
**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

**DEBRA M. BARKES, Individually and)
As Surviving Spouse of JEWELL)
WAYNE BARKES, Deceased,)
)
Plaintiff-Appellant,)
v.)
)
RIVER PARK HOSPITAL, INC., and)
RIVER PARK HOSPITAL (TN),)
)
Defendants-Appellees)**

Appeal No. M2006-01214-SC R11-CV

**Warren County Circuit Court
Case No. 946**

**REPLY BRIEF FILED ON BEHALF OF DEBRA M. BARKES, INDIVIDUALLY
AND AS SURVIVING SPOUSE OF JEWELL WAYNE BARKES**

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DEBRA BARKES' REPLY TO THE HOSPITAL'S STATEMENT OF THE CASE AND
STATEMENT OF FACTS

A. Reply to Hospital's Statement of the Case

Throughout its brief the Hospital assumes that the only claim that went to the jury in this case was its failure to follow hospital policy. This case was tried pursuant to TCA §29-26-115. Plaintiff presented expert witness testimony that the recognized standard of acceptable professional practice for emergency rooms in McMinnville, Tennessee or a similar community on July 26, 2000 required that Mr. Barkes be examined and evaluated by a physician. R. Vol. XV, pp. 628-630, Dr. Roy Keys; R. Vol. XIII, pp. 334, 349-350, 354 Alan Markowitz, hospital administrator; and R. Vol. XVI, pp. 854-855, Dr. Morton Kern. The Hospital presented proof that the recognized standard of acceptable professional practice for emergency rooms in McMinnville, Tennessee or a similar community did not require a physician to examine and evaluate Wayne Barkes on July 26, 2000. R. Vol. XVI, pp. 907, 1916, Dr. Kevin Bonner; R. Vol. XVI, p. 1091, Kevin Spivey; and R. Vol. XVII, p. 1182. The Hospital submitted jury instructions regarding the application of TCA §29-26-115. Exh. 30, attached as No. 6 to Hospital Brief. The Hospital tried Plaintiff's TCA §29-26-115 claim by consent. Rule 15.02, Tennessee Rules of Civil Procedure ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such an amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after the judgment; but failure so to amend does not affect the result of the trial of these issues."), *Farrar v. Farrar*, 553 S.W.2d 741, 744 (Tenn. 1977); *Ward v. Glover*, 206 S.W.3d 17, 35-36 (Tenn. Ct. App. 2006). Since the Hospital tried the Plaintiff's TCA §29-26-

115 claim and lost, it cannot assert on appeal that Plaintiff's claim is strictly limited to the Hospital's failure to follow its policies and procedures.

Without any explanation, the Hospital argues that its liability in this case is strict liability. Hospital brief, p. 26 ("...there is no statute or regulation creating the type of strict liability theory now being advanced by the Plaintiff.") This is nonsense. The Hospital's liability is predicated upon TCA §29-26-115, which creates a statutory duty on health care providers, including hospitals, to comply with the recognized standard of acceptable professional practice for that defendant in its community or a similar community at the relevant time. In her opening brief, Plaintiff cited numerous cases for the proposition that a hospital's violation of its own policies is not conclusive evidence of the standard of care; it is merely evidence of negligence because such policies prove that the hospital foresaw the risk of harm and had the ability to avoid that harm. Barks Opening Brief at p. 33. In its brief the Hospital does not cite any authority to the contrary.

The Hospital is not being held strictly liable in this case. If the jury had found the Hospital's expert witnesses to have been credible and adopted their testimony, the Hospital would not have been held liable in this case. The Hospital was found liable because the jury rejected the testimony of its expert witnesses and adopted the testimony of Plaintiff's expert witnesses, finding that in this case the Hospital breached the recognized standard of acceptable professional practice for emergency rooms in McMinnville or a similar community by failing to have Wayne Barks physically examined and evaluated by a physician on July 26, 2000.

The Hospital's implied separation of the failure to follow hospital policies and procedures claim from the TCA 29-26-115 claim does not assist the Hospital in any way in this appeal. TCA §20-9-502 provides that "[i]f any counts in a declaration are good, a verdict for entire

damages shall be applied to such good counts.” In other words, the verdict in this case should be affirmed under TCA §29-26-115 if supported by material evidence even if this Court should agree with any of the Hospital’s arguments on corporate negligence. *Tutton v. Patterson*, 714 S.W.2d 268, 271 (Tenn. 1986) (“Tennessee courts have held on the basis of the above quoted statute [TCA §20-9-502] that a trial court’s erroneous instructions on one count of a multicount suit is harmless error if its instructions as to the other counts were proper.”)

Throughout its brief, the Hospital stridently argues that it raised the issue of whether a failure to follow policies and procedures states a cause of action against a hospital in the trial court. Since this is a question of law, it would have been raised in the Hospital’s motion for a directed verdict. As has been previously pointed out in the Rule 11 Application and the opening brief filed on behalf of Mrs. Barkes, during his argument for a directed verdict, defense counsel conceded that Mrs. Barkes had a claim against the Hospital for its failure to follow its policies and procedures. During the Hospital’s motion for a directed verdict, the following exchange occurred:

THE COURT: They’ve still got the argument that negligence could arise or did arise because they did not follow a good policy, correct?

I think the plaintiff’s theory is if they had followed the good policy - -

MR. CUMMINGS: Sure.

THE COURT: - - there would not have been - -

MR. CUMMINGS: You’re exactly right. And they have made that argument very repeatedly and consistently, but they don’t have any proof from the providers involved to create a cause and fact connection which is necessary.

THE COURT: Right. We covered that.

MR. CUMMINGS: Right. They've got the legal theory. They've argued it very well, but they don't have the evidence to allow this jury to say that the policy more likely than not caused the care to come out one way or another.

(Our emphasis)
R. Vol. XVII, p. 1212, line 9-
p. 1213, line 6

During the trial, the Hospital did not claim there was no duty on the part of the Hospital to enforce its policies and procedures; it claimed that this claim failed because Plaintiffs did not prove causation.

At page 32 of its brief, the Hospital argues that it never conceded the issue of whether Mrs. Barkes had a claim for its failure to follow its policies in the trial court because it requested a jury instruction which is attached as Exhibit 6 to the Appendix of the Hospital brief and Exhibit 30 in the record. This requested jury instruction states the following:

TPI CIVIL 2.40 (revised) – BURDEN OF PROOF – PREPONDERANCE OF EVIDENCE

In this action, the Plaintiff has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove:

1. The recognized standard of acceptable professional practice applicable to the care provided to Mr. Barkes in the Emergency Department at River Park Hospital or similar communities in July 2000;
2. That the care provided to Mr. Barkes in the Emergency Department at River Park Hospital failed to comply with that standard; and
3. As a legal result of any such alleged failure to comply with the applicable standard of care, the Plaintiff sustained injuries which would not otherwise have occurred.

If you find that the care provided to Mr. Barkes in the Emergency Department at River Park Hospital in July 2000 failed to comply with the applicable standard of care and caused an injury to the Plaintiff which would not otherwise have occurred, you must then determine whether the alleged negligence regarding the fact that Nurse Practitioners were permitted to function, as described during trial, the Plaintiff has the burden of proving the following regarding the claim that the

way in which Nurse Practitioners functioned in the Emergency Department fell below the standard of care and caused injury to the Plaintiff:

1. The recognized standard of acceptable professional practice applicable to the use and function of Nurse Practitioners in the Emergency Department at River Park Hospital or similar communities in July 2000;
2. That the way in which Nurse Practitioners were permitted to function, as described during trial, failed to comply with that standard; and
3. As a legal result of any such alleged failure to comply with that standard regarding the use and function of Nurse Practitioners, the Plaintiff sustained injuries which would not otherwise have occurred.

This requested jury instruction has nothing to do with the legal issue of whether Mrs. Barkes had a claim against the hospital for its failure to enforce its policies.

Further, in its brief, the Hospital never contradicts the statement contained at page 19 of Mrs. Barkes' Opening Brief that "[i]n post-trial motions, the hospital did not assert that as a matter of law a Tennessee hospital has no duty to ensure that its policies and procedures were followed to provide quality care to its patients."

Finally, the absurdity of the Hospital's argument that the duty issue was part and parcel of the inconsistent verdict issue is demonstrated by the fact that the Court of Appeals in its opinion below, treated these issues as entirely separate issues. Opinion, pp. 8-9. It first determined that Tennessee did not recognize the doctrine of corporate negligence. It then separately considered the inconsistent verdict issue. Opinion, p. 10, portion of Opinion under II.

B. Reply to Statement of the Facts

Throughout its brief, the Hospital ignores the applicable standard of appellate review and cites all the facts contrary to the jury's verdict, states these facts in the light most favorable to the Hospital and discards all facts which support that verdict. The Hospital cannot be allowed to ignore the fact that a jury heard the proof in this case and rendered a verdict against the Hospital.

Since the jury rejected the Hospital's proof and found it liable, under the material evidence appellate standard of review, this Court is required to (1) take the strongest legitimate view of the evidence in favor of the verdict, (2) assume the truth of all evidence that supports the verdict, (3) allow all reasonable inferences to sustain the verdict and (4) discard all countervailing evidence. *Barnes v. Goodyear Tire and Rubber Company*, 48 S.W.3d 698, 704 (Tenn. 2000).

A glaring example of the Hospital's refusal to acknowledge the applicable appellate standard of review is its argument that it had updated its emergency room policies to utilize nurse practitioners in its Emergency Department, that it simply failed to perform "the paperwork" to revise its written policies to take Policy No. 001-02-005, which mandates that each patient in its emergency room be examined by a physician, out of its policy and procedures manual. Hospital Brief, pp. 9-10.

It is important to note that at the trial below, Plaintiff introduced into evidence four separate Hospital policies: Policy No. 780-01-005, which is found in the record as Exhibit 5A; Policy No. 780-02-005, which is found in the record as Exhibit 5B; Policy No. 780-04-605, which is found in the record as Exhibit 5C; and Policy No. 01-02-005, which is found in the record as Exhibit 5D.

The evidence introduced at trial shows that on direct examination, Terry Gunn, who was the chief executive officer of the Hospital in 2000, testified that the Hospital's written policies, which are contained in the record as Exhibits 5A, 5B, 5C and 5D, were replaced by a "new and improved" practice of using nurse practitioners in the Emergency Department, which did not require every patient to be seen and evaluated by a physician and that it was "just a question of paperwork" to remove the outdated 1997 policies from the Hospital manual. R. Vol. XV, pp. 708-710.

It is important to note Exhibit 5C, Policy No. 780-04-605, states that its purpose is “[t]o indicate JCAHO certification and indicate procedure for patients presenting.” JCAHO is the Joint Commission of Accredited Health Care Organizations, an organization which must certify a hospital so that it can be paid by Medicare or Medicaid. R. Vol. XV, p. 725. Accordingly, Exhibit 5C establishes that the Hospital had a policy which required that each patient in its emergency room be examined by a physician for the purpose of JCAHO certification.

On cross-examination Terry Gunn testified that Exhibit 5C, Hospital Policy No. 780-04-605, was adopted in March, 1994, was reviewed in May 2001 by the Hospital and was left unchanged. R. Vol. XV, pp. 712-713. This could only mean that this policy, Hospital Policy No. 780-04-605, which is ignored by the Hospital in its brief, was in full force and effect in July, 2000 when Mr. Barkes was a patient in the Hospital emergency room. Mr. Gunn also testified that the process of changing a hospital policy required that the change be voted on by the ER/ICU committee, then approved by vote of the medical executive committee, then approval by vote of the board of trustees. R. Vol. XV, pp. 718-719. This was never done in regard to the hospital policy requiring a physician to examine and evaluate each patient presenting to its Emergency Department. R. Vol. XV, p. 719.

On redirect examination, Mr. Gunn testified that “the ER/ICU committee, the executive committee, the board of directors, the board of trustees all understood and approved the “new process” put into place in ‘this ER’ that allowed nurse practitioners to see patients.” R. Vol. XV, p. 726.

On recross examination, Mr. Gunn admitted that to change policies, a vote was required by the various committees and the board of trustees. R. Vol. XV, pp. 726-727. He testified the process was discussed and that he didn’t recall if “we took votes or not.” R. Vol. XV, p. 724.

According to Mr. Gunn, what actually occurred is that nurse practitioners were granted privileges to work in the hospital under the license of a physician. R. Vol. XV, p. 729.

Eventually, Mr. Gunn admitted that the written policies for the Emergency Department requiring that each patient be seen and assessed by a physician never changed. R. Vol. XV, pp. 729-730.

Accordingly, there is material evidence in the record that the Hospital's written policies, which are included in the record as Exhibits 5A, 5B, 5C and 5D, were in full force and effect on July 26, 2000, and were never changed by the hospital. The mere fact that the hospital granted privileges to nurse practitioners to practice in the hospital Emergency Department did not modify in any way its policies. It merely meant that a nurse practitioner could practice in the Emergency Department. Based upon the expert witness testimony presented by the Plaintiff, the jury in this case adopted the testimony of Plaintiff's standard of care expert witnesses that the recognized standard of acceptable professional practice for emergency rooms in McMinnville or a similar community required each patient presenting to the emergency room to be examined and evaluated by a physician. This does not in any way limit a nurse practitioner's privileges in the hospital; it merely requires that a physician examine and evaluate each patient.

In short, the Hospital's factual contention that it had modified its policies pertaining to its Emergency Department by adopting a "new, improved process" and that it was merely "a matter of paperwork" to remove the "outdated" Emergency Department policies from its policies and procedures manuals was rejected by the jury. It is offensive for the Hospital to have in effect on July 26, 2000 an Emergency Department policy requiring that each patient presenting to its Emergency Department be examined and evaluated by a physician for purposes of JCAHO certification so that it can be paid by Medicare or Medicaid, a policy contained in the record as Exh. 5C which on its face reflects it was promulgated in 1994 and reviewed and left unchanged

in 2001, but argue in the trial court and on appeal in this case that such a policy “really was not the hospital’s policy because it was a matter of paperwork for it to be removed from the hospital’s policies and procedures manual.”

ARGUMENT

I. REPLY TO THE HOSPITAL’S ARGUMENT

A. The Waiver Issue

The Court of Appeals held that as a matter of law Plaintiff had no claim against the Hospital for its failure to follow its policies because it determined that “Tennessee has not adopted the corporate negligence doctrine.” Opinion, p. 10.

In its motion for a directed verdict at the close of all the proof, defense counsel conceded that Mrs. Barkes had a claim against the Hospital for failing to follow its policies and argued that this claim failed on the issue of causation. R. Vol. XVII, pp. 1212, line 9 to page 1213, line 6. After the jury rendered a verdict, the Hospital did not raise the issue in its post-trial motions. R. Vol. 5, pp. 590-591.

In its brief, the Hospital refuses to address, let alone distinguish, the case of *Alexander v. Armentrout*, 24 S.W.3d 267 (Tenn. 2000), in which this Court reversed the Court of Appeals for unfairly reversing a jury verdict by resolving an issue that was not raised in the trial court and not preserved for an appeal. This Court determined that the issue raised by the Court of Appeals had been waived and that the Court of Appeals further erred in failing to apply the material evidence appellate standard of review to determine if the jury verdict should be affirmed. Identical considerations apply in the case at bar.

The policy consideration that supports the application of the holding in the *Alexander* case to the case at bar is that appellate judges apply the law; they do not make policy for the State of Tennessee. As this Court recently noted in regard to the doctrine of *stare decisis*:

The appellate courts are not composed of judges free to write their personal opinions on public policy into law. [Authority cited]. This doctrine is “the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”

Jordan v. Knox County,
213 S.W.3d 751, 780 (Tenn. 2007)

As the Hospital notes in its brief, the Court of Appeals had an obligation to apply the controlling law in the case at bar. The controlling law in this case is TCA §29-26-115 and the material evidence standard of review. Unfortunately in this case, the Court of Appeals ignored the controlling law and raised an issue *sua sponte* without notice to the parties which had been conceded in the trial below and had not been preserved for an appeal. Plaintiff submits that the Court of Appeals’ action in disregarding the testimony of Plaintiff’s expert witnesses and substituting its judgment on liability for the jury’s verdict was policy making, pure and simple, on the part of the Court of Appeals which goes far beyond its powers in our judicial system.

The reason why issues are waived if not raised in post-trial motions is that “failure to file either of these motions [a motion for a new trial or a motion for a judgment notwithstanding the verdict] ... denies the trial judge the opportunity to consider or reconsider alleged errors committed during the course of trial”; such a failure precludes appellate review of the issues. *Mires v. Hayes*, 3 S.W.3d 463 (Tenn. Ct. App. 1999) (failure to file post-trial motion for a new trial or motion for judgment notwithstanding the verdict precludes appellate review of trial court’s failure to direct a verdict.); *Cortez v. Alutech, Inc.*, 941 S.W.2d 891 (Tenn. Ct. App. 1996) (failure to file post-trial motions precluded appellate review of issues of failure to direct

verdict and whether material evidence supported the jury verdict). Giving the trial court an opportunity to rule on issues in the trial below is essential in our judicial system. The jurisdiction of the Court of Appeals is strictly appellate jurisdiction.

The Hospital's reliance on Rule 13(b) of the Tennessee Rules of Appellate Procedure to justify the Court of Appeals' conduct in raising a legal issue that was conceded at trial and not preserved for appeal by being raised in post-trial motions is misplaced. None of the cases cited by the Hospital in its brief involve the adjudication by the Court of Appeals of an issue conceded in the trial court and not preserved for an appeal.

Except in regard to subject matter jurisdiction issues, an appellate court's exercise of its discretion to hear issues not raised on appeal is to "be sparingly exercised." Advisory Commission Comment, Rule 13(b), Tennessee Rules of Appellate Procedure. Courts which have exercised their discretion under Rule 13(b) to hear an issue not raised by the parties, have emphasized that "[t]hese rules permit appellate courts to grant complete relief to the parties so long as they have been given fair notice and an opportunity to be heard." *Heatherly v. Merrimack Mutual Fire Ins. Co.*, 43 S.W.3d 911, at 916 (Tenn. Ct. App. 2001) (noting that statute of limitations issue adjudicated on appeal by exercising discretion under Rule 13(b) had been raised in the pleadings in the trial below). In other words, the issue has to be litigated in the lower court.

Rule 13(b) permits an appellate court to exercise its discretion to hear issues not raised by the parties to an appeal for reasons which include: (1) to prevent needless litigation, (2) to prevent injury to the interests of the public and (3) to prevent prejudice to the justice system.¹

¹ The Court of Appeals did not give any explanation for its decision to address an issue that was conceded in the trial court and not preserved for an appeal.

None of these reasons apply in the case at bar. The issue adjudicated by the Court of Appeals was not adjudicated in the trial court. The Plaintiff had no notice this was an issue in this case during the trial and had no notice or opportunity to address this issue in the Court of Appeals until after the Court of Appeals issued its opinion on December 29, 2008. This lack of notice and an opportunity to be heard undermines our judicial system and injures the public interest. It also prevents Rule 13(b) from applying in this case. *Heatherly v. Merrimack Mutual Fire Ins. Co., supra.*, at 916.

The Hospital argues that the Court of Appeals had an obligation to apply the controlling law in deciding this case. The controlling law is TCA §29-26-115. As has been previously mentioned, the Court of Appeals ignored this controlling law in its December 29, 2008 opinion. Nothing can be more prejudicial to our judicial process than an appellate court ignoring the law relied upon by the parties and the trial court in trying a case, and which the jury applied in deciding that case. It was the Court of Appeals' obligation to apply TCA §29-26-115 and to affirm the jury's verdict if material evidence supported it. Unfortunately, the Court of Appeals injected a legal issue in this case that had been conceded in the trial court, refused to apply the controlling law and, in effect, substituted its own determination of liability for the jury's verdict. This violated Mrs. Barks' right to a trial by jury. A violation of a party's constitutional right to a jury trial is contrary to the public interest and detrimental to the judicial process.

Moreover, the action by the Court of Appeals did not prevent needless litigation. Plaintiff recovered a verdict against the Hospital under TCA §29-26-115. The Court of Appeals refused to apply the material evidence appellate standard of review to determine if this verdict should be affirmed. This litigation would have been completed if the Court of Appeals had merely addressed the issues presented by the parties and applied the material evidence standard

of review, which would have required the Court of Appeals to affirm the jury's verdict in this case. The Court of Appeals' injection of an unnecessary issue in this case that was not raised in the trial court or preserved for appeal, has protracted this appeal to the detriment of the Plaintiff and to the detriment of our court system.

Finally Rule 3(e) of the Tennessee Rules of Appellate Procedure applies in this case because the issue raised *sua sponte* by the Court of Appeals was not specifically stated in a motion for new trial or any other post-trial motion. Under that rule, the issue raised by the Court of Appeals in this case is deemed to have been waived. The only exception to this waiver rule that has been recognized by this Court is if the trial court committed "clear error." *Waters v. Coker*, 229 S.W.3d 682 (Tenn. 2007). The Hospital has not even argued clear error occurred in the trial court, let alone met that standard. The Hospital conceded that Plaintiff had a viable legal theory against the Hospital for its failure to ensure its policies were followed. No error occurred when the trial court accepted the Hospital's concession on this point during the trial.

B. The Constitutional Issue

In its brief, the Hospital refuses to address the substance of Mrs. Barks' violation of her constitutional right to a jury trial argument. The Hospital brief states that:

"Similarly, the plaintiff vaguely contends in her brief that the Court of Appeals somehow violated her constitutional right to trial by jury by finding as a matter of law, that she did not have a viable cause of action for 'corporate negligence' under Tennessee law and the the jury verdict was inconsistent."

Hospital Brief at p. 39, citing p. 24
of the Barks Opening Brief

This is not the constitutional right to a jury trial argument that Plaintiff made beginning on page 24 and continuing through page 28 of her opening brief.

Plaintiff's argument is that this case was tried under TCA §29-26-115, that there was conflicting expert witness testimony on the standard of acceptable professional practice for hospital emergency rooms in McMinnville and a similar community on July 26, 2000, and that by finding the Hospital liable, the jury adopted the testimony of Plaintiff's expert witnesses. The Court of Appeals violated the Plaintiff's right to a jury trial by failing to apply the material evidence standard of review in reviewing the jury's finding of liability. In fact, the Court of Appeals substituted its own judgment in place of the testimony of Plaintiff's expert witnesses and substituted its own judgment for the jury's finding of liability. This is a clear violation of Mrs. Barkes' right to a trial by jury. *Barnes v. Goodyear Tire and Rubber Company*, 48 S.W.3d 698, 704-705 (Tenn. 2000).

The Hospital's only response to this argument is to misstate it. The Hospital refused to respond to the violation of Mrs. Barkes' right to a jury trial argument as stated in the Barkes Opening Brief because it had no response to it.

C. The Court Does Not Need to Address the Issue of Corporate Negligence Because Tennessee Law Recognizes That Hospitals Have a Duty To Promulgate Policies and Procedures to Promote Quality Health Care

Since the issue raised by the Court of Appeals was conceded by the Hospital in the trial below and waived for purposes of an appeal, the Court does not have to address that issue in this appeal. However, Mrs. Barkes will respond to the arguments made by the Hospital on this issue.

The Hospital argues that the Plaintiff fails to cite any authority that contradicts the Court of Appeals' determination that the opinion rendered by the Court of Appeals in *Bryant v. McCord*, 01A01-9801-CV-00046, 1999 WL 10085 (Tenn. App. January 12, 1999) has no precedential value. Hospital Brief, p. 27. In making this argument, the Hospital incorrectly implies that the Tennessee Supreme Court denied an appeal to the hospital on the issue of

whether the hospital owed to a patient a duty to monitor and control the use of investigational devices used in its facilities, concurring in result only in *Bryant*. Hospital Brief, pp. 27-28. The law firm representing the Hospital in this appeal represented the hospital in the *Bryant* appeal. These attorneys know this Court did not deny an appeal on the hospital-duty issue, concurring in results only in the *Bryant* case.

Rule 4(G)(1) of the Rules of the Tennessee Supreme Court states that: “[u]nless designated ‘Not For Citation, DCRO’² or ‘DNP’³ pursuant to F of this Rule, unpublished opinions for all other purposes shall be considered persuasive authority.”

In *Bryant*, the Court of Appeals addressed a number of issues. After the Court of Appeals issued its opinion, the hospital filed a Rule 11 Application for Permission to Appeal on an issue related to the effect of a settlement by AcroMed, a medical device manufacturer, on plaintiffs’ claims against the hospital. Plaintiffs also filed a Rule 11 Application for Permission to Appeal on the issue of whether the hospital owed Rhonda Bryant a duty to obtain her informed consent. The Tennessee Supreme Court entered an order which denied the hospital an appeal and which granted an appeal to the plaintiffs. A copy of this order is attached in the Appendix to this brief. This order did not deny an appeal concurring in results only, did not indicate the Court of Appeals opinion was not for publication and did not state that the opinion was not for citation. In *Bryant v. HCA Health Service of Tennessee*, 15 S.W.3d 804 (Tenn. 2000), this Court affirmed the Court of Appeals’ ruling that the hospital had no duty to obtain a patient’s informed consent.

In short, the ruling by the Court of Appeals in *Bryant* that the hospital owed a duty to patients to monitor and control the use of investigational devices used on its premises was never

² DCRO means denied concurring in results only

³ DNP means do not publish

appealed to the Tennessee Supreme Court. No order was issued that stated “Do Not Publish” or “Concurred in Results Only” or “Not for Citation.” In fact the *Bryant* case was remanded to the trial court for a trial on the claim that the hospital breached a duty to patients to monitor and control the use of investigational devices used on its premises. The same firm representing the Hospital in the case at bar represented the hospital in the trial court after the *Bryant* case was remanded.

Accordingly, the Court of Appeals opinion in *Bryant* holding that a hospital owes a duty to a patient to monitor and control investigational devices used on its premises is persuasive authority. It has been cited as authority by the Tennessee Court of Appeals. See *Wicks v. Vanderbilt University*, No. M 2006-00613-COA-R3-CV (Tenn. Ct. Appeals, March 21, 2007), copy attached in Appendix to this brief.

At footnote 21, page 30 of its brief, the Hospital attempts to distinguish *Prince v. Coffee County*, 1996 WL 221863 (Tenn. App. 1996); *Bryant v. McCord*, *supra.*, and *Keeton v. Maury County Hospital*, 713 S.W.2d 314 (Tenn. Ct. App. 1986) because each case involved an underlying tortfeasor who was not exonerated. Contrary to the Hospital argument, Plaintiff did not cite these cases “in response to the legal principle that a non-actor can be liable when all of the actors are exonerated on the same evidence.” Hospital brief, footnote 21, p. 30. Plaintiff cited these cases for the proposition that Tennessee courts have on several occasions recognized that a hospital owes a duty to patients. Barks Opening Brief, pp. 34-35. Once again, the Hospital mischaracterizes the Plaintiff’s argument because it does not have a response to the argument made in Mrs. Barks’ Opening Brief.

The Hospital argues that the trial court dismissed Plaintiff's claim based on the Certificate of Need. Hospital Brief, footnote 12, p. 22. Plaintiff's verdict was based on the jury's application of TCA §29-26-115 to the evidence presented in this case.

In her opening brief, Mrs. Barkes cited *Scott v. Ashland Health Care Center, Inc.*, 49 S.W.3d 281 (Tenn. 2001) and the Certificate of Need issued to the Hospital as an example of the Legislature and this Court recognizing that a hospital owes a duty to a patient to "ensure adequate, orderly and economical health care for citizens of Tennessee." *Scott, supra.*, 49 S.W.3d at 286, Barkes Opening Brief, pp. 33-34. This was done to show that *Gafner v. Down East Community Hospital*, 735 A.2d 969 (Me. 1999), which interpreted Maine common law, is readily distinguishable and has no application in the case at bar.

Plaintiff's expert witnesses in giving their opinion testimony relied on the fact that the Hospital promulgated hospital policies to comply with the Rules of the Tennessee Department of Health Board for Licensing Health Care Facilities, 1200-8-1-.07(5)(d)(3), which were promulgated under the Certificate of Need legislation and which require a hospital to promulgate policies and procedures to "define how the hospital will assess, stabilize, treat and/or transfer patients" in its emergency room. *See* R. Vol. XIII, pp. 334-339, testimony of Alan L. Markowitz, hospital administrator.

In its argument the Hospital relies exclusively on the December 29, 2008 opinion rendered by the Court of Appeals and the decision rendered by the Maine Supreme Court in *Gafner v. Down East Community Hospital, supra.*, in support of its argument that the Hospital owed no duty to Plaintiff to enforce its policies. Hospital Brief, pp. 24-27. Plaintiff notes that this argument is completely inconsistent with the position taken by the Hospital in the trial court. R. Vol. XVII, pp. 1212-1213. "It is well settled in this state that a party to an appeal will not be

permitted to depart from the theory on which a case was tried in the lower court.” *Tamco Supply v. Pollard*, 37 S.W.3d 905, 909 (Tenn. Ct. App. 2000).

At pages 35-37 of the Barkes Opening Brief, Plaintiff stated five separate reasons why the *Gafner* decision, which interprets Maine common law, has no basis for being applied in Tennessee in light of Tennessee legislation, rules issued by the Tennessee Department of Health Board for Licensing Health Care Facilities and Tennessee case law. The Hospital did not respond to this portion of the Barkes Opening Brief.

D. The Jury’s Verdict Is Not Inconsistent

The Hospital ignores the appellate standard of review in determining whether a jury verdict is inconsistent and a nullity. In determining whether a jury verdict is inconsistent, the Court “must give the verdict ‘the most favorable interpretation and ... give effect to the intention of the jurors if that intention be permissible under the law and ascertainable from the phraseology of the verdict.’ ” *Marshall v. Cintas Corp., Inc.*, 255 S.W.3d 60, 73 (Tenn. Ct. Appeals 2007). “The verdict must be upheld if, after examining it, ‘the court is able to place a construction thereon that will be upheld.’ ” *Id.*

In the leading Tennessee case *D.B. Loveman Co. v. Bayless*, 128 Tenn. (1 Thompson) 307, 160 S.W. 841 (1913), the Tennessee Supreme Court held that when a master is sued under a theory of *respondeat superior* for a servant’s tortious conduct, a jury verdict finding the master liable and exonerating the servant is fatally inconsistent. In so holding, the Court noted that: “[i]f the evidence shows liability on the master on grounds other than the misconduct of the servant, he may be held [liable], notwithstanding a verdict in favor of that servant.” 128 Tenn. at 317.

The Hospital's argument that the verdict is inconsistent is fatally flawed because it assumes that Dr. Stone, Nurse Kinkade and Dr. Weeks owed the exact same duty as the Hospital. As the Hospital points out in its brief, under Tennessee law it cannot practice medicine. The duty owed by the Hospital to Mr. Barkes was an administrative duty "to enforce rules and regulations which were adopted by the hospital to ensure a smoothly run hospital routine and adequate patient care and under which the physicians agreed to operate." *Johnson v. St. Bernard Hospital*, 399 N.E. 198, 204 (Ill. App. 1979). The Hospital had a nondelegable duty to operate under the Tennessee certification and licensing statutes and rules promulgated by the Tennessee Board for Licensing Health Care Facilities to ensure adequate, orderly and economical health care for the citizens of Tennessee. *Scott v. Ashland Health Care Center Inc.*, 49 S.W.3d 281, 286 (Tenn. 2001). Under Rule 1200-8-1.07(5)(d)(3) the Tennessee Board for Licensing Health Care Facilities required hospital policies and procedures to "define how the hospital will assess, stabilize, treat and/or transfer patients presenting to its emergency room." In compliance with this rule the Hospital promulgated policies which required each patient presenting to its Emergency Department to be examined and evaluated by a physician. Exh. 5B, 5C and 5D. In this case the jury determined that the Hospital had the obligation to ensure that each patient who presented to its Emergency Department was examined and evaluated by a physician on July 26, 2000. As has been noted, abundant expert witness testimony in this record supports the jury's finding in this regard.

The jury further found that the Hospital breached this recognized standard of acceptable professional practice on July 26, 2000 when Wayne Barkes presented to its Emergency Department. The record reveals that medical care providers working in the Hospital Emergency Department who treated Wayne Barkes, Nurse Kinkade and Dr. Stone, were not informed or

otherwise educated as to Hospital policies. R. Vol. XV, p. 308 (Dr. Stone testifying that she was “not familiar with this policy here”); R. Vol. XVI, pp. 1017-1019 (Nurse Practitioner Kinkade testifying she was unaware of Hospital policies). The person who was responsible for the “overall administration operation” of the Hospital’s Emergency Department on July 26, 2000 was Terry Gunn, the Hospital CEO at that time. Exh. 5A, Hospital policy 780-01-005. Mr. Gunn testified that he knew that in July, 2000 a patient presenting to the Hospital Emergency Department would not be examined and assessed personally by a physician. R. Vol. XV, p. 724, line 6-line 10. The Hospital knew it was violating its policies and procedures on July 26, 2000 and did nothing.

Finally, the jury determined that the Hospital’s failure to administer its Emergency Department so that every patient, including Wayne Barkes, was examined and evaluated by a physician proximately caused his death. On July 26, 2000, Wayne Barkes presented the following risk factors for a heart attack: (1) he was a male who was 48 years old; (2) he had a high level of cholesterol, 265; (3) he was obese; (4) he was a smoker; (5) he had a family history of cardiac problems, and (6) he was on medication that was a stimulant that could potentially affect his heart function. R. Vol. XVI, pp. 830-832; R. Vol. XVI, pp. 926-929. Significantly, Mr. Barkes also had a heart rate of 100. The heart rate is normally between 60 and 80 and can go up and down depending on a number of circumstances. R. Vol. XVI, p. 832. The fact that somebody has a heart rate of 100 indicates there is an active process going on. In some patients with heart attacks, this is one of the signs of a fast heart rate. R. Vol. XVI, p. 829. Expert testimony was presented that if a physician had examined Wayne Barkes on July 26, 2000, the right questions would have been asked and he would have undergone a cardiac “work up.” R. Vol. XV, pp.642-646, 649-650, R. Vol. XVI, p. 827. Such a reevaluation would have resulted in

a cardiac workup and saved Mr. Barkes' life. R. Vol. XV, pp. 642-646, 649-650; R. Vol. XVI, p. 827.

In this case the Hospital was not sued under a theory of *respondeat superior* for the conduct of Dr. Stone, Dr. Weeks or Nurse Kinkade, who were not employed by the Hospital.⁴ The Hospital was found liable to the Plaintiff on independent grounds from the claims on which Dr. Stone, Dr. Weeks, Nurse Kinkade and EMT Jolly were exonerated by the jury.

This Court can construe the jury's verdict against the Hospital in this case to give effect to the intention of the jurors and can place a construction upon it which is consistent with the verdicts rendered in favor of EMT Jolly, Nurse Kinkade, Dr. Stone and Dr. Weeks. The jury found that these individuals did not breach the standard of acceptable professional practice for an EMT, a nurse practitioner or an emergency room physician in regard to Wayne Barkes. Dr. Weeks never treated Mr. Barkes and was not present in the Emergency Department on July 26, 2000. Since there was no deviation from the recognized standard of acceptable professional practice by these professionals, they were exonerated. However, the jury could still have concluded and did conclude that the failure of a physician to examine and evaluate Mr. Barkes on July 26, 2000 was the proximate cause of his death. Only the Hospital had the nondelegable duty to administer its Emergency Department to ensure adequate, orderly and economical health care to citizens of Tennessee which the jury in this case determined included the obligation to ensure that each patient who presented to the Hospital Emergency Department was examined and evaluated by a physician.

⁴ The Hospital was sued under a theory of *respondeat superior* for the conduct of an EMT, Mr. Jolly, who triaged Wayne Barkes on July 26, 2000. As the Hospital notes in its brief, triage does not include a head-to-toe assessment of the patient, a decision to admit the patient, or to discharge the patient. Mr. Jolly was not involved in any diagnosis and could not order a cardiac workup. Hospital brief, footnote 7, p. 12. In other words, Mr. Jolly merely obtained information from Mr. and Mrs. Barkes.

In her opening brief, Plaintiff analyzed *Ward v. Glover*, 206 S.W.3d 176 (Tenn. Ct. App. 2006) and demonstrated that the Hospital had a nondelegable duty to ensure that its policies were followed in its Emergency Department and that Dr. Weeks did not have this obligation because he was not issued a Certificate of Need, this obligation was not stated in his contract and Plaintiff is not a third-party beneficiary to that contract. Barks Opening Brief, pp. 45-46. In its brief, the Hospital never addresses the application of the *Ward* case to the case at bar.⁵

At footnote 21, p. 30 of its brief, the Hospital attempts to distinguish *Longnecker v. Loyola University Medical Center*, 891 N.E.2d 954 (Ill. App. 2008) on the ground that the hospital was found liable in *Longnecker* for not properly informing the physician of everything his role involved in the hospital's heart transplant program. The Hospital also argues that unlike the *Longnecker* case, in the case at bar the Hospital had an outdated written policy which merely required paperwork to bring up to date.

The *Longnecker* case is directly on point. In that case Mr. Longnecker needed a heart transplant. The hospital had a transplant procedure in which the transplant cardiologist made an evaluation on a donor's history and test results to preliminarily accept or decline the donor's heart for a transplant. Under the hospital's transplant program, if a donor was preliminarily accepted, a procuring surgeon traveled to the donor hospital where he opened the donor's sternum and visually inspected the heart and felt for defects. 891 N.E.2d at 958. The procuring surgeon then made "the final phone call" during which his findings were reported to the transplant surgeon, who decided whether to accept or reject the heart. If accepted, the heart was

⁵ The Amicus Brief does address the *Ward* decision and cites it for an entirely different proposition of law. In the section of this brief dealing with the Amicus Brief we demonstrate that the Tennessee Hospital Association's interpretation of the *Ward* case is patently wrong.

cut out of the donor, flushed, and transported to Loyola University Medical Center where it was transplanted into the patient.

In *Longnecker*, the procuring surgeon, Dr. Parvathaneni, failed to understand that under Loyola's system, he was supposed to evaluate the donor's heart for transplant purposes. Dr. Parvathaneni did not consider himself capable of evaluating a heart for transplant purposes. 891 N.E.2d at 960.

The heart Dr. Parvathaneni procured was hypertrophic and when transplanted into Mr. Longnecker never functioned, resulting in the death of Carl Longnecker.

In the wrongful death suit, the jury exonerated Dr. Parvathaneni on the professional negligence claim and Loyola on the vicarious liability claim but found the hospital liable for \$2.7 million on the institutional negligence claim. The trial court held the jury verdict was inconsistent and granted the hospital a judgment notwithstanding the verdict.

The Illinois Court of Appeals reversed, holding that:

“Finally the circuit court's conclusion that a verdict in favor of Dr. Parvathaneni precluded a proximate cause showing as to the institutional negligence claim, in the context of this case, is, simply put, wrong. Our supreme court has expressly stated: ‘Liability is predicated on the hospital's own [institutional] negligence, not the negligence of the physician.’ Jones, 191 Ill.2d at 298, 246 Ill.Dec. 654, 730 N.E.2d 1119. ‘[T]he tort of institutional negligence “does not encompass, whatsoever, a hospital's responsibility for the conduct of its *** medical professionals.” ’ Jones, 191 Ill.2d at 298, 246 Ill.Dec. 654, 730 N.E.2d 1119, quoting *Advincula*, 176 Ill.2d at 31, 223 Ill.Dec. 1, 678 N.E.2d 1009.

“To hold Dr. Parvathaneni liable, the jury would have had to conclude that he deviated from the professional standard of care to which a procuring surgeon is held. The standard of care for Loyola as to the institutional negligence claim required a showing of what a reasonably careful hospital would do under the circumstances of this case. If, in fact, as the circuit judge concluded, before institutional negligence can be found, professional negligence on the part of Dr. Parvathaneni must be found, the claims of professional negligence and institutional negligence would conflate into a single theory of vicarious liability. Dr. Parvathaneni's commission of medical malpractice would impose vicarious

liability on Loyola, as principal to Dr. Parvathaneni, and render the claim of institutional negligence against Loyola pointless. The two claims, however, are independent, as our supreme court has made clear. Because the jury found in favor of Dr. Parvathaneni, it does not follow that the jury was compelled to find in favor of Loyola on the institutional negligence claim.”

891 N.E.2d at 970-971

Identical considerations apply in the case at bar. Just as the hospital in the *Longnecker* case failed to instruct Dr. Parvathaneni on his duties as a procuring surgeon in its heart transplant program, the Hospital in the case at bar never instructed Dr. Stone or Nurse Kinkade on its Emergency Department policies. The Hospital knew its policies for its Emergency Department were being violated in July, 2000, knew that patients presenting to its Emergency Department were not being examined or evaluated by a physician and did nothing.

In its brief the Hospital ignores the cases cited by Mrs. Barks for the proposition that negligent credentialing claims and failure to promulgate or enforce hospital policies are based upon a duty entirely separate and apart from any medical care rendered to the patient by a physician or nurse. The difference between a negligent credentialing claim and a failure to promulgate or enforce hospital policy claim lies in the element of proximate cause. In order to recover under a negligent credentialing claim, the plaintiff has the burden of proving that the physician committed medical malpractice performing a procedure for which the hospital negligently provided him with credentials to perform. In a failure to promulgate or enforce hospital policy case, the plaintiff has the burden of proving that the failure to enact or enforce a hospital policy proximately caused the plaintiff's injuries. *Gregg v. National Medical Health Care Service*, 699 P.2d 925, 928 (Az. Ct. App. 1985) (case dismissed when plaintiff failed to prove a causal connection between a hospital's lack of hospital rules and protocols and patient's death.)

Other than futilely attempting to distinguish the *Longnecker* case, the Hospital ignores all the other cases cited in Mrs. Barks' Opening Brief which held that a jury verdict holding a hospital liable under a claim that it failed to promulgate or ensure the enforcement of hospital policies was not inconsistent with that jury's exoneration from liability of physicians and nurses who rendered medical treatment to the plaintiff.

In fact, the cases cited by the Hospital actually demonstrate that courts have separate proximate cause requirements for an action for negligent credentialing as distinguished from an action for negligent failure to promulgate hospital rules or failing to ensure the enforcement of hospital rules. The Hospital cites a Texas case, *Hiroms v. Scheffey*, 76 S.W.3d 486 (Tx. App. 2002) for the proposition that a hospital cannot be liable for negligent credentialing when the physician involved was not negligent. Hospital Brief, p. 28. However, Texas courts have held that in a case in which a hospital has been held liable for negligently failing to promulgate or ensure enforcement of hospital policies and procedures, a verdict against the hospital is not inconsistent with a verdict exonerating the physician or nurse who rendered medical treatment to the plaintiff. *Denton Regional Medical Center v. LaCroix*, 947 S.W.2d 941, 949 (Ct. App. Tex. 1997).

The Hospital cites a North Carolina case, *Hogan v. Forsyth Country Club*, 346 S.E.2d 114 (N.C. App. 1986) for the proposition that an employer cannot be held liable for negligent hiring or negligent retention when the plaintiff did not establish the alleged negligence of the employee/agent involved. Hospital Brief, p. 29. However, North Carolina courts have held that in a negligent failure to promulgate or ensure the enforcement of hospital policies and procedures case, the plaintiff has the burden of proving proximate causation by proving that the failure to

enact or enforce a policy injured the plaintiff. *Daniels v. Durham County Hospital Corporation*, 615 S.E.2d 60, 65 (N.C. App. 2005).

E. Material Evidence in the Record Supports the Jury's Finding That the Hospital's Negligence Proximately Caused the Death of Wayne Barkes

The Hospital argues that as a matter of law its actions did not cause the death of Wayne Barkes. Hospital Brief, pp. 51-57. In making this argument, the Hospital ignores the applicable material evidence appellate standard of review and ignores the evidence in the record that supports the jury's finding that the Hospital's breach of duty proximately caused Wayne Barkes' death. *Cf. Smoak v. Hall*, 2009 WL 2778101 at *6 (6th Cir. (Tenn.) 2009) (“Again Bush [River Park] is asking us to do what the law flatly forbids — to substitute our opinion for that of the jury based on a re-weighing and reinterpreting of the evidence. This we will not do.”).

The evidence in the record that supports the jury's proximate cause finding is stated in an earlier portion of this brief, at p. 22. To avoid repetition, that portion of this brief is incorporated by reference herein.

One aspect of Plaintiff's case is that the Hospital violated its obligation to ensure that a physician examined and evaluated each patient who presented to its Emergency Department. In regard to a claim that a hospital has failed to enforce its rules, the Plaintiff has to establish that the failure to follow hospital rules proximately caused injury to the patient. *Gregg v. National Medical Health Care Services*, 699 P.2d 925, 928 (Az. Ct. App. 1985) (In a case in which it is claimed the hospital was negligent in not having any regulations or protocols for referral of patients with signs or symptoms of acute coronary disease to other facilities or specialists properly skilled and trained to treat such problems, case dismissed when plaintiff failed to prove there was a causal connection between the lack of hospital rules and protocols and the patient's

death.) In the case at bar, there is abundant evidence in the record that the failure by the Hospital to ensure that its Emergency Department policies were followed caused the death of Wayne Barkes. *Infra.* at p. 22.

F. The Trial Court Did Not Abuse Its Discretion in Denying The Hospital's Motion for a New Trial Based on Comments Made by Plaintiff's Counsel

The Hospital argues in its brief that “[a]lthough these arguments individually may not have merited a mistrial, combined they mandate a new trial because they ultimately permeated the entire trial and cumulatively prejudiced the jury.” Hospital Brief, p. 58. The Hospital cites the case of *Gray v. Bernard*, 1992 WL 52697 (Tenn. Ct. App., March 20, 1992) in support of its argument.

In *Gray*, the plaintiff's lawyer: (a) argued to the jury that defendant was worth eight million dollars and should be punished for its conduct even though the trial court had ruled that punitive damages was not an issue to be submitted to the jury, (2) argued that the jurors should place themselves in the position of the plaintiff in awarding damages, which is a golden rule argument, and (3) implied that the defendant had thrown away records or otherwise tried to hide the whereabouts of a key witness without any proof to support such a spurious argument. Needless to say, the Tennessee Court of Appeals in *Gray* ordered a new trial because the plaintiff's conduct, which was highly improper, had a potentially highly prejudicial effect on the jury, and the trial court's curative instructions were ineffective given the fact they were made after both attorneys had presented their closing arguments and were inadequately worded. Nothing like this happened in the case at bar.

In the case at bar, the Defendant complains about five statements made by Plaintiff's counsel. In regard to two of these statements, these statements were so insignificant that the

Hospital did not preserve them for an appeal by either objecting when the statement was made or including the fact the statement was made as a ground in its motion for a new trial. This is discussed at pp. 49 and 51 of Mrs. Barkes' Opening Brief.

The remaining three statements that the Hospital complains about are discussed on pages 50-55 of Mrs. Barkes' Opening Brief. One was made in closing argument with a curative instruction being given immediately after an objection was made. The other two were made in opening statement. After one comment was made, a curative instruction was given immediately after the objection was made. In regard to the other, the trial court overruled the objection. Moreover, in its jury charge, the trial court instructed the jury that "[i]n reaching your verdict you may consider only the evidence that was admitted. Remember that any questions, objections, statements, or arguments made by the attorneys during the trial are not evidence." R. Vol. XVIII, pp. 1401-1402.

Nowhere in the Hospital's brief is there any demonstration how any of these comments could possibly have prejudiced the jury. There is no golden rule argument involved in this case. There is no punitive damages argument placing the net worth of the defendant before the jury. Some of these objections involve mere semantics.

The law is clear that a trial court's ruling denying a motion for a new trial based upon an alleged improper argument will not be reviewed "unless the argument is clearly unwarranted and made purely for the purpose of appealing to the passion, prejudice and sentiments which cannot be removed by sustaining the objection of counsel." *Freeman v. Blue Ridge Paper Products, Inc.*, 229 S.W.3d 694, 712 (Tenn. Ct. App. 2007). There has been simply no showing how any of these alleged misstatements could possibly have prejudiced any jury. Moreover, a curative instruction was given by the trial court when the Hospital objected except in the one instance

where the trial court overruled the objection. The trial court clearly did not abuse its discretion in denying the Hospital's Motion for a New Trial based on any statement made by Plaintiff's counsel. In fact, in resolving the Hospital's post-trial motions, the trial court held that the jury's award was not so excessive as to indicate that it was formed with sympathy or passion and that the amount of the verdict was within the range of reasonableness. R. Vol. 9, p. 1195.

G. The Trial Court Acted Properly in Its Role of Acting As a Thirteenth Juror

The Hospital has raised one issue in this appeal that was not raised in Mrs. Barks' Opening Brief. The Hospital claims that the trial court abandoned its role as thirteenth juror based on remarks it made during the Hospital's motion for a directed verdict at the trial in January, 2006, when it later denied the Hospital's Motion for a New Trial in May, 2006. In making this argument, the Hospital ignores the language contained in the order entered by the Court in denying the Hospital's Motion for a New Trial.

"A court only speaks through its written orders." *Ladd v. Honda Motor Co., Ltd.*, 939 S.W.2d 83, 104 (Tenn. Ct. App. 1996), *Heath v. Memphis Radiological Professional Corporation*, 79 S.W.3d 550 (Tenn. Ct. App. 2001). "While the appellate courts may consider the trial court's comments made in the course of reviewing a motion for a new trial, [that] review is limited to determining whether the trial court properly reviewed the evidence and was satisfied with the verdict." *Id.* In its argument the Hospital does not cite or rely on any comments made by the trial court during the May, 2006 hearing on the motion for a new trial. In denying the Hospital's motion for a new trial, the trial court stated in its order that:

"The court, in its role as thirteenth juror, has considered all the evidence presented at trial, the arguments of counsel, the testimony of witnesses, the exhibits introduced into evidence and the entire record as a whole. After independently weighing the evidence the Court finds that the weight of the evidence preponderates in favor [of] the Court's finding that the judgment in this case is correct."

Simply put, the trial court conscientiously carried out its role as thirteenth juror, weighed the evidence and agreed that the jurors' verdict was correct.

The Hospital bases its claim that the trial court abandoned its role as thirteenth juror in ruling on its motion for a new trial in May, 2006 on statements the trial court made during the Hospital's motion for a directed verdict at the close of proof in January, 2006. The Hospital does not cite any authority for the proposition that comments made during the course of trial can be reviewed in determining whether a court properly acted in its role as thirteenth juror later in the case, nor does it explain how comments made approximately four months earlier are relevant to the resolution of a motion for a new trial. The Hospital apparently believes that a trial court cannot change its mind about issues as a trial proceeds. Under such logic, there would be no reason to go through with a trial in this case since the court made comments during the motion for a directed verdict which the Hospital claims requires the trial court to set aside a verdict if it lost the case.

Sadly, and pathetically, the Hospital fails to inform the Court that the trial court changed its mind on this issue, after having ruled on the motion for directed verdict at the close of proof, during the jury charge conference.

During the jury charge conference the Hospital argued that on the element of causation on the direct hospital negligence claim the Plaintiff had to prove that Nurse Kinkade was negligent "before you then get up to ... the direct negligence claim in a case like this." R. Vol. XVIII, p. 1296. After Mr. Smith responded to that argument the trial court stated:

"I thought that same thing. I've gone back and forth about that. And I know what you are saying."

R. Vol. XVIII, p. 1299, line 18-line 20

Hospital counsel then responded:

“It’s part of his burden of proof to establish that the hospital deviated from the recognized standard of acceptable professional practice and that Ms. Kinkade deviated from the recognized standard of acceptable professional practice.”

R. Vol. XVIII, p. 1299, line 21 - p. 1300, line 2

Mr. Smith responded by stating:

“I think that that comes under cause because we are not saying -- otherwise it’s a vicarious liability. In other words, you’ve granted a directed verdict that the hospital cannot be liable for the fault of Nurse Kinkade, because there is no superior there. Obviously, we’re proceeding on an independent primary negligence case where the hospital staff is negligent and the negligence is failing to follow the policy.

“So we have to prove that the failure to follow the policies caused an injury which would not otherwise have occurred. Yes, we have to prove that.”

R. Vol. XVIII, p. 1300, lines 3-17

Counsel for the Hospital replied:

“I just simply believe that it’s more than a causation issue. He has to establish as an element to recover that Ms. Kinkade’s care did not comply with the standard of care.”

R. Vol. XVIII, p. 1300, lines 20-24

The Court then ruled in favor of the Plaintiff on this issue:

THE COURT: I’m going with that version. I’m changing my mind.

MR. ESSARY: You’re going with Mr. Smith’s version.

THE COURT: That version generally that he just read.

And I’ve gone over this and over this and over this. I think that the causation language, the cause and fact, the proximate cause, encompasses what had to go on. It encompasses the treatment and the connection between the hospital and the care that was given that caused the damages.

And I understand your point in saying that we need to make sure that the jury understands that it’s not just the hospital was negligent in doing something

without proving that she did something wrong. I keep going back to this, but it does all fall under cause of injury, legal cause and proximate cause.”⁶

R. Vol. XVIII, p. 1300, line 25 – p. 1301, line 20

We regret that it was necessary to extensively quote the record above. However, the Hospital’s failure to present a complete picture of what occurred during the trial below compels us to do so. The Hospital’s argument is not only spurious, it is misleading and is a disservice to the trial court which conscientiously tried this case.

MRS. BARKES’ RESPONSE TO AMICUS BRIEF
FILED BY THE TENNESSEE HOSPITAL ASSOCIATION

A. Introduction

Throughout its brief, the Tennessee Hospital Association does not act in the traditional role of an Amicus curiae. “An amicus may perform many different duties as long as it is serving the interests of the court rather than the parties.” *State of Tennessee Ex Rel. Commissioner of Transportation v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 758 (Tenn. Ct. App. 2001). Amicus “status is advisory rather than adversary and one who appears as Amicus curiae has no right to except to the ruling of the court or prosecute an appeal.” *Casey v. Mole*, 63 N.J. Super. 255, 164 A.2d 374, 376 (1960). “Where a petitioner’s attitude toward the litigation is patently partisan, [she] should not be allowed to appear as Amicus Curiae.” *Supra.*, 164 A.2d at 377. In *Ferguson v. Paycheck*, 672 S.W.2d 746, 747-748 (Tenn. 1984), this Court held that the amicus curiae rule “excludes the appointment of counsel to serve the interest of litigants, witnesses, or other private parties.” The Tennessee Hospital Association’s amicus brief is patently adversarial.

⁶ The Hospital quotes the last paragraph of the Court’s ruling at page 65 of its Brief in support of its argument without noting that this paragraph was part of the trial court’s ruling in which it changed its mind on this issue. The paragraph taken out of context by the Hospital merely indicates the Court understood the Hospital’s argument, nothing more.

Even more concerning is that in its role as an Amicus curiae, the Tennessee Hospital Association attempts to interject issues in this appeal that were not raised in the trial court or addressed by the Court of Appeals. This, of course, violates well-known principles of appellate practice. This Court's jurisdiction is exclusively appellate. Issues not raised in the trial court cannot be raised on appeal.

Especially troubling is the fact that the Hospital cannot raise the issues which the Amicus curiae attempts to inject in this appeal. For example, the Hospital tried this case under TCA §29-26-115, presented expert witness testimony under this statute and lost. On appeal the Court of Appeals violated Mrs. Barkes' right to a trial by jury by failing to review the jury verdict under a material evidence standard of review in regard to TCA §29-26-115. The Court of Appeals ignored the fact that this case was tried under TCA §29-26-115, ignored all of Plaintiffs' expert witness testimony that was competent under that statute which supported the jury's verdict and substituted its own judgment on the applicable standard of care and liability for the jury's verdict. The Tennessee Hospital Association now appears in this Court and argues that TCA §29-26-115 does not apply in this case. This is an attempt to vitiate Mrs. Barkes' constitutional right to a jury trial. This argument is patently adversarial and violates fundamental principles of appellate procedure.

Courts have held that Amicus curiae are not parties to the case and do not have standing to raise issues not raised by the parties. *City of Tempe v. Prudential Insurance Co.*, 510 P.2d 745, 748 (Az. 1973) ("We do not discuss this issue since it was not raise nor argued by the parties and amicus curiae are not permitted to create, extend or enlarge issues."); *Ruiz v. Hull*, 957 P.2d 984, 989 (Az. 1998); *Karas v. Strevell*, 884 N.E.2d 121, 129 (Ill. 2008) ("This court has repeatedly rejected attempts by amicus to raise issues not raised by the parties to the appeal.");

Wellington v. Mahoning County Board of Elections, 882 N.E.2d 420, 430 (Ohio 2008) (“In general, amici curiae are not parties to an action and may not, therefore, interject issues and claims not raised by the parties”); *Acton v. Ft. Lauderdale Hosp.*, 418 So.2d 1099, 1101 (Fla. App. 1982) (“Amici do not have standing to raise issues not available to the parties nor may they inject issues not raised by the parties.”). *see also* *City of Minneapolis v. Church Universal & Triumphant*, 339 N.W.2d 880, 882, fn. 3, (Minn. 1983) and *Citizens For Responsible Wildlife Management v. State*, 71 P.3d 644, 649 (Wash. 2003); “An Amicus curiae takes the case as [she] finds it, with the issues framed by the parties.” *Karas, supra.*, at p. 129. Since the Amicus curiae lacks standing, a court “cannot grant relief on an issue raised by the amicus brief but not by the appellant.” *Nationwide Mutual Insurance Co. v. Chillura*, 952 So.2d 547, 553, fn. 7 (Fla. Ct. App. 2007). In *Thigpen v. Greenpeace, Inc.*, 657 A.2d 770, fn 5 (D.C. Ct. App. 1995), the appellate court refused to address an argument made by an Amicus curiae which stated a new theory of recovery that had not been pled in the complaint. The court held that “[u]nder longstanding principles of appellate review, it cannot be raised for the first time on appeal.” 657 A.2d at 772, fn. 5.

Identical considerations apply in the case at bar. In its Amicus brief, the Tennessee Hospital Association attempts to relitigate the issue of liability by making arguments that were not made in the trial court and attempts to raise issues that were not raised by the parties or addressed by any lower court. Since this Court’s jurisdiction is exclusively appellate jurisdiction, the Tennessee Hospital Association should not be permitted to relitigate this case when it has no standing to do so.

B. Factual Assertions

The Tennessee Hospital Association asserts throughout its brief that the Hospital adopted a “new policy” in 1999 which allowed nurse practitioners to treat patients in the Hospital Emergency Department which rescinded the 1997 Hospital policy which required that each patient presenting to the Emergency Department be examined and evaluated by a physician. This contention was rejected by the jury in the trial below. The testimony of Terry Gunn, who was CEO of the Hospital in 2000, provides material evidence in support of the jury’s finding. Mr. Gunn testified that the Hospital policies admitted into the record as Exhibits 5A, 5B, 5C and 5D were in full force and effect on July 26, 2000, and were never changed by the Hospital. R. Vol. XV, p. 729. Exhibit 5C is Hospital Policy No. 780-04-005, which was promulgated for JCAHO certification and to indicate procedure for treating patients presenting to the Emergency Department. It was placed in effect in 1994, revised in October, 1997, and reviewed in March, 1998 and May, 2001. On its face it was in full force and effect at the Hospital on July 26, 2000. Exhibit 5C. It requires that any patient arriving at the Emergency Department “will be seen by the emergency department nurse, triaged and then seen by the appropriate physician.” Exhibit 5C, Policy, Paragraph 3.

The Tennessee Hospital Association argues that the JCAHO standards did not require that a physician treat each patient in an emergency room. Amicus Brief, p. 6. This is an incorrect reading of the JCAHO standards.

JCAHO Standard PE 4.2 states that:

“A licensed independent practitioner with appropriate clinical privileges determines the scope of assessment and care for patients in need of emergency care.”

Amicus Brief, Tab 10, Comprehensive
Manual for Hospitals, p. 3

While the Tennessee Hospital Association argues that a “licensed independent practitioner” includes a nurse practitioner, it clearly does not because other JCAHO standards apply to nurses, such as PE 4.3. PE 4.2 applies to physicians who are not employed by the hospital. Such people are “licensed independent practitioners” of medicine.

Any doubt concerning this construction of PE 4.2 is resolved by the construction that was placed on this section by JCAHO and the Hospital. When the JCAHO inspected the Hospital, the first thing it examined was the Hospital’s policies and procedures. R. Vol. XV, p. 725. As has been previously noted, in 1994 the Hospital promulgated Policy No. 780-04-005 “to indicate JCAHO classification and indicate procedure for treating patients presenting” to the Emergency Department. Exh. 5C, Purpose. This policy was revised in October, 1997 and reviewed and left unchanged in March, 1998 and May, 2001. Exh. 5C. This shows that the JCAHO and the Hospital interpreted JCAHO standards to require each patient presenting to the Emergency Department to be examined and evaluated by a physician.

This situation is analogous to an agency interpreting a statute it is responsible to enforce. The well known rule of statutory construction is that “interpretations of statutes by administrative agencies are customarily given respect and accorded deference by the courts. *Riggs v. Burson*, 941 S.W.2d 44, 50-51 (Tenn. 1997)

The Tennessee Hospital Association argues that the effect of the jury verdict in this case will alter existing practices in an emergency room and will “upend” the system of emergency care in Tennessee. Given the fact that 2000 JCAHO standards require each patient in an emergency room to be examined by a physician and that, as the Tennessee Hospital Association states at p. 5 in its brief, “[h]ospitals in Tennessee that have obtained accreditation from the Joint Commission are deemed to meet all state licensure requirements,” it appears that all JCAHO

accredited hospitals in Tennessee in 2000 required that each patient presenting to an emergency room be examined and evaluated by a physician. All the jury determined in this case **was** that the recognized standard of acceptable professional practice for emergency rooms in McMinnville, Tennessee or a similar community on July 26, 2000 was to have each patient presenting to an emergency room be examined and evaluated by a physician. The Tennessee Hospital Association fails to explain how this standard of care, which is governed by the locality rule and is determined on the date of the occurrence of the alleged malpractice, could have any impact on the system employed by emergency rooms today. If, as the Tennessee Hospital Association implies, most hospitals in this state utilize nurse practitioners to examine and evaluate patients in an emergency room without a physician being involved, then obviously the recognized standard of acceptable professional practice for emergency rooms in assessing patients has changed. This case has no impact on how emergency rooms operate today, because the applicable standard of care is governed by the recognized standard of acceptable practice for emergency rooms at the time the malpractice occurred.

C. Argument

The Tennessee Hospital Association refers to the Emergency Medical Treatment and Active Labor Act. 42 U.S.C.A. §1395dd(h). It then notes that this statute requires that persons who present to the emergency department be provided “an appropriate medical screening examination within the capability of the hospital’s emergency department to determine whether an emergency medical condition exists and that the screening examination must be conducted by a qualified individual as determined by hospital bylaws and regulations. 42 C.F.R. §489.24(a)(1)(i).” Amicus Brief, p. 2 (our emphasis). The Hospital’s Policy No. 780-04-005, Exh. 5C, required that a physician examine and evaluate each person presenting to the Hospital

Emergency Department in the case at bar. This law cited by the Tennessee Hospital Association supports the jury's finding of liability in the case at bar.

The Tennessee Hospital Association correctly notes that the Board for Licensing Health Care Facilities Rules do not have a requirement concerning the level of practitioner who may assess, stabilize, treat and/or transfer patients who present to a hospital's emergency department. Amicus Brief, pp. 9-10. However, the Board for Licensing Health Care Facilities does have a rule which requires that if emergency services are provided at a hospital, that:

“...policies and procedures governing medical care provided in the emergency service or department are established by and are a continuing responsibility of the medical staff. These policies and procedures must define how the hospital will assess, stabilize, treat and transfer patients.”

Rule 1200-8-0-1-07(5)(d)(3)

In the case at bar, the Hospital had a policy which required that each patient presenting to its Emergency Department be examined and evaluated by a physician. The Hospital violated that rule and that rule violation caused the death of Mr. Barkes. Here again the rules of the Board for Licensing Health Care Facilities and the rules promulgated by the Hospital to comply with those rules support the jury's verdict in this case.

The Tennessee Hospital Association objects to the testimony of Dr. Roy Keys because he practices in Kentucky, which it asserts cannot possibly be a similar medical community to McMinnville, Tennessee. The trial court determined that Dr. Keys was competent to testify in this case under TCA §29-26-115. The Hospital did not raise an issue on appeal concerning the trial court's ruling that Dr. Keys was competent to testify. Hospital Brief filed Court of Appeals, Statement of Issues. The Tennessee Hospital Association has no standing to raise this issue, which was not raised by the Hospital on appeal. This objection should have been made in the trial court. This Court's jurisdiction is exclusively appellate and, as such, it cannot hear this

issue. Further, the Plaintiff established the applicable recognized standard of acceptable professional practice for emergency rooms in McMinnville or a similar community through three separate expert witnesses: Mr. Markowitz, a hospital administrator; Dr. Kern and Dr. Keys. R. Vol. XIII, pp. 334, 349-350, 354; R. Vol. XVI, pp. 854-855 and R. Vol. XV, pp.628-630.

The Tennessee Hospital Association argues that TCA §29-26-115 does not apply to this case. This argument was not raised in the trial court. In fact, the parties tried this case by consent under that statute by presenting expert witnesses who were qualified as being competent to testify under that statute and provided expert witness testimony in compliance with the requirements of that statute. The Hospital cannot raise this claim on appeal because it is totally inconsistent with its position in the trial court. Plaintiff submits that this argument is being made in an attempt to vitiate Mrs. Barkes' right to a trial by jury because the Court of Appeals reversed the jury's verdict without applying the controlling law, TCA §29-26-115, and without determining whether material evidence was contained in the record which supported the jury's verdict. Instead, the Court of Appeals substituted its own judgment for the jury's finding of liability. The Tennessee Hospital Association has no right to interject new issues in this litigation which were not presented to the lower courts. As an Amicus curiae, the Tennessee Hospital Association is not entitled to any relief because it is not a party.

The Tennessee Hospital Association argues that *Ward v. Glover*, 206 S.W.3d 17 (Tenn. Ct. App. 2006) does not apply because in the case at bar the Hospital did not treat Mr. Barkes. The Tennessee Hospital Association entirely misinterprets the *Ward* case.

In *Ward v. Glover*, 206 S.W.3d 17 (Tenn. Ct. App. 2006), the plaintiffs sued the hospital as well as Dr. Glover and the anesthesia service. The plaintiff settled with the hospital. However, the physician and the anesthesia service asserted a comparative fault claim against the

hospital that was tried by consent at the trial. In fact, in *Ward*, the Court of Appeals held that the hospital had the obligation to develop and maintain proper policies because it was an entity that had been issued a license for a health care facility. At the trial the jury exonerated the physician and the anesthesia service. Since the Plaintiff raised the issue on appeal as to whether comparative fault could be assessed against the hospital, it appears all fault by the jury was assessed against the hospital. Thus the verdict in this case appears to be similar to the verdict rendered by the jury in *Ward*.

In *Ward*, Plaintiffs argued that TCA §29-26-115 did not apply to their claim against Dr. Glover for failing to develop and maintain policies for the hospital obstetrics unit because that conduct did not involve any diagnosis or medical treatment rendered to plaintiffs. The Court of Appeals rejected this argument and held that TCA §29-26-115 applied because the promulgation and enforcement of hospital policies and procedures bears a substantial relationship to the rendition of medical treatment by a medical professional.

The holding of *Ward* is squarely on point. A hospital cannot practice medicine; however, its promulgation of hospital policies and procedures and its obligation to ensure that such policies and procedures are enforced bears a substantial relationship to the medical treatment rendered in its Emergency Department to Wayne Barks on July 26, 2000. If the Hospital policy had been enforced, Mr. Barks would not have died. Accordingly, the Hospital's liability in this case is governed by TCA §29-26-115.

The Tennessee Hospital Association argues that TCA §29-26-115 does not apply to hospitals. Tennessee courts have applied this statute to hospitals since the Medical Malpractice Review and Claims Act of 1975, which includes TCA §29-26-115, was promulgated. The Tennessee Hospital Association relies on the fact that the portion of that legislation concerning

the medical malpractice review board was repealed in 1985. That repeal included the section of that legislation which defined various terms used in that statute. However, in 1985, the Legislature did not modify in any way the language in TCA §29-26-115. Subsequent to that repeal, courts have properly held that the sections of the Tennessee Medical Malpractice Act which were not repealed in 1985 should be construed in accordance with the repealed definition sections of that legislation because such definitions accurately reflect the intent of the Legislature at the time the statute was promulgated in 1975. *Doe v. Vanderbilt University*, 824 F.Supp. 746, 748 (M.D. Tennessee 1993); see *Burris v. Hospital Corporation of America*, 773 S.W.2d 932 (Tenn. Ct. App. 1989). This makes eminent sense because the Legislature promulgated TCA §29-26-116 with the definitions that were part of that same legislation in mind. At the time TCA §29-26-115 was promulgated, hospitals as well as numerous other entities were defined to be health care providers. Not only did the 1985 repeal have nothing to do with medical malpractice actions, since the 1985 repeal, the Legislature has done nothing to indicate that the reliance by the courts on the repealed definitions section of that legislation to construe unrepealed sections of that legislation is contrary to its legislative intent.

CONCLUSION

On January 27, 2006 a Warren County jury found River Park Hospital liable for the wrongful death of Jewell Wayne Barkes pursuant to TCA §29-26-115. Experienced and well-prepared lawyers represented both parties at trial.

The Court of Appeals reversed the jury's verdict *sua sponte* on a legal issue conceded by the Hospital at trial and not raised in its post-trial motions or as an appellate issue. In reversing the jury's verdict, the Court of Appeals disregarded controlling law, TCA §29-26-115 and the appellate material evidence standard of review. By rejecting Plaintiff's expert witness testimony,

which the jury adopted in finding the Hospital liable, and by substituting its judgment for the jury's finding of liability, the Court of Appeals violated Mrs. Barks' constitutional right to a trial by jury and exceeded its role in our system of justice by making public policy for the State of Tennessee, a role reserved for the Legislature.

The Court is requested to grant Plaintiff relief from this miscarriage of justice by applying the controlling law to this case, TCA §29-26-115, and the material evidence standard of review, determining that the verdict against the Hospital is not in any way inconsistent and affirming the jury's verdict in this case. Justice in this case is long overdue for the Barks family. The Court is respectfully urged to affirm the jury verdict and remand this case to the trial court for enforcement of the judgment with the costs being assessed against the Hospital.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Rule 11 Application for Permission to Appeal has been mailed by first class United States mail, postage prepaid, to the following counsel:

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on this the ____ day of December, 2009.

David Randolph Smith

APPENDIX

1. *Bryant v. McCord*, 01A01-9801-CV-00046 (Tenn. Ct. App. January 12, 1999).
2. Tennessee Supreme Court Order granting Plaintiffs a Rule 11 appeal and denying HCA Health Services of Tennessee an appeal from the decision in *Bryant v. McCord, supra*.
3. *Wicks v. Vanderbilt University*, M2006-0613-COA-R3-C1 (Tenn. Ct. App., March 21, 2007).
4. *Gray v. Bernard*, 1992 WL 52697 (Tenn. Ct. App. March 20, 1992).
5. River Park Hospital Policy No. 780-04-605 (Ex. 5C)