**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A20-0537**

Daniel J. Cafferty,
Appellant,

vs.

Mille Lacs Health System, et al.,
Respondents.

**Filed December 14, 2020**
**Reversed and remanded**
**Reilly, Judge**

Mille Lacs County District Court
File No. 48-CV-16-1325

Brandon E. Thompson, Colin F. Peterson, Ciresi Conlin LLP, Minneapolis, Minnesota (for appellant)

Katherine A. McBride, Nicole L. Brand, Besse H. McDonald, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota (for respondents)

Considered and decided by Jesson, Presiding Judge; Larkin, Judge; and Reilly, Judge.

**U N P U B L I S H E D  O P I N I O N**

**REILLY**, Judge

Appellant Daniel Cafferty brought this medical-malpractice action after his mother died following her stay and treatment at respondent Mille Lacs Health System. The jury rendered a verdict for appellant, finding that the negligence of the hospital's nurses caused

the death of appellant's mother. But the district court later granted judgment as a matter of law (JMOL) for the hospital and also conditionally granted the hospital's motion for a new trial based on the district court's purported error in allowing appellant to introduce evidence about the negligence of the nursing staff as a whole. Appellant challenges both decisions on appeal. We reverse the grant of JMOL because the evidence was sufficient for the jury to find that the nursing staff's negligence substantially contributed to the decedent's death, and we reverse the conditional grant of a new trial because the hospital implicitly consented to litigate the nursing staff's negligence by failing to object to the introduction of evidence on that issue.

## FACTS

Appellant filed this medical-malpractice, wrongful-death action in May 2016 against several doctors and healthcare systems, alleging that their negligence caused the death of his mother, Linda Cafferty (Cafferty). The complaint alleged that Cafferty went to respondent Mille Lacs Health System in June 2013 with symptoms of abdominal pain, nausea, and vomiting. According to the complaint, Cafferty remained at the hospital for a few days and was then transferred to another hospital, where doctors discovered that she had a bowel obstruction and had developed pneumonia after aspirating on her vomit. Cafferty developed respiratory failure and passed away at the second hospital. The complaint alleged that the defendants failed to provide proper care to Cafferty and that their negligence caused Cafferty's death.

The complaint named five parties as defendants: Mille Lacs Health System (the hospital); Dr. Magnolia Larson and Dr. Cathy Donovan, who were employed by the

hospital and treated Cafferty during her stay; Dr. Joseph Pietrafitta, a surgeon who examined Cafferty at the hospital; and Dr. Pietrafitta's professional corporation. Appellant retained two experts, Dr. Richard Sweet and Dr. Adam Balin. Both experts submitted affidavits disclosing that they intended to testify that the defendants failed to follow the proper standards of care.

Before trial, the parties agreed to dismiss Dr. Larson as well as Dr. Pietrafitta and his professional corporation. The case proceeded to a jury trial with the hospital and Dr. Donovan as the remaining defendants. Various witnesses testified to the following facts.

***Trial Testimony***

Linda Cafferty was 62 years old in June 2013. She had a history of multiple abdominal surgeries, which led to extensive scar tissue. Cafferty had gastric-bypass surgery in 2007, a weight-loss surgery that drastically reduced the size of her stomach. She later underwent surgery to repair a bowel obstruction, as well as several hernias. She often complained about abdominal pain.

Cafferty went to the emergency department at the hospital on June 17, 2013. She complained about abdominal pain and accompanying vomiting that started the day before. A physician examined Cafferty's lungs and determined that they were clear. Because of her severe nausea, vomiting, and pain, the hospital admitted Cafferty for IV fluid rehydration, as well as pain and nausea control.

Cafferty remained at the hospital for the next few days. Dr. Larson examined her on June 18 and concluded that her condition was most consistent with constipation. Dr. Larson placed Cafferty on bowel rest, limiting the amount of food that she would eat; Dr.

Larson did not believe that surgery was necessary. Nurses' notes revealed that, on the morning of June 19, Cafferty was "spitting up into emesis[1] bag" and had "dry heaves." Dr. Larson again examined Cafferty that day, before leaving to go out of town. Dr. Donovan started seeing Cafferty on the morning of June 20. Dr. Donovan examined Cafferty and determined that she was still severely constipated but was breathing normally.

Concerned about possible complications and that Cafferty may need to be transferred, Dr. Donovan arranged for a surgeon at the hospital, Dr. Pietrafitta, to examine Cafferty. Dr. Pietrafitta believed that Cafferty looked okay but said that there was nothing more that the hospital could do to treat her. He recommended that Cafferty be transferred to another hospital so she could be treated by Dr. Jeffrey Baker, the surgeon who had performed her gastric-bypass surgery. Dr. Donovan phoned Dr. Baker and arranged for Cafferty to be transferred. Although Dr. Baker was willing to accept Cafferty that evening, Dr. Donovan decided to transfer her the following morning, June 21, because Cafferty preferred that option and her medical situation did not appear urgent.

Nurse Rena Schreur worked the overnight shift from the evening of June 20 to the morning of June 21. Cafferty vomited multiple times throughout the night. At 10:05 p.m., Nurse Schreur recorded in the patient-care notes that Cafferty had pain that felt like a "knot in [her] abdom[e]n," but that the pain had substantially subsided from earlier that day. Cafferty also experienced nausea, a small emesis, bouts of retching, and a bowel movement around that time. Nurse Schreur did not observe any signs of aspiration and reported that

[1] "Emesis" refers to "[t]he act of vomiting." *The American Heritage Dictionary of the English Language* 584 (5th ed. 2018).

Cafferty's lungs were clear. Nurse Schreur made a second progress note at 3:49 a.m. reflecting that Cafferty was throwing up "small, tan-colored" vomit "with a faint bowel odor throughout the night," meaning that the vomit smelled like undigested food or rotted teeth. Nurse Schreur did not contact a doctor about Cafferty's condition. At 4:52 a.m., as Cafferty was being prepared to be transferred, Nurse Schreur reported that she appeared stable and did not seem to have deteriorated since the nurse had begun caring for her the night before.

Cafferty left the hospital around 5:30 a.m. on June 21. Dr. Donovan examined her briefly and believed that "she looked really good" and that her condition had not changed. When Cafferty arrived at the other hospital, Dr. Baker observed that she "looked comfortable, not in distress," and Cafferty said that she had been having bowel movements, which suggested that her constipation issues were improving. But then Cafferty worsened. Screening labs revealed that her white-blood-cell count was low, and a CAT scan showed a bowel obstruction as well as evidence of pneumonia in parts of her lungs, even though she had not been showing symptoms of pneumonia. Doctors began administering antibiotics at about noon to treat the pneumonia. Despite Dr. Baker's efforts, Cafferty's condition deteriorated rapidly within a few hours. She passed away the next day, June 22. The pathologist performed an autopsy and concluded "pneumonia as a result of aspiration" caused Cafferty's death.

***Experts' Testimony***

Appellant's two expert witnesses testified. Dr. Sweet opined that the care Cafferty received at the hospital fell below the accepted standard of medical practice and that this

care substantially contributed to her death. Dr. Sweet testified that he was certain that Cafferty died by aspirating vomit, based on the pneumonia she developed, her increasing respiratory failure as evidenced by the hospital records, and narcotics and sedatives she received. Dr. Sweet believed that the vomit aspiration occurred while she was at the hospital, rather than before her hospital visit, because she had no respiratory complaints when she first came to the hospital. He said that the tan-colored, stool-smelling emesis that she was vomiting up on the night of June 20-21 could cause pneumonia if aspirated, but that the pneumonia that she ultimately died from likely "was a culmination of many days of aspiration into her lungs," including the tan-colored, stool-smelling vomit. Dr. Sweet also testified that, if the doctors had recognized that Cafferty was aspirating, they could have taken various actions to treat her, including giving her antibiotics. He said that "antibiotics would be absolutely mandatory in somebody who has evidence of aspiration," and opined that, if hospital staff had recognized that Cafferty was aspirating and treated it properly, he was "100 percent confident" that she would have survived.

Dr. Balin opined that the nursing staff failed to meet the standard of care and that the nursing staff's negligence contributed substantially to Cafferty's death. He testified that, after Nurse Schreur observed Cafferty throw up tan-colored vomit on the night of June 20-21, she should have notified a doctor because this was a change in Cafferty's status.

Dr. Richard Mayerchak testified as an expert witness for the hospital. He testified that doctors cannot completely eliminate a patient's risk of aspirating and that the best way to prevent aspiration is to remain vigilant and watch for it. Dr. Mayerchak also said that antibiotics are an appropriate treatment for pneumonia once a patient has aspirated and that

antibiotics should be given "as a preventative measure the minute [doctors] determine someone has aspirated." But he noted that the hospital's medical records did not reflect that nurses observed any choking, coughing, or other signs of aspiration. Dr. Mayerchak also testified that it was unnecessary for the hospital to take measures, such as antibiotics, to prevent or treat Cafferty for aspiration because she did not display signs that she was aspirating. He opined that the care Cafferty received at the hospital was not a direct cause of her death.

***Verdict and Posttrial Motions***

At the end of the trial, the district court submitted the matter to the jury. The jury instructions stated that they applied separately to Dr. Donovan and "the nursing staff employed by the Mille Lacs Health System," and that the jury could find the hospital negligent based on the actions of "a nurse or nurses." After deliberating, the jury returned a special verdict finding that Dr. Donovan was *not* negligent. But it found that the hospital's nurses were negligent in the care they provided Cafferty and that the nurses' negligence was a direct cause of her death. The jury awarded appellant $500,000 to compensate Cafferty's family for damages incurred since her death and for future damages.

After the jury verdict for appellant, the hospital filed a motion for JMOL and, alternatively, for a new trial. The hospital argued that it was entitled to JMOL because appellant failed to establish causal negligence with respect to Nurse Schreur or other nurses. The hospital argued alternatively that it was entitled to a new trial because of alleged errors during the trial, including the district court allowing appellant's experts to

testify about the fault of the nursing staff in general, rather than just Nurse Schreur, and the district court's failure to allow the hospital to impeach Dr. Sweet.

The district court agreed with the hospital and granted its motion for JMOL, concluding that appellant did not provide sufficient expert testimony proving that either Nurse Schreur or the nursing staff in general caused Cafferty's death. The district court determined that appellant's expert testimony about "generalized statements that the unnamed nurses' unspecified actions contributed to Cafferty's death" was not sufficient to show causation. It likewise reasoned that testimony about Nurse Schreur's inaction on the overnight shift of June 20-21 did not show that her conduct caused Cafferty's death, because Dr. Sweet testified that Cafferty needed to be transferred sooner to prevent her death, meaning that Cafferty would have died regardless of Nurse Schreur's conduct. The district court also conditionally granted the hospital's motion for a new trial. The district court determined that it had erred by allowing appellant's experts to testify about the fault of the nursing staff in general and by allowing appellant to argue for an adverse inference against the hospital for not calling other nurses to testify. Because these errors prejudiced the hospital, the district court determined, the hospital was entitled to a new trial if JMOL was reversed on appeal.

Appellant challenges the district court's grant of both motions for the hospital.

## D E C I S I O N

### I. The district court erred by granting JMOL for the hospital because the expert testimony was sufficient to support the jury's verdict that Nurse Schreur's negligence caused Cafferty's death.

Appellant challenges the district court's grant of JMOL for the hospital. We review a district court's decision on a motion for JMOL de novo. *Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220, 229 (Minn. 2010). A party is entitled to JMOL if "the verdict is manifestly against the entire evidence" or there is no "competent evidence reasonably tending to sustain the verdict." *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998) (quotation omitted). When reviewing the grant of a motion for JMOL, we independently determine the sufficiency of the evidence. *Kedrowski v. Lycoming Engines*, 933 N.W.2d 45, 54-55 (Minn. 2019). We consider all the evidence, "including that favoring the verdict," view the evidence "in the light most favorable to the verdict," and "may not weigh the evidence or judge the credibility of the witnesses." *Id.* at 55 (quotation omitted). We will not set aside the jury's verdict "if it can be sustained on any reasonable theory of the evidence." *Pouliot*, 582 N.W.2d at 224.

To prevail on a claim of medical malpractice, appellant had to prove three elements through expert testimony: "(1) the standard of care recognized by the medical community as applicable to the particular defendant's conduct, (2) that the defendant in fact departed from that standard, and (3) that the defendant's departure from the standard was a direct cause of the patient's injuries." *Dickhoff ex rel. Dickhoff v. Green*, 836 N.W.2d 321, 329 (Minn. 2013) (quotation omitted). The district court granted JMOL for the hospital based on its determination that the evidence presented at the trial did not satisfy the third element,

causation. Testimony by both parties' expert witnesses established that Cafferty died as a result of aspirating vomit. As stated on the special-verdict form, the jury found that the treatment provided by the hospital's *nurses* (not its doctors) was a direct cause of Cafferty's death. The parties' dispute is therefore whether the evidence established that the actions or inactions taken by the nurses—either Nurse Schreur specifically or the nursing staff in general—were a cause of Cafferty's death.

To show causation, a medical-malpractice plaintiff must prove, using expert testimony, that "it was more probable that death resulted from some negligence for which [the] defendant was responsible than from something for which [it] was not responsible." *Smith v. Knowles*, 281 N.W.2d 653, 656 (Minn. 1979) (quotation omitted). "The guiding principle behind this rule is that a jury should not be permitted to speculate as to possible causes of a plaintiff's injury or whether different medical treatment could have resulted in a more favorable prognosis for the plaintiff." *Leubner v. Sterner*, 493 N.W.2d 119, 121 (Minn. 1992). Causation in wrongful-death cases may be established by showing that the negligent act was a "substantial factor" in bringing about the harm. *George v. Estate of Baker*, 724 N.W.2d 1, 10 (Minn. 2006). Appellant therefore had to prove that the negligent treatment of Cafferty by the hospital's nurses substantially contributed to her death. Appellant argues that the jury's verdict can be sustained based on multiple theories of the evidence. We conclude that the jury's finding that the nurses' negligence caused Cafferty's death is supported by the evidence.

The evidence supports the theory that Nurse Schreur's inaction during the overnight shift of June 20-21 substantially contributed to Cafferty's death. Nurse Schreur testified

that Cafferty was vomiting multiple times throughout the overnight shift. The nurse wrote in the patient-care notes that, at 3:49 a.m., she observed that Cafferty was having "small emesis tan in color, with faint bowel odor throughout the night." Nurse Schreur testified that she did not believe that this change in Cafferty's condition was significant enough to notify Dr. Donovan. Dr. Balin, though, testified that Cafferty's throwing up tan-colored, bowel-smelling vomit was of a nature that Nurse Schreur should have notified a doctor. The district court rejected the argument that Nurse Schreur's inaction could have been a legal cause of Cafferty's death because, according to Dr. Sweet's testimony, Cafferty needed to be transferred on June 20 to prevent her death. That is, Cafferty would have died even if the nurse had informed Dr. Donovan about her observations on the June 20-21 overnight shift.

But the district court's reasoning focused only on a theory of causation based on the timing of Cafferty's transfer. Appellant maintains that, regardless of the timing of the transfer, Nurse Schreur could have prevented Cafferty's death by notifying a doctor because this would have allowed the doctor to administer medication to treat the aspiration. We agree that the evidence supports this theory.

The jury heard Dr. Sweet's testimony that, if the doctors had recognized that Cafferty was aspirating, they should have used antibiotics to treat her. Dr. Sweet said that he was "100 percent confident" that Cafferty would have survived if she had been treated with antibiotics once she had started aspirating. And Dr. Mayerchak, the hospital's expert witness, corroborated Dr. Sweet's testimony. Dr. Mayerchak testified that doctors "give antibiotics as a preventative measure the minute [they] determine someone has aspirated."

This testimony allowed the jury to make a clear causal link: if Nurse Schreur had informed Dr. Donovan about Cafferty's change in condition during the overnight shift of June 20-21, Dr. Donovan would have recognized that Cafferty was aspirating and given her antibiotics; and the antibiotics would have successfully treated the pneumonia and prevented Cafferty's death. Viewing the evidence in the light most favorable to the verdict, *Kedrowski*, 933 N.W.2d at 55, the jury could have found that Nurse Schreur's inaction substantially contributed to Cafferty's death.

We are not persuaded by the hospital's contention that this theory of causation cannot sustain the verdict because it requires the jury to speculate impermissibly. Certainly "[t]he jury cannot be permitted to speculate as to whether earlier diagnosis or different treatment would have resulted in a cure." *Cornfeldt v. Tongen*, 295 N.W.2d 638, 640 (Minn. 1980). And in *Leubner*, for example, the supreme court held that an expert's testimony could not show causation in a failure-to-diagnose case because the expert did not say that it was more probable than not that the decedent's recurrence of cancer resulted from the defendant's alleged negligence. 493 N.W.2d at 122. The supreme court reasoned that the plaintiff could not make a prima facie case based on a conclusory citation to a 20-year-old medical textbook for the proposition that "delay in diagnosis invariably results in a more serious prognosis." *Id.* (quotation omitted).

At oral argument, the hospital also cited *Maudsley v. Pederson*, 676 N.W.2d 8 (Minn. App. 2004), to argue that here appellant did not provide a sufficient level of specificity to meet the burden of proof on causation. *Maudsley* involved the sufficiency of an expert affidavit under Minn. Stat. § 145.682 (2002), rather than a motion for JMOL, and

in that case, a medical-malpractice plaintiff submitted an affidavit stating that, if the plaintiff had been treated for an eye infection one day earlier, she more likely than not would have recovered from the infection and would not have lost her vision. *Id.* at 13-14. The affidavit's basis for this conclusion was that "When infections are present it is generally the rule that better outcomes are the result of earlier treatment; in fact every hour counts." *Id.* at 13. This court held that the affidavit did not satisfy the standard for an expert affidavit because "[t]he conclusory statements that generally earlier treatment results in better outcomes and that every hour counts fails to outline specific details explaining how and why" the delay in treatment caused the plaintiff to lose her vision. *Id.* at 14. The type of impermissible speculation recognized in *Leubner* and *Maudsley* were generalized statements, nonspecific to the facts of those cases, that earlier treatment will lead to a better outcome.

The prohibition on speculation, though, "does not necessarily require that the plaintiff prove causation by direct and positive evidence which excludes every other possible hypothesis as to the cause of the injuries." *Schulz v. Feigal*, 142 N.W.2d 84, 89 (Minn. 1966). As appellant points out, the jury may still make reasonable inferences based on expert testimony without speculating. For example, in *Knuth v. Emergency Care Consultants, P.A.*, a medical-malpractice plaintiff's expert witnesses testified that a cardiac test likely would have revealed problems with the decedent's heart, the decedent likely had an artery blockage, and that discovery of the blockage would have led to its treatment and increased the decedent's life expectancy. 644 N.W.2d 106, 111-12 (Minn. App. 2002), *review denied* (Minn. Aug. 6, 2002). This court held that this was sufficient evidence of

causation. *Id.* at 112. This court recognized that "the causation testimony was not entirely explicit," but that despite its "thinness," the plaintiff presented the jury with circumstantial evidence from which it could reasonably infer that the decedent would not have died if the blockage had been discovered. *Id.* at 111-12. *Knuth* shows that expert testimony need not fill in every detail for the jury as long as it presents sufficient testimony from which the jury can make reasonable inferences as to causation.

We believe that this case is more like *Knuth* and less like *Leubner* or *Maudsley*. Dr. Sweet testified that the doctors should have given Cafferty antibiotics sooner and that she would have lived if they had. This was not a generalized statement that antibiotics should be administered earlier to a typical patient who has aspirated; the testimony was specifically tied to Cafferty's condition. As in *Knuth*, the expert testimony here did not fill in every detail in the chain of causation. Dr. Sweet did not specifically testify that Cafferty would have been given antibiotics if Nurse Schreur had informed doctors of the change in her situation during the overnight shift. But the jury heard from Nurse Schreur that nurses are supposed to communicate with the doctor, watch patients for any signs that may be of concern, and inform the doctor about any significant changes in the patient's condition. Dr. Donovan also testified that doctors can take various actions if they notice that a patient is aspirating, and Dr. Mayerchak testified that a patient may be given antibiotics as soon as she has aspirated. The jury therefore could fill in the gaps in the chain of causation by reasonably inferring that, if Nurse Schreur had alerted Dr. Donovan to Cafferty's vomiting, the doctors then could have taken appropriate action that would have prevented Cafferty's

death. We conclude that, based on the expert testimony, these are reasonable inferences that the jury could have made, without resorting to impermissible speculation.

Because the expert testimony was sufficient for the jury to conclude that Nurse Schreur's failure to inform Dr. Donovan about Cafferty's change in condition in her vomiting during the overnight shift of June 20-21 substantially contributed to Cafferty's death, we reverse the district court's grant of JMOL for the hospital. Because we conclude that the jury verdict can be sustained based on the evidence about Nurse Schreur, we need not address appellant's alternative arguments about the negligence of other nursing staff.

## II. The district court erred by conditionally granting a new trial for the hospital.

Appellant challenges the district court's conditional grant of the hospital's motion for a new trial. When the district court grants JMOL, it may conditionally grant a motion for a new trial if its judgment is later vacated or reversed. Minn. R. Civ. P. 50.03(a). The district court may grant a new trial to the parties on various bases, including "[i]rregularity in the proceedings," "[a]ccident or surprise which could not have been prevented by ordinary prudence," and "[e]rrors of law occurring at the trial." Minn. R. Civ. P. 59.01. We review a district court's decision whether to grant a new trial for an abuse of discretion. *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 892 (Minn. 2010). But the district court "does not have discretion to grant a new trial merely because it would have reached a conclusion different from that of the jury." *Benson v. Rostad*, 384 N.W.2d 190, 195 (Minn. App. 1986); *see also Koenig v. Ludowese*, 243 N.W.2d 29, 30 (Minn. 1976) (recognizing that the district court is not "free to set aside a jury verdict whenever it is displeased or dissatisfied with the result of the jury's deliberations").

Here, the district court granted a new trial for the hospital based on its conclusion that it had erred by allowing appellant's experts to testify about the fault of the nursing staff in general, rather than just that of Nurse Schreur, and by allowing appellant to argue for an adverse inference against the hospital for not calling other nurses. The hospital also argues that the district court's grant of a new trial can be affirmed on an alternative basis, which it raised before the district court,[2] that the district court erred by not allowing the hospital to impeach Dr. Sweet about his prior opinion that Dr. Pietrafitta was causally negligent. We conclude that neither ground is a proper basis for granting the hospital a new trial.

**A. The hospital implicitly consented to litigate the issue of the nursing staff's negligence by failing to object to the admission of testimony discussing the nursing staff in general.**

Appellant argues that the district court erroneously granted a new trial based on the appellant's experts' testimony about the causal negligence of the nursing staff generally. The district court granted the new trial based on unfair surprise to the hospital, reasoning that appellant had "never identified any claim, or theory of liability, against any nurse other than Schreur," meaning that the hospital "had no notice that [appellant] would make such a claim at trial." Appellant maintains that the hospital is not entitled to a new trial on this

[2] This issue is properly before this court because a notice of related appeal need not be filed when the respondent "advances on appeal an argument that was presented to, but was not ruled on by, the district court and is an alternative ground that supports affirmance of a judgment or order that was entered in respondents' favor." *Day Masonry v. Indep. Sch. Dist. 347*, 781 N.W.2d 321, 332 (Minn. 2010).

basis because it failed to object to the admission of expert testimony on this issue and therefore failed to preserve its claim of error.

We note that cases generally have not addressed failure-to-preserve-error arguments in the context of a conditional grant of a new trial, and we construe appellant's argument as a consent-to-litigate argument. "Issues litigated by either express or implied consent are treated as if they had been raised in the pleadings." *Roberge v. Cambridge Coop. Creamery Co.*, 67 N.W.2d 400, 403 (Minn. 1954). A party is deemed to implicitly consent "where the party fails to object to evidence outside the issues raised by the pleadings." *Id.* Here, appellant essentially argues that the hospital consented to litigate the issue of the nursing staff's negligence because it failed to object to appellant's introduction of evidence relevant to this issue throughout the proceedings. Framing the issue in this way, we agree that the hospital's failure to object shows their consent to litigate this issue.

Even though appellant's expert disclosures did not specifically discuss negligence about the nursing staff in general, the record shows, before and during trial, the nursing staff's negligence was at issue. Appellant's proposed special-verdict form submitted shortly before trial listed Dr. Donovan and the hospital separately, framing the issue of the hospital's negligence as whether "*any employees* of the Mille Lacs Health System" were negligent. (Emphasis added.) At trial, appellant elicited testimony from Cafferty's son, Christopher, that he visited his mother at the hospital multiple times between June 17 and 20 and that he saw her condition deteriorate. Christopher testified that he witnessed Cafferty vomiting and having trouble breathing, and that he told one of the nurses at the nurses' station about it right away. Appellant's counsel also asked Dr. Donovan on cross-

examination whether "the nurses at Mille Lacs did a lung exam" on Cafferty and failed to realize that she had pneumonia. The record shows that appellant elicited testimony about the actions of different nurses at various times throughout Cafferty's stay at the hospital, not merely Nurse Schreur's actions on the overnight shift of June 20-21.

Additionally, appellant's expert witnesses offered opinions about the negligence of the nursing staff generally, and the hospital did not object. The hospital insists that it did not need to object because appellant's counsel repeatedly used nonspecific terms—such as "the folks" at the hospital—that referred generally to several different parties. Even if the hospital was not required to object to such general references, the record shows that appellant's counsel twice asked specifically about the nursing staff. Counsel asked Dr. Sweet, "You're of the opinion that the nursing staff at Mille Lacs failed to do what a reasonable nursing staff would have done for Mrs. Cafferty under the same or similar circumstances, right?" Counsel also inquired of Dr. Balin, "[W]ith respect to the care that was provided by the nursing staff at Mille Lacs, do you have an opinion as to whether that met accepted standards of practice?" He then asked, "And do you have an opinion as to whether the nursing staff at Mille Lacs' failure to meet the standard of care contributed substantially to Mrs. Cafferty's death?" Despite the specific references to the "nursing staff," the hospital's counsel did not object to any of these questions.

Given the hospital's failure to object, we reject the district court's framing of the issue, when conditionally granting the new trial, that it "erred when it allowed [appellant's] experts to testify as to the fault of the nursing staff in general." It was the hospital's obligation to object to testimony about the nursing staff's negligence, and it failed to do so.

*See* Minn. R. Evid. 103(a)(1) (providing that an error may not be based on a ruling that admits evidence unless "a timely objection or motion to strike appears of record, stating the specific ground of objection"). The district court had no duty to sua sponte prevent the admission of testimony relevant to the negligence of nurses other than Nurse Schreur. The district court cited two places in the transcript—during pretrial discussions and during the charge conference—where the hospital supposedly objected and the district court decided against it. But a review of the record shows that the hospital did not object and the district court never "allowed" the allegedly impermissible testimony.

Contrary to the district court's determination and the hospital's contention, the hospital did not object before trial. Counsel for the hospital did mention during pretrial discussions that the expert disclosures identified only Nurse Schreur. This was not an objection, and it occurred in the context of the parties' discussion over whether appellant's expert witnesses could testify about the actions of Dr. Larson, who had been dismissed as a defendant. Counsel was not asking the district court to preclude testimony about the nursing staff's negligence, and the district court never made a ruling permitting expert testimony about the nursing staff generally.

We also are not persuaded by the hospital's argument that it objected to testimony about the nursing staff's negligence when discussing jury instructions during the charge conference. Appellant's counsel brought up the instruction about the "duty of nurse." He requested that the instruction be changed to the plural, "duty of nurses," based on trial testimony about the nursing staff as a whole. The hospital's counsel expressed her disagreement, saying that the complaint referred to the negligence of just Nurse Schreur.

The district court allowed for the change in the jury instruction based on the testimony presented at trial. A party objecting to a jury instruction "must do so on the record, stating distinctly the matter objected to and the grounds of the objection." Minn. R. Civ. P. 51.03(a). Again, the hospital's counsel did not formally object, stating merely that "we have a little disagreement about" that jury instruction. Nor did the hospital raise the issue later to make a record that it wished to object to the jury instruction.

At the same jury-instruction conference, the parties and court discussed the special-verdict form. The special-verdict form asked the jury to determine whether "any of the nurses employed by the Mille Lacs Health System" were negligent and whether "the negligent treatment and care of the nurses employed by the Mille Lacs Health System" caused Cafferty's death. These questions mirrored appellant's proposed special-verdict form, which referred to "any employees" at the hospital. The hospital never objected to the questions on the special-verdict form. And the hospital's failure to object to the special-verdict form referring to multiple "nurses" also supports our conclusion that the hospital implicitly consented to litigate the issue of the nursing staff's negligence.

Moreover, by the time of the charge conference, when the hospital's counsel referenced the jury instruction, the time had passed for the hospital to object to the admission of the testimony about the nursing staff. The alleged error that prompted the district court's conditional-new-trial ruling was not the jury instructions that referred to multiple "nurses," but the district court's *admission* of expert testimony about the nursing staff's negligence. A party is entitled to a jury instruction if the evidence presented at the trial supports the instruction. *Daly v. McFarland*, 812 N.W.2d 113, 122 (Minn. 2012). The

district court properly allowed for the jury instructions referring to "nurses" based on the relevant testimony admitted about the nursing staff's actions throughout Cafferty's stay at the hospital and the expert testimony opining about the nursing staff's negligence.

Because appellant introduced testimony relevant to the nursing staff's negligence, and because the hospital never properly objected to the admission of this evidence, the hospital implicitly consented to litigate the issue. The district court erred by relying on its purported error in "allowing" that testimony to conditionally grant a new trial for the hospital.

**B. The hospital is not entitled to a new trial based on its inability to impeach Dr. Sweet because the hospital was not prejudiced by the alleged error.**

The hospital argues, as an alternative basis for affirming the grant of a new trial, that the district court erred by not allowing the hospital to impeach Dr. Sweet on an inconsistency between his prior opinion and his trial testimony about whether Dr. Pietrafitta was causally negligent. The district court did not decide this issue. We agree with appellant that the alleged error, if any, did not prejudice the hospital.

"[P]rejudice is the primary consideration in determining whether to grant a new trial." *Torchwood Props., LLC v. McKinnon*, 784 N.W.2d 416, 419 (Minn. App. 2010) (quotation omitted). A new trial is required only if the improperly excluded evidence "had a reasonable likelihood of affecting the jury's verdict." *Becker v. Mayo Found.*, 737 N.W.2d 200, 218 (Minn. 2007). The hospital's reason for wanting to impeach Dr. Sweet was so that the jury could have been asked to determine Dr. Pietrafitta's percentage of fault, which might have reduced the hospital's liability. But the jury found that Dr. Donovan

was *not* negligent, implicitly rejecting Dr. Sweet's testimony about Dr. Donovan's negligence. Dr. Pietrafitta's only involvement in Cafferty's treatment was examining her on June 20 and recommending that she be transferred. Dr. Sweet's expert affidavit opined that Dr. Pietrafitta was negligent based on his failure to recommend that Cafferty be transferred immediately rather than waiting until the following morning. The alleged negligence on Dr. Pietrafitta's part was over the timing of Cafferty's transfer, but Dr. Donovan was the one who ultimately made the transfer-timing decision. Because the jury found that Dr. Donovan was not negligent for any of her actions surrounding Cafferty's transfer, there is not a reasonable likelihood that the jury would have found Dr. Pietrafitta negligent. Any error in not allowing the hospital to impeach Dr. Sweet about his opinion of Dr. Pietrafitta's negligence did not prejudice the hospital. We therefore reject this alleged error as a basis to affirm the district court's conditional-new-trial order.

***Conclusion***

In sum, we reverse the district court's grant of JMOL for the hospital, and we also reverse the district court's conditional grant of a new trial. We remand with instructions to reinstate the jury verdict for appellant.

**Reversed and remanded.**