff in a negligence action to prove through the use of circumstantial evidence that the defendant was negligent." *Hansen v. Wal-Mart Stores, Inc.*, 4th Dist. No. 07CA2990, 2008-Ohio-2477, ¶21, citing *Jennings Buick, Inc. v. Cincinnati* (1980), 63 Ohio St.2d 167, 170. This court has previously described *res ipsa loquitur* as "a rule of evidence that allows, but does not require, the trier of fact to draw an inference of negligence." *Schmidt v. Univ. of Cincinnati Med. Ctr.* (1997), 117 Ohio App.3d 427, 431. To invoke the rule, a plaintiff must establish that the instrumentality causing the injury was "under the exclusive management and control" of the defendant and "that the injury occurred under such

circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed." (Internal citations omitted.) *Id.*

{¶33} With respect to the post-discharge treatment, appellant has failed to establish that the instrumentality causing the injury was under the exclusive management and control of the appellee. Following discharge from the hospital, several medical professionals, including paramedics not affiliated with appellee, saw Mr. Nutt and assessed his condition. Additionally, Mr. Nutt and his family had control over whether he would go to the emergency room or seek other treatment. Where a plaintiff fails to establish that the instrumentality purported to have caused the injury was in the exclusive control of the defendant, *res ipsa loquitur* is inapplicable. *Oberlin v. Friedman* (1965), 5 Ohio St.2d 1, 9-10.

{¶34} Additionally, the trial court concluded that the standard of care had not been violated—i.e., that ordinary care had been observed. Where there is no deviation from the standard of care, the doctrine of *res ipsa loquitur* does not apply. *Schmidt* at 431-32. In *Schmidt*, the Supreme Court of Ohio concluded that *res ipsa loquitur* did not apply because all the medical evidence established that there was no deviation from the standard of care. While the experts dispute the medical evidence in the present case, there is competent, credible evidence supporting a finding that there was no deviation from the standard of care, and therefore the doctrine of *res ipsa loquitur* does not apply.

{¶35} Finally, appellant argues that, if Dr. Michler had not treated Mr. Nutt, he would not have suffered peritonitis and death. However, the doctrine of *res ipsa loquitur* may not be applied "based solely upon the fact that the treatment was unsuccessful or terminated with poor or unfortunate results." *Oberlin* at paragraph three of the syllabus.

{¶36} Appellant's fifth assignment of error lacks merit and is overruled.

{¶37} Appellant's seventh assignment of error asserts that the trial court erred in failing to make findings of fact or conclusions of law regarding negligence in appellee's post-discharge treatment of decedent.

{¶38} Appellant's objections to the magistrate's decision claimed that the magistrate failed to make findings of fact and conclusions of law regarding the post-discharge treatment. The trial court considered and overruled these objections before adopting the magistrate's decision. The trial court's decision will not be reversed if supported by competent, credible evidence. *O'Connor* at ¶16.

{¶39} The trial court offered two bases for overruling the objections regarding alleged failure to make findings of fact and conclusions of law regarding the post-discharge treatment: (1) the request for findings of fact and conclusions of law was untimely; and (2) the magistrate's decision contained sufficient detail to allow the appellant to frame his objections and for the trial court to independently review those objections.

{¶40} Following the entry of the magistrate's decision, appellant filed objections to the decision and requested that the magistrate make certain additional findings. Civ.R. 53(D)(3)(a)(ii) provides that a party must make a request for findings of fact and conclusions of law before the entry of a magistrate's decision or within seven days after the filing of the decision. The magistrate's decision was filed on November 23, 2009. Appellant filed objections to the decision 42 days later on January 4, 2010. Based on the application of Civ.R. 53, the trial court found that appellant's request for findings of fact

and conclusions of law was untimely. The trial record itself constitutes competent, credible evidence supporting the trial court's decision.

{¶41} Appellant filed a post-trial brief on June 6, 2008, more than a year prior to the magistrate's decision, that contained proposed findings of fact and conclusions of law. However, this brief did not expressly request that the magistrate make findings of fact and conclusions of law, and there is no other record of any express request from the appellant. Further, the magistrate did not ask the parties to file proposed findings of fact and conclusions of law, and appellee did not file any proposed findings and conclusions. One party's unilateral filing of proposed findings of fact and conclusions of law is likely insufficient to constitute a request that the court make findings of fact and conclusions of law. See *Kelly v. Northeastern Ohio Univ.*, 10th Dist No. 07AP-945, 2008-Ohio-4893, ¶32 ("With the exception of the actual findings and conclusions filed by the parties, no other references to findings of fact and conclusions of law appear in the record. Thus, we conclude the record does not appear to contain a request pursuant to Civ.R. 52 for findings of fact or conclusions of law, and a denial of the same.").

{¶42} Assuming, arguendo, that appellant's unilateral filing of proposed findings of fact and conclusions of law was sufficient to constitute a request for findings and conclusions, such a request would have been timely under Civ.R. 53. However, the trial court also overruled appellant's objections to the failure to make findings of fact and conclusions of law because the magistrate's decision was sufficiently detailed despite the lack of separately captioned findings and conclusions.

{¶43} The purpose of setting forth findings of fact and conclusions of law is to permit a reviewing court to assess the validity of the trial court's judgment. A decision that

recites various facts and legal conclusions is sufficient when, considered with the rest of the record, it forms an adequate basis to decide the issues on appeal. *Ferrari v. Ohio Dept. of Mental Health & Mental Retardation* (1990), 69 Ohio App.3d 541, 545. Although *Ferrari* dealt with a trial court's findings of fact and conclusions of law under Civ.R. 52, this court's reasoning applies by logical extension to a magistrate's findings of fact and conclusions of law under Civ.R. 53.

{¶44} The trial court concluded that the magistrate's decision contained sufficient detail to allow the appellant to frame his objections and to allow the court to review those objections. A review of the decision supports the trial court's conclusion. The decision contains five paragraphs reciting the facts related to the post-discharge treatment and a clear statement finding that the post-discharge treatment did not violate the standard of care. Thus, there is competent, credible evidence supporting the trial court's decision to overrule appellant's objection that the magistrate failed to make findings of fact and conclusions of law related to the post-discharge treatment.

{¶45} Appellant's seventh assignment of error is without merit and is overruled.

{¶46} Third, we will address appellant's first, second, third, sixth and ninth assignments of error, regarding whether appellee's actions were the proximate cause of Mr. Nutt's death.

{¶47} The primary basis for the magistrate's decision was a finding that the standard of care had not been violated. "Where there is no deviation from the applicable standard of care, there can be no finding of negligence." *Golec v. Fairview General Hosp.* (2000), 139 Ohio App.3d 788, 795, citing *Bruni*, supra. Because there was competent, credible evidence supporting the conclusion that appellee did not violate the

standard of care, there was no need for the court to reach the issue of causation. Therefore, the trial court was not required to consider the issue of proximate cause, nor is this court required to do so. Nevertheless, because the trial court considered proximate cause, we will briefly address the assignments of error related to this issue.

{¶48} Appellant's first assignment of error claims that the trial court erred in finding that the treatment of Mr. Nutt was not the proximate cause of death. Appellant's third assignment of error asserts that the trial court erred by finding Dr. Murphy more credible than Dr. Balke, despite Dr. Murphy not testifying on the issue of proximate cause and not refuting Dr. Balke's testimony on that issue. Appellant's ninth assignment of error asserts that the trial court erred by not finding appellee liable when the appellee failed to rebut appellant's expert testimony regarding proximate cause.¹ Because all of these assignments of error relate to the trial court's findings on proximate cause, we will consider them together.

{¶49} The appellant raised similar objections to the magistrate's decision. The trial court overruled these objections in adopting the magistrate's decision. This court reviews the record to determine whether there was competent, credible evidence supporting the trial court's decision. *O'Connor* at ¶16.

{¶50} In addition to finding no violation of the standard of care, the trial court also explicitly held that "the timing of Mr. Nutt's discharge was not proximately related to the

¹ At oral argument, appellant's counsel cited for the first time *Farrell v. Stewart* (Aug. 24, 1993), 10th Dist. No. 92AP-1756, arguing that this court's decision in that case stood for the proposition that, where there is no testimony contradicting a plaintiff's expert testimony on the issue of proximate cause, the plaintiff should be granted a directed verdict on proximate cause. However, we find that the *Farrell* decision is inapplicable to the instant case. In *Farrell*, the defendant stipulated as to his negligence, thus leaving causation and damages as the only issues for the jury. By contrast, there was no stipulation as to negligence in the instant case, and in fact the magistrate's decision turned on a finding that there was no negligence.

ischemic injury and subsequent perforation that led to Mr. Nutt's demise." (Magistrate's Decision at 8.) Although the trial court did not expressly make a finding regarding whether the post-discharge treatment proximately caused Mr. Nutt's injury and death, there is competent, credible evidence supporting a conclusion that neither the discharge nor the post-discharge treatment was the proximate cause of Mr. Nutt's death.

{¶51} Appellant's brief concedes that the timing of Mr. Nutt's discharge would not have prevented the ischemic bowel but argues that, if he had been kept in the hospital longer, the condition could have been diagnosed and treated. Further, appellee's experts testified that the perforation probably could not have been prevented even if Mr. Nutt had been in the hospital. There is competent, credible evidence supporting the conclusion that the discharge of Mr. Nutt from the hospital was not the proximate cause of the ischemic bowel, the perforation of the bowel, or the peritonitis.

{¶52} Further, there is evidence demonstrating that the post-discharge treatment was not the proximate cause of Mr. Nutt's death. In addition to the testimony that the post-discharge treatment did not violate the standard of care, there was testimony establishing that Mr. Nutt declined to go to the hospital during the post-discharge period. Mr. Nutt's family called 911 on the day after discharge, and the emergency medical squad came to evaluate his condition. The lead medic testified that Mr. Nutt declined to be taken to the hospital. The next day, Mr. Nutt's family called Dr. Michler's office to report complaints of vomiting. The on-call physician, Dr. Firstenberg, testified that he would have instructed the family to take Mr. Nutt to the emergency room or make a follow-up appointment to be seen in Dr. Michler's office if the problems persisted. Mr. Nutt did not make a follow-up appointment and did not go to the emergency room until he was in a

dire state. This evidence tends to demonstrate that there were other potential causes of Mr. Nutt's death than the post-discharge treatment given by appellee.

{¶53} The court below determined that the appellee's experts were more persuasive than appellant's expert. Although the testimony of appellee's expert witnesses did not incorporate the term "proximate cause," their testimony addressed the issue of causation. For example, on cross-examination, Dr. Murphy offered the following assessment:

The following day he had an acute intestinal perforation with peritonitis that I don't believe could have been predicted based upon his symptoms, his examination and his evaluation since the time of discharge. It was like a lightening strike that was going to happen whether he'd been in the hospital to [sic] Wednesday or Thursday or not, or whether he ambulated 100 feet or [sic] Monday prior to going home. It was just one of those things that's tragic and unfortunate, but was not predictable based upon the records and the facts in evidence.

(Tr. 479-80.)

{¶54} Similarly, appellee's other expert witness, Dr. Nussbaum, offered the following opinion when asked whether the outcome would have been any different if Mr. Nutt had been in the hospital when the perforation occurred:

It is unlikely. I mean, he was – they got him to the hospital pretty rapidly. A perforation such as this, that the morbidity of that perforation, whether it's in the hospital or at home, is pretty much the same. It's got a very high likelihood of ending up in the patient's demise.

(Nussbaum Tr. 31.)

{¶55} This testimony supports a conclusion that the post-discharge treatment did not cause Mr. Nutt's death. Considering the totality of the evidence presented, there is

competent, credible evidence supporting the trial court's decision overruling appellant's objection to the proximate cause determination and the weighing of expert testimony.

{¶56} Appellant's first, third, and ninth assignments of error are without merit and are overruled.

{¶57} Appellant's second assignment of error asserts that the trial court erred in finding that appellant did not prove his claim by the preponderance of the evidence when the trial court relied on the testimony of Dr. Michler because Dr. Michler testified that he was not an expert in ischemic injuries, perforations of the intestinal tract, peritonitis, or the cause of Mr. Nutt's death.

{¶58} This assignment of error challenges the basis for the magistrate's decision, which the trial court adopted. We shall review the trial court's decision to adopt the magistrate's decision for abuse of discretion. *Mayle* at ¶15.

{¶59} The magistrate's decision, as adopted by the trial court, demonstrates that the magistrate relied on the testimony of Dr. Michler, as well as appellee's experts, Dr. Murphy and Dr. Nussbaum, in reaching his conclusions. It is correct that Dr. Michler testified he was not an expert on ischemic injuries of the intestines, perforated bowels, or peritonitis. However, both Dr. Murphy and Dr. Nussbaum also testified on these issues. Dr. Nussbaum is a general surgeon who primarily performs gastrointestinal surgery. The magistrate expressly noted that he found "that the testimony of Dr. Murphy and Dr. Nussbaum was more persuasive than the opinions offered by Dr. Balke, especially in reference to assessing and responding to Mr. Nutt's complaints of postoperative nausea, vomiting and constipation." (Magistrate's Decision at 8.) Even conceding that Dr. Michler was not an expert on ischemic injuries of the intestines, perforations of the bowel, or

peritonitis, the evidence provided by Dr. Murphy and Dr. Nussbaum on these issues supported the magistrate's decision. There was no abuse of discretion in relying on Dr. Michler's testimony as part of the totality of the evidence considered because appellee presented other expert witnesses who testified regarding ischemic injuries and peritonitis.

{¶60} Appellant's second assignment of error is without merit and is overruled.

{¶61} Appellant's sixth assignment of error asserts that the trial court erred in not making an express conclusion of law on the theory of "loss of chance."

{¶62} Appellant raised this objection to the magistrate's decision, and the trial court overruled the objection in adopting the magistrate's decision as its own. We find no abuse of discretion by the trial court because the loss of chance doctrine does not apply in the case at hand.

{¶63} "[T]he loss-of-chance doctrine permits an injured plaintiff to recover for the loss of a less than 50-percent chance of recovery or survival resulting from medical malpractice." *McDermott v. Tweel*, 151 Ohio App.3d 763, 2003-Ohio-885, ¶41. However, "the case law does not presently allow for the application of the loss-of-chance doctrine to a case * * * in which the injured patient had an even or greater-than-even chance of recovery at the time of the alleged medical negligence." *Id.* at ¶43.

{¶64} In *McDermott*, the court held that the loss of chance doctrine did not apply because all parties agreed that the patient had a better than even chance of survival when the alleged malpractice occurred. *Id.* at ¶45. Likewise, in the present case, appellant's own expert witness—as cited in appellant's brief—testified that, had the cause of Mr. Nutt's peritonitis been eliminated, he would have had a better than 50 percent chance of survival. Therefore, the loss of chance doctrine cannot apply to this case.

{¶65} Appellant's sixth assignment of error is without merit and is overruled.

{¶66} For the foregoing reasons, appellant's nine assignments of error are overruled, and the judgment of the Court of Claims of Ohio is hereby affirmed.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.
