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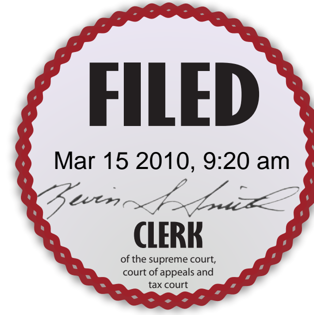

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IN THE
COURT OF APPEALS OF INDIANA

KEVIN GREEN and NANCY GREEN,	)	
	)	
Appellants-Plaintiffs,	)	
	)	
vs.	)	No. 49A02-0907-CV-612
	)	
COMMUNITY HOSPITALS OF INDIANA, INC.,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable John F. Hanley, Judge
Cause No. 49D11-0801-CT-1973

March 15, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Kevin and Nancy Green ("the Greens") appeal the denial of an Indiana Trial Rule 59 motion seeking a new trial after the jury found that Community Hospitals of Indiana, Inc. ("Community") was not liable for alleged medical negligence arising from the use of hand/wrist restraints on Kevin while he was a patient in a Community intensive care unit. We affirm.

Issues

The Greens raise the issue of whether the trial court abused its discretion by denying their Indiana Trial Rule 59 motion to correct error and motion for a new trial. Community cross-appeals, and raises the issue of whether the trial court erroneously denied its motion for judgment on the evidence, which asserted a lack of evidence of proximate cause.[1]

Facts and Procedural History

On July 9, 2000, Kevin was seen at an outpatient clinic at Community Hospital North, after he had fallen downstairs while carrying laundry to his basement. At that time, Kevin reported that he had back pain but did not report numbness or weakness in his upper extremities.

On July 20, 2000, Nancy returned home from work to find Kevin unresponsive and near-comatose. By that time, Kevin had been in bed for twelve to eighteen hours, presumably sleeping. Kevin was transported to the Emergency Department of Community Hospital North, and was then admitted to the Intensive Care Unit. For six days, Kevin was in

[1] Because we affirm the denial of a new trial on other grounds, we need not address Community's cross-appeal.

a semi-comatose state, suffering from bacterial pneumonia, sepsis, and renal failure. He was sedated, intubated, and on a ventilator.

Intermittently, Kevin became agitated and attempted to grab his ventilator tubes; members of the nursing staff decided to restrain him with soft wrist restraints.[2] However, his medical records do not reflect physician's orders for initiating or continuing the use of restraints.

A few days after his release from the hospital, Kevin saw Dr. Craig Cieciura, who had previously treated him for diabetes mellitus, back pain, and depression. Kevin was "still recovering from pneumonia" and also reported "tingling and some discomfort of his upper extremities bilaterally, both of the arms." (Tr. 21-22.) On August 23, 2000, Kevin sought treatment at The Indiana Hand Center, reporting persistent numbness and weakness in both hands. He was diagnosed as having bilateral neuropathy of ulnar nerves (located in the elbows), with sensory and motor function loss.

On January 15, 2008, the Greens filed a proposed complaint alleging that the nursing staff of Community North was negligent in failing to properly evaluate and monitor Kevin's arm/wrist restraints during his hospitalization, so as to avoid excessive and continuous pressure. The Greens further alleged that the nursing staff failed to procure orders for the restraints from a physician. Kevin contended that he had endured pain and suffering and disfigurement, while Nancy alleged a loss of Kevin's companionship. The Medical Review Panel rendered a unanimous opinion as follows:

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[2] Dr. Cieciura described "soft wrist restraints" as "basic ties that are very soft, have some kind of cushion, a little elasticity." (Tr. 29.)

> While the evidence supports the conclusion that the hospital did not follow proper documentation of its use of wrist restraints, the evidence does not support the conclusion that the hospital's use or monitoring of the wrist restraints was below the appropriate standard of care, and there is no evidence that the wrist restraints were a factor of the patient's ulnar nerve palsy.

(Appellee's App. 1.)

Kevin's malpractice claim proceeded to trial on April 21, 2009. The Greens' "central theory of liability" was that Community violated federal regulations regarding patient restraints and said regulations were "applicable" and "preemptive" relative to the standard of care in a medical malpractice case in state court. (App. 192.) In furtherance of their theory of liability, the Greens convinced the trial court to take judicial notice of certain information that had been reviewed and relied upon by their expert witness, specifically, Health Care Financing Administration, Centers for Medicare and Medicaid Services publications <u>Hospital Conditions of Participation for Patients' Rights</u>, codified at 42 C.F.R. § 482.13, and <u>Interpretive Guidelines: Quality of Care – Standards</u>, and a handbook for healthcare organizations, <u>2000 Hospital Accreditation Standards: Comprehensive Accreditation Manual for Hospitals</u>. Although the trial court agreed to take judicial notice of the materials, the court declined the Greens' request that the jury be provided evidentiary exhibits consisting of the text of those materials. Too, the trial court declined the Greens' proposed instructions to the effect that violation of the federal regulatory standards and hospital accreditation standards "would constitute negligence and fault to be assessed against the Defendant." (App. 81, 83.)

The jury returned a verdict for Community. On May 13, 2009, the Greens filed a Trial

Rule 59 motion to correct error, asking the trial court to set aside the jury verdict and order a new trial. The Greens contended that errors and omissions in jury instruction and the admission of evidence had deprived them of a fair opportunity to pursue their theory of liability. The trial court denied the motion for a new trial, and this appeal ensued.

Discussion and Decision

Trial Rule 59(J) governs the grant of a new trial upon a party's motion to correct error, providing in relevant part: "The court, if it determines that prejudicial or harmful error has been committed, shall take such action as will cure the error, including without limitation the following with respect to all or some of the parties and all or some of the errors: (1) Grant a new trial[.]" Subsection (7) provides:

> In reviewing the evidence, the court shall grant a new trial if it determines that the verdict of a non-advisory jury is against the weight of the evidence; and shall enter judgment, subject to the provisions herein, if the court determines that the verdict of a non-advisory jury is clearly erroneous as contrary to or not supported by the evidence, or if the court determines that the findings and judgment upon issues tried without a jury or with an advisory jury are against the weight of the evidence.

When considering a motion to correct error where the request is for a new trial, the trial court sits as a thirteenth juror and may weigh the evidence and judge the witnesses' credibility. Jones v. State, 697 N.E.2d 57, 59 (Ind. 1998). Accordingly, the trial court must determine whether in the minds of reasonable men a contrary verdict should have been reached. Pendleton v. Aguilar, 827 N.E.2d 614, 624 (Ind. Ct. App. 2005), trans. denied. "[T]o order a new trial under T.R. 59(J), a trial court must determine 'that the verdict … is against the weight of the evidence,' … thus requiring … careful sifting and evaluation[.]"

Chi Yun Ho v. Frye, 880 N.E.2d 1192, 1995 (Ind. 2008) (internal citation omitted).

The trial court's decision on a motion to correct error is "cloaked in a presumption of correctness," and the appellant must show that the trial court abused its discretion. Page v. Page, 849 N.E.2d 769, 771 (Ind. Ct. App. 2006). When reviewing a trial court's ruling on a motion for a new trial, the appellate court is to examine the record to determine whether: the trial court abused its judicial discretion; a flagrant injustice has been done to the appellant; or a very strong case for relief from the trial court's order for a new trial has been made by the appellant. Huff v. Travelers Indem. Co., 266 Ind. 414, 429, 363 N.E.2d 985, 994 (1977). An abuse of discretion occurs where the trial court's action is against the logic and effect of the facts and circumstances together with the inferences which may be drawn therefrom. Pendleton, 827 N.E.2d at 624.

Medical malpractice cases are like other negligence actions regarding what must be proven. Ziobron v. Squires, 907 N.E.2d 118, 123 (Ind. Ct. App. 2008). Generally, the fact that an injury occurred will not give rise to a presumption of negligence. Ross v. Olson, 825 N.E.2d 890, 892 (Ind. Ct. App. 2005), trans. denied. The plaintiff must show (1) a duty owed to the plaintiff by the defendant; (2) a breach of duty by allowing conduct to fall below the applicable standard of care; and (3) a compensable injury proximately caused by the defendant's breach of duty. Ziobron, 907 N.E.2d at 123.

Health care providers are not held to a duty of perfect care, but must exercise the degree of skill and care ordinarily possessed and exercised by a reasonably skillful and careful practitioner under the same or similar circumstances. Syfu v. Quinn, 826 N.E.2d 699,

703 (Ind. Ct. App. 2005). An act is a proximate cause of injury if it is the natural and probable consequence of the act and should have been reasonably foreseen and anticipated under the circumstances. Hellums v. Raber, 853 N.E.2d 143, 146 (Ind. Ct. App. 2006). At a minimum, proximate cause requires that the harm would not have occurred but for the defendant's conduct. Id. The act need not be the sole cause of the plaintiff's injuries. Id.

As to the reasonableness of the nursing care provided to Kevin, two Community nurses testified. They acknowledged the lack of physician orders for restraints and further acknowledged that the nursing flow charts did not document frequent repositioning of the patient. Nonetheless, they testified that the routine duties in intensive care required frequent interaction with a critical care patient, and frequent repositioning would likely have been done but not always charted.

With regard to causation, the jury was privy to the diverse opinions of several medical experts. Medical Review Panel member Dr. John Botkin reviewed Kevin's medical records and found it less likely that Kevin experienced injury in the intensive care unit and more likely that he was injured during the twelve-to-eighteen hour span of time he was unattended in his home before admission. Dr. Andrew Vicar, the other physician on the Medical Review Panel, was unable to determine when the ulnar nerve injury occurred, but was of the opinion that wrist restraints were not a cause of ulnar nerve injury because of the "different anatomic area." (Vicar Depo. Pg. 21.) He found it possible that Kevin could have struck his elbows as he thrashed about in his hospital bed, or that he could have injured his nerves before his hospital admission.

Dr. Hill Hastings, who had performed surgery on Kevin in October of 2000, opined that some pressure event at the elbows caused Kevin's ulnar nerve injuries, but his testing and observations could not determine when the injury occurred. According to Dr. Hastings, he had "no way of knowing" whether the nerve palsy occurred when Kevin was comatose and then persisted through his hospitalization, or was caused by prolonged positions or pressure during hospitalization. (Hastings Dep. Pg. 68.)

Kevin's primary physician, Dr. Cieciura, executed an affidavit wherein he opined that a review of Kevin's hospitalization records indicated that Community's nursing staff injured Kevin by failing to properly use and monitor restraints. More particularly, he pointed to "little evidence" of "periodic release of restraints" or "periodic repositioning." (Pl. Ex. 48, pg. 3.) Dr. Cieciura also testified as an expert witness at trial, criticizing the scant documentation of repositioning and the absence of signed physician orders. He opined that the need for restraints was "obvious" in Kevin's case but he was "alarmed as a physician that there was not any direct patient or direct physician contact or initiation of them, maintaining of them, things that are required by [Medicare/Medicaid] policies and procedures that most hospitals have to abide by." (Tr. 30.) He testified that the patient records should have reflected a daily entry for physician approval of restraints; he found none.

Nonetheless, Dr. Cieciura was not able to relate the scant documentation or lack of physician orders to a proximate cause of Kevin's harm. He did not offer an opinion that a reasonable physician would have declined to order the restraints or that their supervision

would have changed the outcome.[3] As to what precipitated Kevin's nerve injury, Dr. Cieciura offered the following testimony:

> [T]he one thing that could make his bilateral injuries occur was if he [was] restrained in such a way that he had equal pressure or fairly equal pressure on both aspects of his ulnar nerve for a period of time which would cause pressure there and subsequent neuropathy and paralysis.

(Tr. 34.) (emphasis added.) Dr. Cieciura thought that Kevin did not have his ulnar nerve injury before his hospitalization. However, although he believed that the use of restraints "likely" caused Kevin's injury, he did not opine whether this was avoidable or unavoidable, and stopped short of identifying a negligent act that contributed to injury. (Tr. 38.) He expressed "worry" that there was "improper use of the restraints that would cause those injuries." (Tr. 39.) Moreover, Dr. Cieciura's opinion that Community staff or nurses failed to meet the applicable standard of care was rendered solely with reference to a hospital accreditation standard.[4]

The Greens alleged a lack of physician oversight for the restraints and lack of thorough documentation of frequent repositioning of the patient. Further, they offered expert testimony that Kevin's injuries could have and likely resulted from the use of restraints. However, they offered no connection between the lack of documentation or supervision and

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[3] Dr. Cieciura was asked to describe what a physician evaluation "would have done to change the outcome" and he declined, stating that it would be "conjecture." (Tr. 60.)

[4] When asked if he had an opinion whether Community staff or nurses failed to meet the applicable standard of care, Dr. Cieciura responded: "I think they did perform a life saving measure in initiating the restraints, I think the review of his condition he needed those for the safety of himself and the nurses around him. But, the monitoring and the maintenance of those without lack a [sic] physician supervision, a licenses, you know, independent practitioner, I found to be very troubling and I would have like to have seen that as a time out in order for the patient's situation to see if we could have, to see if that could have changed the outcome [of] this." (Tr. 36.) (emphasis added.) When asked whether that constituted a breach of the applicable standard of care, Dr. Cieciura specified that it was a breach of CMS accreditation standards.

injury; there is no evidence that physician oversight would have changed the outcome. Moreover, there is testimony from which the jury could conclude that the nursing staff frequently repositioned Kevin, but did not diligently chart each change in position.

In sum, the jury was apprised that physicians did not order the restraints and that the nursing charts did not include notations of frequent repositioning of the patient. Nonetheless, the jury did not hear any testimony that the procedural deficiencies proximately caused an injury to Kevin. At most, the jury could have inferred that a lack of documentation meant a lack of repositioning and failure to reposition frequently could have caused injury. Regardless, the experts were divided as to whether Kevin's ulnar nerve injury was at all related to the use of restraints. As such, the trial court did not abuse its discretion by refusing to set aside the verdict in favor of Community as against the weight of the evidence.

Although the Greens have framed their issue in terms of whether they are entitled to relief pursuant to T.R. 59, their arguments actually distill to a claim that erroneous evidentiary rulings and instructional error deprived them of a full and fair opportunity to present the theory that violation of Medicare regulations and hospital accreditation standards is negligence per se. Pursuant to Indiana Trial Rule 61:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order in anything done or omitted by the court or by any of the parties is ground for granting relief under a motion to correct errors or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order or for reversal on appeal, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

The Greens argue that their proposed exhibits and proposed final instructions

incorporated the correct standard of care, and the trial court's instructions to the contrary were fundamentally erroneous. Their central premise is that the applicable standard of care is derived from Medicare regulations and accreditation standards that require the use of patient restraints only when necessary and only as monitored by a physician. They baldly assert, without citation to relevant authority and developing a cogent argument, that federal preemption principles apply and Medicare/Medicaid regulations and hospital accreditation standards necessarily provide the applicable standard of care whenever restraints are used.

They also claim that the jury should have been provided with the text of Medicare/Medicaid Conditions of Participation, and with hospital accreditation standards, to be considered as the applicable standard of care. Then, according to the Greens, that standard should be incorporated into instructions advising the jury that non-compliance constitutes negligence, obviating any requirement of proximate cause.[5]

However, as previously observed, a medical malpractice action requires a showing of duty, breach, and injury proximately caused by a breach of duty. Ziobron, 927 N.E.2d at 123. The applicable standard of care is that which is reasonable under the circumstances. Mills v. Berrios, 851 N.E.2d 1066, 1070 (Ind. Ct. App. 2006). The existence of regulations,

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[5] The Greens tendered Proposed Final Instructions 12 and 13. Proposed Instruction Twelve, concerning Medicare/Medicaid Hospital Conditions of Participation, included the language: "If you find that the Defendant, Community Hospitals of Indiana, Inc., or any member of its nursing or hospital staff at Community Hospital North, violated any one of these Federal Regulations on the occasion in question and that such violation was without excuse or justification, such conduct would constitute negligence and fault to be assessed against the Defendant, Community Hospitals of Indiana, Inc." (App. 81.)

Proposed Instruction Thirteen, concerning hospital standards, included the language: "If you find that the Defendant, Community Hospitals of Indiana, Inc., or any member of its nursing or hospital staff at Community Hospital North, violated any one of these JCAHO Hospital Accreditation Standards on the occasion in question and that such violation was without excuse or justification, such conduct would constitute negligence and fault to be assessed against the Defendant, Community Hospitals of Indiana, Inc." (App. 83.)

accreditation standards, or hospital protocols may be relevant to a standard of care although not substituting for the general negligence standard of reasonableness under the circumstances.

Here, the trial court instructed the jury in accordance with Indiana law, and was not required to give instructions substituting federal regulations and accreditation standards for the applicable standard of care and eliminating the element of proximate cause. The Greens have not identified instructions and evidentiary rulings inconsistent with substantial justice.[6]

Affirmed.

BAKER, C.J., and ROBB, J., concur.

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[6] The Greens also assert that Community should not have been allowed to use a portion of Dr. Cieciura's discovery deposition after he had testified and Community had acquiesced to his being excused as a witness. They contend that the use of the deposition deprived them of a right of cross-examination. Although the Greens were present at Dr. Cieciura's deposition, they contend that they had no motive to develop his testimony at that time. Nonetheless, the admitted portion of Dr. Cieciura's deposition established that, prior to the execution of his affidavit, Dr. Cieciura had familiarized himself with federal standards and not with Community protocol, something that the jury likely had already inferred from his prior testimony expressing his reliance upon regulations and accreditation standards. The Greens do not explain how the limited use of the discovery deposition undermined their theory of liability such that they were denied a fair trial.