NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

KAINE A. MCFARLAND, A MINOR, BY AND THROUGH HIS PARENTS AND NATURAL GUARDIANS, ROXANNE M. MCFARLAND AND LONNIE J. MCFARLAND Appellants v. CLARION HOSPITAL, A PENNSYLVANIA CORPORATION, WOMEN'S HEALTHCARE OF CLARION, P.C.; JOHN H. MYERS, D.O.; BART MATSON, D.O.; AND ERIC J. FIELDING, M.D. Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 989 WDA 2012

Appeal from the Order Entered May 29, 2012
In the Court of Common Pleas of Clarion County
Civil Division at No(s): 843-2007

BEFORE: SHOGAN, J., LAZARUS, J., and MUSMANNO, J.

MEMORANDUM BY LAZARUS, J. **FILED DECEMBER 31, 2013**

Kaine A. McFarland (Baby), a minor, by and through his parents and natural guardians, Roxanne M. McFarland and Lonnie J. McFarland (collectively referred to as "the McFarlands" or Plaintiffs), appeals from the trial court's order denying Plaintiffs' post-trial motions and entering judgment in favor of Appellees-Defendants, Clarion Hospital (Clarion), Eric J. Fielding, M.D., John H. Myers, D.O., Bart Matson, D.O, and their professional

practice, Women's Healthcare of Clarion, P.C. (WHC).[1] Following trial, a jury determined that the Defendant Doctors' conduct did not fall below the applicable standard of care and, therefore, they were not negligent.[2]

Because Doctors Myers and Matson admitted to the fact that their office clerk misfiled Baby's ultrasound report and that this malfeasance constituted a breach in the standard of care for their medical office, the jury's verdict of no negligence bears no rational relationship to the evidence. Accordingly, we reverse the order entering judgment in favor of Defendants Myers and Matson and their professional corporation, WHC, remand for a new trial with regard to these specific Defendants, and affirm the trial court's order entering judgment in favor of the remaining Defendants, Clarion and Dr. Fielding.

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[1] The trial court's order also states that Clarion and Dr. Fielding were not negligent and that, if a new trial were to be granted, Clarion and Fielding will not be required to participate in the new trial.

[2] Negligence is established by proving the following four elements: (1) a duty or obligation recognized by law; (2) a breach of that duty; (3) a causal connection between the conduct and the resulting injury; and (4) actual damages. ***Grossman v. Barke***, 868 A.2d 561 (Pa. Super. 2005). The underlying elements of negligence in a medical malpractice claim are more specifically described as a "duty owed by the physician to the patient, a breach of that duty by the physician, that the breach was the proximate cause of the harm suffered, and the damages suffered were a direct result of the harm." ***Id.*** at 566 (quoting ***Hightower-Warren v. Silk***, 698 A.2d 52, 54 (Pa. 1997)).

FACTS

When Plaintiff was in her thirty-seventh week of pregnancy, Appellee Obstetricians, Doctors Myers and Matson, concerned about fetal growth due to Plaintiff's low weight gain, ordered a diagnostic pre-natal ultrasound. The ultrasound was performed on December 10, 2004, and was interpreted by Appellee Dr. Fielding, a radiologist at Clarion. In interpreting the ultrasound, Dr. Fielding noticed an unexpected finding, a large cyst or mass located in the area of the fetus' right kidney. Doctor Fielding dictated his report describing the abnormality. At trial, a factual dispute arose regarding whether Dr. Fielding attempted to contact Doctors Myers and Matson by phone or pager to notify them of the result. Doctor Fielding claimed that he paged Doctors Myers and Matson and waited for a return phone call which never came. Doctors Myers and Matson deny that Dr. Fielding attempted to contact them via phone or pager with the results, noting that their office was open 24-hours a day for calls.

Doctor Fielding sent his ultrasound report/findings to Doctors Myers and Matson's office *via* the routine hospital mail system; however, while the report was *en route* to the doctors' office, Plaintiff went into labor and delivered Baby on the morning of December 11, 2004. On December 15, 2004, Dr. Fielding's written ultrasound report arrived at Doctors Myers and

Matson's office. However, the report was misfiled by an office staff member[3] and did not make it into the doctors' hands until after Baby was admitted to Clarion on December 27, 2004, suffering from severe lethargy and vomiting. Upon Baby's admission to Clarion, another ultrasound was performed which showed a 6.2 cm. cyst on Baby's right kidney. Baby was life-flighted to Pittsburgh's Children's Hospital, where he was diagnosed with an obstructed urethra and underwent emergency treatment to remove bladder pressure.

On July 6, 2007, the McFarlands filed a medical malpractice action alleging vicarious liability and negligence on the part of Defendants. Specifically, Plaintiffs' claims of vicarious liability against WHC and Doctors Myers and Matson alleged, in part, that their office staff and employees were responsible for establishing and enforcing policies to ensure timely communication of radiology reports to the ordering physicians, that the doctors shared in that duty, and that the doctors, their office staff and employees negligently failed to enforce the protocols and policies to timely communicate the results of Baby's fetal ultrasound report. Plaintiff also brought a count of direct corporate negligence against WHC and a count of professional liability against Doctors Myers and Matson.

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[3] According to Dr. Myers, Baby's ultrasound report was inadvertently placed in a pile of papers relating to disability claims. N.T. Jury Trial, 10/20/2011, at 54.

Plaintiffs' claim against Dr. Fielding alleged that he breached his professional standard of care by failing to urgently contact Doctors Myers and Matson with the ultrasound results. Finally, Plaintiffs' complaint alleged that Clarion Hospital was vicariously responsible for the actions of its employee, Dr. Fielding, for his failure to communicate the ultrasound results to the Plaintiffs and pediatricians in a timely manner.

After a seven-day jury trial, a verdict was rendered in favor of all Defendants; the jury found that none of the defendants were negligent, or, more specifically, that they did not breach their respective standards of care. The jury did not reach the issue of causation.[4] Plaintiffs filed timely post-trial motions alleging:

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[4] The jury verdict form states:

> 1. Do you find that the conduct of any of the defendant doctors or medical providers fell below the applicable standard of medical care? In other words, were any of the defendants negligent?
>
> | | | |
> |---|---|---|
> | Women's Healthcare of Clarion | YES ___ | NO ___ |
> | John H. Myers, D.O. | YES ___ | NO ___ |
> | Bart Matson, D.O. | YES ___ | NO ___ |
> | Eric J. Fielding, M.D. | YES ___ | NO ___ |
>
> ***
>
> If you answer Question 1 "NO" as to all defendants, the plaintiff cannot recover and you should not answer any further questions and should return to the courtroom.

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(1) The court erred when it denied Plaintiff's motion for partial summary judgment/directed verdict as against Defendants Women's Healthcare of Clarion ("WHC"), Dr. Myers and Dr. Matson, admitted principles of WHC, on the issue of negligence and vicarious liability for the negligence of their clerk in misfiling a medically significant abnormal ultrasound report, in as much as negligence and agency had been admitted both by counsel and under oath by the Defendants Dr. Myers and Dr. Matson;

(2) The Court erred when it denied Plaintiff's motion to preclude the testimony of Defendants Dr. Myers and Dr. Matson in their case in chief after they admitted negligence, vicarious liability for their clerk, and the negligence of their clerk, and thus had no relevant testimony to offer the jury and could not as a matter of law contradict their admissions.

(3) The Court erred in its instructions to the jury by instructing the jury to decide the negligence of Defendants WHC, Dr. Myers and Dr. Matson[,] after negligence and agency had been admitted.

(4) The verdict was against the weight of the evidence on the issue of negligence of Defendants WHC, Dr. Myers and Dr. Matson[,] in their [sic] negligence and agency had been admitted.

Plaintiffs' motion sought: (1) judgment in their favor and against WHC and Doctors Myers and Matson on the issue of negligence;[5] and (2) a new trial as

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Verdict, 11/1/2011, at 1. The jury checked "NO" for each Defendant under question one. The remaining questions asked the jury to determine whether the Defendants' negligence was a factual cause of any harm to Plaintiff, whether Dr. Fielding was an agent of Clarion Hospital, what percentage of causal negligence was attributable to each Defendant listed in question one, and the amount of damages. ***Id.*** at 2.

[5] In reviewing a trial court's decision regarding whether or not to grant judgment in favor of one of the parties, an appellate court must consider the
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to all parties, or, in the alternative, a new trial. The trial court denied Plaintiffs' motion. This appeal follows.

On appeal, the McFarlands raise the following issues for our review:[6]

> (1) Whether the jury's verdict of October 28, 2011[,] was against the weight of the evidence when Defendants Dr. Myers and Dr. Matson admitted that they were negligent and had breached the standard of care.
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> (2) Whether the trial court abused its discretion and/or committed an error of law in instructing the Jury to decide the negligence of Defendants Women's Healthcare of Clarion, Dr. Myers and Dr. Matson when Defendants Dr. Myers and Dr. Matson admitted that they were negligent and had breached the standard of care.
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> (3) Whether the trial court abused its discretion and/or committed an error of law in its Post-Trial Order of May 29, 2012 when it held that if a new trial is granted that Defendants Clarion Hospital and Dr. Eric Fielding do not have to participate in the new trial.
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> (4) Whether the trial court abused its discretion and/or committed an error of law in denying Plaintiffs' Motion for Partial Summary Judgment/Directed Verdict as against Defendants Women's Healthcare of Clarion, Dr. Myers and Dr. Matson[,] on the issue of issue of negligence and vicarious liability when Defendants Dr. Myers and Dr. Matson admitted that they were negligent and had breached the standard of care.

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evidence, together with all favorable inferences drawn therefrom, in a light most favorable to the verdict winner. ***Ty-Button Tie, Inc. v. Kincel & Co., Ltd.***, 814 A.2d 685 (Pa. Super. 2002). The appellate court will reverse a trial court's grant or denial of a judgment notwithstanding the verdict only when it finds an abuse of discretion or an error of law that controlled the outcome of the case. ***Id.***

[6] We have renumbered Plaintiffs' issues on appeal for ease of disposition.

DISCUSSION

Plaintiffs contend that the admissions of Defendants Doctor Myers and Matson regarding their clerk's negligence demands that the verdict be set aside as against the clear weight of the evidence. After careful review, we are constrained to agree.

An appellate court's standard of review in denying a motion for a new trial is to decide whether the trial court committed an error of law which controlled the outcome of the case or committed an abuse of discretion. ***Pentarek v. Christy***, 854 A.2d 970, 975 (Pa. Super. 2004). A new trial will be granted on the grounds that the verdict is against the weight of the evidence where the verdict is so contrary to the evidence it shocks one's sense of justice; an appellant is not entitled to a new trial where the evidence is conflicting and the finder of fact could have decided either way. ***Id.***

> Appellate review of challenges to the weight of the evidence is extremely limited. The appellate court will respect the trial court's findings with regard to credibility and weight of the evidence unless it can be shown that the lower court's determination was manifestly erroneous, arbitrary and capricious, or flagrantly contrary to the evidence. Additionally, the appellate court's review of a weight of the evidence claim is a review of the trial court's exercise of discretion in weighing the evidence, not of the underlying question of whether it believes that the verdict is, in fact, against the weight of the evidence.

Wytiaz v. Deitrick, 954 A.2d 643, 645 (Pa. Super. 2008) (citations omitted).

In this case, the McFarlands' treating obstetricians, Doctors Myers and Matson, admitted on cross-examination that, due to a clerical mistake, Baby's fetal ultrasound test results were misfiled in their medical office. N.T. Jury Trial, 10/25/2011, at 33. The Doctors testified that they are responsible for their office staff's actions, N.T. Jury Trial, 10/25/2011, at 34, 40, and that because of this clerical mistake the practice breached its standard of care by not reviewing the ultrasound in a timely manner. ***Id.*** at 31; N.T. Jury Trial, 10/21/2011, at 43.[7]

Although no expert evidence was presented on the issue of whether Doctors Myers' and Matson's office clerk was negligent in misfiling the ultrasound report, such testimony was not necessary because the issue itself was so simple and the lack of care so obvious that expert testimony was unnecessary for the jury's deliberation on the issue. ***See Cangemi v. Cone***, 774 A.2d 1262, 1266 (Pa. Super. 2001) (where hospital radiologist had report suggesting decedent had abdominal aneurysm and attending physician did not get report, no expert testimony needed to conclude that negligence resulted from actions of either hospital or physician); ***see generally Matthews v. Clarion Hosp.***, 742 A.2d 1111, 1112 (Pa. Super.

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[7] Although not evidence, counsel for Doctors Myers, Matson and WHC admitted during opening statements that the ultrasound report was misfiled in the Doctors' office, that the normal system of receiving such reports and communicating their results to the office obstetricians was breached, and that these actions constituted clerical malpractice. N.T. Trial, 10/20/2011, at 9.

1999) ("[e]xpert testimony is not . . . required to establish a breach of duty 'where the matter under investigation is so simple, and the lack of skill or want to care so obvious, as to within the range of the ordinary experience and comprehension of even nonprofessional persons.'"). In fact, the trial court acknowledges in its Pa.R.A.P. 1925(a) opinion that Defendants Myers' and Matson's "admission [that the clerk misfiled Dr. Fielding's ultrasound report and that she should not have misfiled it] is conclusive and the Plaintiffs did not need to present any further evidence to prove the facts." Trial Court Opinion, 5/29/2012, at 5.

Moreover, there was no factual dispute that the reason for the delay in the Doctors' receipt and review of the ultrasound report once it reached their office was due to the clerk's misfiling. ***Cf. Cangemi***, 774 A.2d at 1266-67 (where factual dispute existed regarding whether attending physician's failure to receive radiology report was result of hospital or physician, order granting summary judgment in favor of medical center reversed as question was one for jury to resolve). Although a defense expert opined that he did not believe Doctors Myers and Matson breached their standard of care by failing to track down the ultrasound themselves *after* the baby was born, N.T. Trial, 10/26/2010, at 73-75, the expert qualified his response by saying that he believed this because the baby had an uneventful delivery. This testimony does not bear on the issue regarding the standard of care of the office's filing procedures and the Doctors' potential vicarious liability for such

actions; it speaks to causation and whether the misfiling of the report was a factual cause of any harm to Baby.

Finally, there is also no question that Doctors Myers and Matson and WTC were responsible for the actions of the office clerk. ***See Rostock v. Anzalone***, 904 A.2d 943, 946 (Pa. Super. 2006) (even if plaintiff's claims regarding maintenance of patient records were characterized as purely clerical functions, defendant doctor, as professional charged with supervising employees in professional context, would be responsible for staff's derelictions under doctrine of vicarious liability). Appropriately, the jury was instructed on this specific issue:

> In this case it is ADMITTED that the clerk was, as the time she misfiled the ultrasound report, acting as an employee of Women's Healthcare, P.C., and/or of Drs. Myers and Matson. And she was engaged in furthering the interests, activities or business of Women's Healthcare, P.C., and Drs. Myers and Matson. **Therefore, if you find the clerk was negligent, then you must find the employer was also negligent.** You must also find who was the employer[:] Women's Healthcare, P.C. or Drs. Myers and Matson or all of them.[8] If, however, you

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[8] Despite this language, we find that the verdict of negligence shall be directed as against Doctors Myers and Matson and WHC. These entities specifically admitted in their answer that "at all times relevant to events alleged in Plaintiffs' Complaint, Defendant Women's Healthcare of Clarion, P.C. acted by and through its agents John H. Myers, D.O., Bart Matson, D.O., . . . who were acting within the course and scope of their agency." Defendants' Answer and New Matter, 10/31/2010, at ¶ 8. ***Sinclair by Sinclair v. Block***, 594 A.2d 750, 760 n.20 (Pa. Super. 1991), modified on other grounds, 633 A.2d 1137 (Pa. 1994) (professional corporation liable for any malpractice committed by officers, shareholders or agents while rendering professional services); ***see also*** 15 Pa.C.S. § 2925 (2013) (Professional relationship retained). Thus, for all intents and purposes of

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> find the clerk was not negligent, then you must find the employer not negligent also.

N.T. Trial, 10/28/2011, at 14-15 (emphasis added).

In light of the jury's instruction, the fact that the duty to formulate and adopt adequate office procedures and policies surrounding the filing and delivery of ultrasound reports fell squarely upon the shoulders of Doctors Myers and Matson and WHC, and because Doctors Myers and Matson admitted to the breach of that duty in their medical office, the jury's verdict of no negligence was manifestly erroneous in light of the undisputed evidence of the clerk's malfeasance.[9] Thus, we reverse the order denying Plaintiffs' post-trial motion with regard to the judgment entered in favor of Doctors Myers and Matson and their professional corporation, WHC. We further direct that a verdict of negligence be entered against those parties, and remand for a new trial with regard to causation, apportionment of liability, and damages. ***See supra*** note 8.

With regard to the Plaintiffs' claim that the trial court improperly instructed the jury on the issue of Doctors Myers' and Matson's negligence, we find this issue meritless.

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imputing negligence, we find that Doctors Myers and Matson and WHC were the clerk's employers.

[9] Although Doctors Myers and Matson may have testified that they did not feel "personally responsible" for their clerk's actions, this does not change the fact that under the law of agency the clerk's negligence can be imputed to them.

Our standard of review when considering the adequacy of jury instructions in a civil case is to "determine whether the trial court committed a clear abuse of discretion or error of law controlling the outcome of the case." ***Stewart v. Motts***, 654 A.2d 535 (Pa. 1995). It is only when "the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue" that error in a charge will be found to be a sufficient basis for the award of a new trial. ***Id.*** at 540; ***Ferrer v. Trustees of University of Pennsylvania***, 825 A.2d 591, 612 (Pa. 2002); ***see also Tindall v. Friedman***, 970 A.2d 1159, 1175 (Pa. Super. 2009).

As indicated above, the trial court instructed the jury that if it found the clerk was negligent, then, as a matter of law, the jury must also find the clerk's employer(s) negligent. The instruction was one of simple agency principles in light of Plaintiffs' claim of vicarious liability against Doctors Myers and Matson and WHC. ***See The Milton S. Hershey Med. Center of The Pennsylvania State Univ. v. Pennsylvania Med. Prof'l Liab. Catastrophe Loss Fund***, 821 A.2d 1205, 1212 (Pa. 2003) (Pennsylvania law provides that employer may be vicariously liable for harm caused by negligence of employee). Instantly, Doctors Myers and Matson testified that they are responsible for their office staff's actions, N.T. Jury Trial, 10/25/2011, at 34, 40, and that because of their office clerk's mistake, the practice breached its standard of care. ***Id.*** at 31; N.T. Jury Trial,

10/21/2011, at 43. Because the charge was materially relevant to a key issue in the case, we find no error. ***Stewart***, ***supra***.

In their final claim, Plaintiffs specifically take issue with the portion of the trial court's order that states "if a new trial is granted [then] Defendants Clarion Hospital and Dr. Eric Fielding do not have to participate in the new trial." We agree with the trial court's order limiting the parties involved in any retrial to Defendants Doctors Myers and Matson and WHC.[10]

> Generally, where there are several defendants, if the record shows that the interests of justice require a new trial as to all of them, an order to that effect will not be disturbed on appeal. If, however, it appears that, as matter of law, there is no liability on the part of a defendant, a new trial as to such defendant should not be granted. Such non-liability appearing, the defendant should not be subjected to the expense and inconvenience of again demonstrating that in law he was not liable.

Simmons v. St. Clair Memorial Hospital, 481 A.2d 870, 875 (Pa. Super. 1984), quoting ***Brogan v. Philadelphia***, ***et al.***, 29 A.2d 671, 672 (Pa. 1943).

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[10] Defendant Dr. Fielding has filed a motion to dismiss due to Plaintiffs' failure to raise any issues in their post-trial motion with regard to the jury verdict in his favor. He claims that, pursuant to Pa.R.C.P. 227.1, grounds not specified in post-trial motions are deemed waived, unless leave is granted upon cause to specify additional grounds. Likewise, in its brief, Hospital raises the same waiver argument, claiming that because Plaintiffs did not identify any trial error with regard to the verdict entered in the Hospital's favor, "under no circumstances can Plaintiffs be entitled to a new trial as to the Hospital." Brief of Appellee Clarion Hospital, at 5. Having remanded for a new trial only to include Doctors Myers and Matson and WHC, the motion is denied as moot.

Plaintiffs sued Clarion Hospital under a theory of direct corporate negligence and vicarious liability due to the fact that Dr. Fielding was an employee of the Hospital. However, the jury found that both the Hospital and Dr. Fielding were not negligent. The new trial ordered today is not a result of the negligence of either the Hospital or Dr. Fielding, both of which were sued for the establishment and enforcement of policies and protocols regarding the timely communication of radiology reports to ordering physicians. Having determined that the jury's verdict is erroneous for failing to conclude that Doctors Myers and Matson and WHC were negligent as a result of their office clerk's breach, the new trial shall be limited to those Defendants.

Order reversed in part and affirmed in part. Case remanded for a new trial[11] as to Defendants Doctors Myers and Matson and Women's Healthcare of Clarion, P.C. Jurisdiction relinquished.[12]

SHOGAN, J., Concurs in the result.

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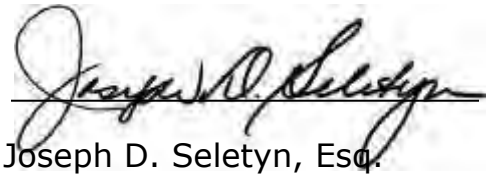
[11] Upon remand, the new trial shall be limited to a determination by the jury regarding: (1) whether Defendant Doctors Myers' and Matson's and/or WHC's negligence was a factual cause of harm to Baby; (2) if Defendants' negligence was a factual cause of harm to Baby, what percentage of causal negligence is attributable to each Defendant; and (3) the amount of damages (including past noneconomic loss; future noneconomic loss; and future medical and other related expenses by year), if appropriate, sustained by Baby as a result of negligence of Defendants.

[12] Having determined that Plaintiffs are entitled to a new trial based upon a weight of the evidence claim, we need not address whether the court properly denied Plaintiffs' motion for a directed verdict.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/31/2013