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IN THE CIRCUIT COURT
FOR WARREN COUNTY
STATE OF TENNESSEE
AT MCMINNVILLE

DEBRA M. BARKES,)
Individually and as)
surviving Spouse of JEWELL)
WAYNE BARKES, Deceased,)

Plaintiff,)

vs.)

RIVER PARK HOSPITAL, et al.,)

Defendants.)

FILED
AUG 08 2006
Time _____ Initials _____
BERNADETTE W. MORRIS
CIRCUIT COURT CLERK

NO. 946
JURY DEMAND

FILED
M2006-1214
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Motion for new trial

Taken before the
Honorable Larry Stanley, Jr.

May 12, 2006

ORIGINAL

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APPEARANCES:

For the
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1 THE COURT: I understand there
2 are a couple of motions that were withdrawn;
3 is that correct?

4 MR. SMITH: Yes, Your Honor. The
5 plaintiffs withdraw our motion for
6 prejudgment interest, and River Park withdrew
7 its motion for discretionary costs of Mr.
8 Jolly. So the motions that we have, they're
9 new trial remittitur and our discretionary
10 costs.

11 THE COURT: Okay. You can begin.

12 MR. WISEMAN: Your Honor, I'm Tom
13 Wiseman, and C.J. Gideon and Bryan Essary,
14 we're here on behalf of River Park Hospital
15 on these post-trial motions.

16 If I may, I want to preface my remarks
17 by first observing, of course, Mr. Gideon and
18 I did not participate in this trial. We, at
19 the conclusion of this trial and when the
20 record was prepared, both of us, as you might
21 imagine, have gone through the record
22 thoroughly. This is no reflection on Mr.
23 Essary that we're standing here arguing this
24 case before you at all. And I want to make
25 that clear for the record and for you.

1 THE COURT: They did a good job.

2 MR. WISEMAN: And I appreciate
3 you saying that.

4 We felt that it is important in a case
5 like this where a jury returns a verdict of
6 this magnitude, this significance, that a
7 fresh look be given to it by all involved.
8 And that's important, too, Your Honor, I
9 think, because when a case like this is tried
10 before a jury and a result like this occurs,
11 it gets everyone's attention, of course. And
12 that is an important factor to acknowledge.
13 Because you sit in a very important role as
14 you consider the case as the 13th jury, a
15 very unique role and important role.

16 I can't help but observe that I have
17 been before a Court before with the defense
18 verdict and had a judge in Davidson County,
19 Walter Kurtz, act as a 13th juror and set
20 aside a defense verdict because he felt that
21 the jury had wrongly decided the case. It's
22 a role that I know is a difficult one for any
23 judge.

24 A jury from this county sat and
25 listened to this case for a long time and

1 listened to it and deliberated it and came
2 with a verdict.

3 Mr. Gideon and I want to talk with you
4 in some detail about why we believe it is
5 your duty to set this verdict aside, because
6 we submit to you that the verdict is not a
7 true verdict of the jury. It's not logical.
8 It's not internally consistent. And it
9 reflects passion and prejudice and caprice,
10 and it should be set aside.

11 We will address many points with you
12 today. You have been provided with
13 voluminous pleadings and cases, and we are
14 not going to go over each one of those
15 points. And I want to say that if we don't
16 address a certain point, we're not
17 withdrawing that, for the record. We do want
18 to touch upon the highlights and the reasons
19 why we submit to you this verdict should be
20 set aside.

21 Now, Your Honor, we're going to show
22 you the verdict form. And I think it's
23 important that we look at this and consider
24 what the jury had to consider.

25 The first question the jury was asked

1 was concerning River Park Hospital and was it
2 at fault. And "fault" is a word that's been
3 introduced into our courtrooms. And as you
4 know, it's two things: It's negligence and
5 it's legal cause.

6 We submit to Your Honor that the jury's
7 verdict that River Park is at fault was
8 wrongly decided, and it was based upon their
9 apparent finding about the policy and
10 procedure concerning whether a patient should
11 be seen by an emergency room physician each
12 time a patient is in the emergency room at
13 River Park Hospital. And that was the
14 launching point for the jury's decision.

15 Tennessee case law discusses what a
16 jury's obligation is when they consider
17 evidence. I forgot about this podium, Judge.
18 Excuse me.

19 According to the long established
20 Tennessee case law, Your Honor, the jury's
21 obligation is to render a true verdict
22 according to the law and evidence. And many
23 Tennessee cases state that a jury cannot
24 reach two different conclusions of fact in
25 law unless the opposite inconsistent

1 conclusions are reconcilable under an
2 applicable rule of law.

3 And third, the Tennessee cases
4 establish that an irreconcilable verdict is
5 one which cannot be logically justified nor
6 reasonably integrated from any perspective.

7 And as you know, Judge, this jury found
8 River Park Hospital 100 percent at fault, and
9 for four individuals, found them not to be at
10 fault. The three individuals who actually
11 provided some measure of care to this
12 patient, Rosa Stone, the emergency room
13 physician who was consulted by the nurse
14 practitioner after she examined Mr. Barkes,
15 Sherry Kinkade, the nurse practitioner who
16 examined Mr. Barkes and assessed him and
17 evaluated him as a nurse practitioner,
18 Jeffrey Jolly, the person who triaged the
19 patient and came into the emergency room, the
20 jury found them not at fault.

21 And then, Your Honor, the medical
22 director of the Emergency Department, who
23 acknowledged it was his responsibility to
24 enforce the policies and procedures at the
25 hospital, found him not to be at fault.

1 Found him not to be at fault. Yet, with that
2 first question, they found River Park
3 Hospital to be a fault.

4 Now, I want to remind you, Judge, about
5 what was said during closing argument in this
6 case concerning the policies and procedure.
7 And this is found at Page 1,361 of the
8 transcript, and this is Mr. Schmidt's closing
9 argument and what he told this jury this case
10 was about and this is during his rebuttal
11 close.

12 "Wayne Barkes went to the River Park
13 Hospital to see a doctor. He was released by
14 a nurse. River Park Hospital asked Jeff
15 Jolly, an EMT, to perform the job of a nurse.
16 It was too much. River Park Hospital, Nurse
17 Kinkade performed the job of a doctor, and it
18 was too much. How do we know it was too
19 much? Because the written policies say so
20 and the written policies were never changed,
21 ever changed."

22 Now, Judge, the proof in the case --
23 and I've read the transcript in its entirety.
24 For that argument and for the jury's verdict
25 to have any consistency at all, what the jury

1 essentially decided is, is River Park
2 Hospital did not take a page out of a policy
3 and procedure notebook and change what was
4 written down, and for that reason and that
5 reason alone, it is justified to hold River
6 Park Hospital one hundred percent at fault in
7 this case.

8 THE COURT: Are you saying that
9 that was an inappropriate statement?

10 MR. WISEMAN: Yes, I am.

11 THE COURT: Was there an
12 objection made to the statement?

13 MR. WISEMAN: No. I'm not saying
14 it was inappropriate in terms of a lawyer
15 making the statement and it being
16 objectionable because the lawyer is arguing
17 something that he cannot argue as a
18 reasonable inference from the facts.

19 I'll tell you this, Judge, it is wrong,
20 it is inconsistent with the facts for him to
21 tell the jury, or essentially he was implying
22 to the jury this: Because the written policy
23 wasn't changed, River Park Hospital alone is
24 at fault in this case because an emergency
25 room physician did not see this patient.

1 But you know --

2 THE COURT: That was their
3 opinion.

4 MR. WISEMAN: That was their
5 proof.

6 THE COURT: Right.

7 MR. WISEMAN: That proof,
8 however, Your Honor, was not supported by the
9 facts. In other words, that argument was not
10 supported by the facts. Why is that? It is
11 because the proof established definitively
12 that the written policy and procedure had
13 been abandoned by the hospital through its
14 course and conduct of creating this new track
15 in the emergency room at least two years
16 before Mr. Barkes walked into the hospital.

17 THE COURT: Was there not also
18 conflicting proof as to whether or not that
19 fell below the reasonable standard of care
20 for a hospital?

21 MR. WISEMAN: Mr. Gideon is going
22 to address that, and that's where you come in
23 as a 13th jury.

24 They had a witness say that it was a
25 deviation from the standard of care for a

1 patient to be in the emergency room and not
2 be seen by an emergency room physician.

3 THE COURT: Right. All
4 conflicting their experts on both sides.
5 Yours said it was legitimate. Yours said it
6 did not fall below the standard of care.
7 Theirs said it did.

8 MR. WISEMAN: Correct. However,
9 Your Honor, we submit that that expert
10 witness, first of all, wasn't qualified to
11 say that, number one. Number two, Your
12 Honor, as a 13th juror, you heard evidence
13 that established clearly that there are, I
14 believe, 14 hospitals in the Middle Tennessee
15 area alone who have the very same system or
16 similar system in place.

17 It was not the standard of care in the
18 emergency rooms in Middle Tennessee for every
19 patient who comes into the emergency room to
20 be seen by an emergency room physician. It's
21 just wrong, flat wrong. That wasn't the
22 standard of care. You heard overwhelming
23 proof that that wasn't the standard of care.

24 And as a 13th juror, Your Honor, if you
25 conclude that the jury decided this case on

1 the basis that it was a deviation from the
2 standard of care in McMinnville, Tennessee,
3 or similar community for a patient to go into
4 an emergency room and not see an emergency
5 room physician, then you should set that
6 aside, Judge, because you have overwhelming
7 proof that that testimony is just flat wrong.

8 And that gets to the point of, is this
9 a true verdict and is it based on the law and
10 evidence? And I go back just to this
11 metaphor here, Judge. We're talking about a
12 written policy and procedure that existed as
13 of 1997. It was not formally changed by
14 typing out a new policy and procedure. The
15 administrator of the hospital said it should
16 have been and it wasn't, but the practice was
17 as it was set up.

18 You have a patient come in, they're
19 triaged and their nurse practitioner system
20 was set up. Mr. Gunn, the hospital CEO at
21 the time Mr. Barkes came to the emergency
22 room --

23 THE COURT: If I may interrupt.

24 MR. WISEMAN: Sure. Please.

25 THE COURT: Was it ever changed?

1 Without regard to the typed version of it,
2 was there ever a formal change of that policy
3 other than getting away from it in practice?

4 MR. WISEMAN: "The getting away
5 from it in practice," Your Honor, was the
6 change.

7 THE COURT: Okay.

8 MR. WISEMAN: Was the change.
9 And Mr. Gunn testified at trial at Page 726
10 of his testimony. This is the question. It
11 was asked by Mr. Essary, I believe.

12 "All these groups we talked about, the
13 ERICU Committee, the Medical Executive
14 Committee, the Board of Directors, the Board
15 of Trustees, did all four of those groups
16 understand and approve the new process put in
17 place in this ER and that allowed nurse
18 practitioners to see patients?" Answer,
19 "Absolutely."

20 And, Your Honor, it defies common sense
21 and logic to conclude that a practice that
22 had been in place for at least two years,
23 giving the plaintiff the benefit of the
24 doubt, more than two years. If you look at
25 the transcript and see, it really started,

1 apparently, in 1999, earlier in 1999. We
2 don't have a precise date. But it was the
3 practice in this community for at least two
4 years before Mr. Barkes entered the emergency
5 room.

6 THE COURT: Does that not bring
7 us back, then, to your point a few minutes
8 ago as to whether or not not having an
9 emergency room patient seen by a doctor falls
10 below the standard of care regardless of
11 whether or not that River Park was utilizing
12 this new practice?

13 The question still comes back to then.
14 Is this practice acceptable?

15 MR. WISEMAN: Correct. I think
16 that for this particular issue, that is
17 correct, and what you have to evaluate as a
18 13th juror, on the question of you looking at
19 this verdict as a 13th juror, hearing all the
20 evidence, knowing based upon the evidence
21 this practice was in place for more than two
22 years here at River Park in McMinnville and
23 in all the other hospitals. And Mr. Gideon
24 is going to go over with you the specific
25 testimony, all those other hospitals.

1 The fact they had an extra witness come
2 in, I believe, with five years of emergency
3 room experience from Ashland, Kentucky, to
4 say it was a deviation from the standard of
5 care in this community, saying that or a
6 similar community in suggesting that Ashland
7 is similar, you should totally reject that as
8 a 13th juror. And, Your Honor, if that's the
9 basis for this jury's ruling, it's just
10 flatly wrong. It's not a true verdict based
11 upon all the evidence that was presented in
12 this courtroom. It's just flat wrong.

13 It is a rare thing for a trial judge to
14 step in as a 13th juror. We absolutely
15 concede that. But in this circumstance, Your
16 Honor, we submit to you that it has to be
17 done.

18 And let me emphasize something else,
19 because this is important.

20 Put up Page 1,304, if you would,
21 please.

22 This is something Mr. Schmidt told the
23 jury. Let me acknowledge to you, Your Honor,
24 this was not objected to. However, I'm
25 pointing this out to you because it

1 illustrates compellingly what the case was
2 about in terms of how this case was presented
3 to the jury from the plaintiffs' perspective
4 and what the jury was encouraged to do.

5 THE COURT: Well, let me ask
6 this: Let's assume that the theories set
7 forth by the plaintiff might be objectionable
8 or might indicate an inconsistent verdict by
9 the jury. Can I infer that the jurors'
10 verdict was as they -- can I get into the
11 jurors' minds and try to figure out how they
12 did what they did simply because of what the
13 plaintiffs' attorney asked them to do?

14 MR. WISEMAN: No. As a 13th
15 juror, Your Honor, you sit as your own jury.

16 THE COURT: Right.

17 MR. WISEMAN: That is absolutely
18 right. But I think that you have to consider
19 why -- what led the jury to this result.
20 Because as the 13th juror and as the judge,
21 you are passing on yourself on whether this
22 verdict was a true verdict consistent with
23 the law and evidence and whether it was a
24 consistent verdict.

25 Mr. Schmidt said this to the jury, Your

1 Honor, and I submit to you this an
2 illustration of how this case went awry, how
3 the jury went awry and went off track.

4 "How you decide this case will be
5 talked about for years. This will be more
6 than the buzz in this courthouse. This will
7 go way beyond Warren County. Your verdict
8 will be heard from one end of this state to
9 the other. And it will impact the operation
10 of hospitals on two issues: On how hospitals
11 deal with their policies, and whether
12 patients that go into the emergency room see
13 a doctor."

14 That's improper argument. It wasn't
15 objected to, but it is argument that was made
16 to the jury and goes to the fundamental
17 underpinnings of why I strongly submit to
18 Your Honor why you should set this verdict
19 aside. Because the fact that a policy was
20 written in 1997 and not formally changed but
21 was changed by the hospital formally in terms
22 of the conduct in which they engaged in, they
23 set up a nurse practitioner track that were
24 granted privileges by the medical staff to
25 work in the emergency room. It was a

1 sanctioned process and it was consistent with
2 the standard of care in this area without a
3 doubt. And the proof was abundantly clear on
4 that.

5 And what was suggested to the jury is
6 that they should make a finding and
7 essentially punish River Park Hospital and
8 say substitute their view of what the
9 standard of care should be for what the proof
10 showed the standard of care is. And that's
11 why as the 13th juror, Your Honor, you -- and
12 that doctrine has been in place for a long,
13 long, time -- are to right these kinds of
14 wrongs.

15 And as the 13th juror, in righting the
16 wrong, now, we submit -- and Mr. Gideon will
17 go over this in more detail with you --
18 analyze the proof that was presented to the
19 jury, we submit they didn't prove their case
20 on the breach of standard of care and
21 causation. That's a technician's approach.
22 It's important. And if the case goes up on
23 appeal, it will be something the Court of
24 Appeals will have to look strongly at, but we
25 want to go over that with you here today as

1 well, but as the 13th juror, Judge.

2 The jury decided this case on a false
3 premise. And the false premise was that if
4 that policy as written in 1997, because it
5 wasn't formally changed, because it stayed in
6 the notebook, no matter what happened after
7 that, no matter what the hospital did, no
8 matter what system they set up, that that was
9 a basis alone to find River Park Hospital 100
10 percent at fault.

11 Let me go to the next section of the
12 presentation, Your Honor, because there's a
13 second issue and I think this is important.
14 We talked first was this a true verdict, and
15 I submit to you it wasn't a true verdict
16 based upon the law and evidence. We've gone
17 over that in terms of the policy and
18 procedure. But was this a consistent
19 verdict? Is the verdict logically justified
20 and reasonably integrated? That's language
21 from the case law.

22 First, let's look at the policy and
23 procedure itself. Is it consistent for the
24 jury to find that the policy, the 1997
25 written policy that every patient should be

1 seen by an emergency room physician, was
2 enforceable? Is it consistent for the jury
3 to say that Mr. Weeks, the person who was
4 responsible for implementing the policies and
5 procedures in the emergency room, the medical
6 director of the emergency room, was not at
7 fault? Is that a reasonably integrated
8 consistent verdict if that was the basis for
9 finding River Park Hospital at fault?

10 The briefs that were submitted by the
11 plaintiffs say that a hospital can be found
12 liable on a corporate negligence theory based
13 upon policy and procedure and the people
14 beneath the hospital. When I say beneath, I
15 mean the actors, the individuals who were
16 delivering the care can be found not at
17 fault, but the hospital can still be found at
18 fault.

19 One of the -- I submit their most
20 compelling case was that case from Texas
21 where it had to do with whether a CRNA was
22 able to deliver anesthesia care at the
23 hospital without an attending
24 anesthesiologist or the supervision
25 component. I suspect you've reviewed that