

FILED

IN THE SUPREME COURT OF TENNESSEE PM 4:12
AT NASHVILLE

APPELLATE COURT CLERK
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

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

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TABLE OF CONTENTS

	<u>Pages</u>
TABLE OF AUTHORITIES.....	iv
STATEMENT OF JURISDICTION AND STATEMENT OF ISSUES PRESENTED FOR REVIEW.....	1
STATEMENT OF THE CASE.....	2
A. The Trial Court.....	2
B. The Court of Appeals.....	6
STATEMENT OF THE FACTS.....	9
ARGUMENT.....	17
I. THE COURT OF APPEALS ERRED IN <i>SUA SPONTE</i> DECIDING ISSUES NOT RAISED IN THE TRIAL COURT AND NOT PRESERVED FOR AN APPEAL.....	17
A. The Court of Appeals Committed Reversible Error By Deciding Issues Not Raised in the Trial Court and Not Preserved For An Appeal.....	17
B. The Court of Appeals Committed Reversible Error by <i>Sua Sponte</i> Deciding the Duty Owed by the River Park Hospital to Wayne Barkses Without Providing the Parties with a Meaningful Opportunity to be Heard on This Issue.....	20
II. THE COURT OF APPEALS VIOLATED DEBRA BARKES’ CONSTITUTIONAL RIGHT TO A TRIAL BY JURY BY OVERLOOKING ABUNDANT MATERIAL EVIDENCE IN THE RECORD SUPPORTING THE JURY FINDING OF HOSPITAL LIABILITY	24
III. IF THE COURT OF APPEALS PROPERLY ADJUDICATED THE DUTY ISSUE, IT ERRED IN LIMITING A HOSPITAL’S DUTY TO KNOWN CONDITIONS OF A PATIENT.....	28
IV. THE JURY’S VERDICT IS NOT INCONSISTENT.....	38

V. MATERIAL EVIDENCE IN THE RECORD SUPPORTS THE JURY’S FINDING THAT THE HOSPITAL’S NEGLIGENCE PROXIMATELY CAUSED THE DEATH OF WAYNE BARKES.....	47
VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT A NEW TRIAL BECAUSE OF COMMENTS MADE BY COUNSEL DURING CLOSING ARGUMENT.....	49
CONCLUSION.....	55
CERTIFICATE OF SERVICE.....	57
APPENDIX.....	58

TABLE OF AUTHORITIES

Cases

<i>Alexander v. Armentrout</i> , 24 S.W.3d 267 (Tenn. 2000).....	20
<i>Barnes v. Goodyear Tire and Rubber Company</i> , 48 S.W.3d 698 (Tenn. 2000)	24, 27, 48
<i>Blanton v. Moses H. Cone Memorial Hospital, Inc.</i> , 354 S.E.2d 455 (N.C. 1987)	31, 32
<i>Bling v. Thunig</i> , 143 N.E.2d 3 (N.Y. 1957)	30
<i>Boland v. Garber</i> , 257 N.W. 2d 384 (Minn. 1977).....	33
<i>Brown v. Crown Equipment Corporation</i> , 181 S.W.3d 268 (Tenn. 2005).....	27
<i>Bryant v. HCA Health Services of Tennessee</i> , 15 S.W.3d 804 (Tenn. 2000)	7
<i>Bryant v. McCord</i> , No. 01A01-9801-CV-00046, 1999 WL 100085 (Tenn. Ct. App., January 12, 1999).....	32
<i>Burriss v. Hospital Corporation of America</i> , 773 S.W.2d 932 (Tenn. Ct. App. 1989)	29
<i>Clement v. Nichols</i> , 209 S.W.2d 23 (Tenn. 1948).....	18
<i>Crabtree Masonry Co. v. C&R Construction, Inc.</i> , 575 S.W.2d 4 (Tenn. 1978).....	24
<i>Daniels v. Durham County Hospital Corporation</i> , 615 S.E.2d 60 (N.C. Ct. App. 2005).....	45
<i>Denton Regional Medical Center v. La Croix</i> , 947 S.W.2d 941 (Tex. Ct. App. 1997)	33, 41, 42
<i>Estate of Doe v. Vanderbilt University</i> , 824 F.Supp. 746, (M.D. Tenn. 1993).....	29
<i>Evitts v. Lucey</i> , 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985)	22
<i>Finks v. Gillum</i> , 273 S.W.2d 722 (Tenn. Ct. App. 1954)	24
<i>Foley v. Bishop Clarkson Memorial Hospital</i> , 73 N.W.2d 881 (Neb. 1970)	30
<i>Gafner v. Down East Community Hospital</i> , 735 A.2d 969 (Me. 1999)	35, 36
<i>Haley v. University of Tennessee – Knoxville</i> , 188 S.W.3d 518 (Tenn. 2006).....	53

<i>Hodge v. VMC of Puerto Rico, Inc.</i> , 933 F.Supp. 145 (D. P.R. 1996).....	33
<i>Jennison v. Providence St. Vincent Medical Center</i> , 174 Or. App. 219, 25 P.3d 358 (Ore. Ct. App. 201).....	42
<i>Johnson v. St. Bernard’s Hospital</i> , 399 N.E.2d 198 (Ill. App. 1979).....	33, 37
<i>Kelley v. Middle Tennessee Emergency Physicians</i> , 133 S.W.3d 587 (Tenn. 2004).....	18
<i>Larson v. Wasemiller</i> , 738 N.W.2d 300 (Minn. 2007).....	45
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).....	22
<i>Longnecker v. Loyola University Medical Center</i> , 891 N.E.2d 954 (Ill. App. 2008).....	41, 43, 44
<i>March Group Inc. v. Bellar</i> , 908 S.W.2d 956 (Tenn. Ct. App. 1995).....	21
<i>Marress v. Carolina Direct Furniture</i> , 785 S.W.2d 121 (Tenn. Ct. App. 1989).....	49-50
<i>Marshall v. Cintas Corporation, Inc.</i> , 255 S.W.3d 60 (Tenn. Ct. App. 2007).....	47
<i>McCall v. Wilder</i> , 913 S.W.2d 150 (Tenn. 1995).....	30
<i>Moore v. California Minerals Products Corp.</i> , 115 CalApp.2d 834, 252 P.2d 1005 (Cal. 1953).....	23
<i>Morgan v. Duffey</i> , 94 Tenn. 686, 30 S.W.735 (1895).....	50
<i>Morgan v. Tennessee Central Railway Company</i> , 216 S.W.2d 32 (Tenn. Ct. App. 1948).....	24
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306, 705 S.Ct. 652, 94 L.Ed.2d 865 (1950).....	21, 22
<i>O’Quin v. Baptist Memorial Hospital</i> , 201 S.W.2d 694 (Tenn. 1947).....	28
<i>Pedroza v. Bryant</i> , 677 P.2d 166 (Wash. 1984).....	31
<i>Prince v. Coffee County Medical Center</i> , 1996 WL 221863 (Tenn. Ct. App., filed May 3, 1996).....	34, 37
<i>Richards v. Jefferson County, Alabama</i> , 517 U.S. 793, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996).....	21-22

<i>Runnels v. Rogers</i> , 596 S.W.2d 87 (Tenn. 1980).....	52
<i>Scott v. Ashland Health Care Center, Inc.</i> , 49 S.W.3d 281 (Tenn. 2001).....	17, 33, 40, 46
<i>Shilling v. Humphrey</i> , __ N.E.2d __, 2009 WL 2634561 (Ohio Sup., filed August 26, 2009).....	45
<i>Stewart Title Guaranty Company v. The Cadle Company</i> , 74 F.3d 835 (7 th Cir. 1996) ...	21
<i>Street v. Calvert</i> , 541 S.W.2d 576 (Tenn. 1976).....	18
<i>Tamco Supply v. Pollard</i> , 37 S.W.3d 904 (Tenn. Ct. App. 2000).....	18
<i>Thomas v. Transport Inc. Co.</i> , 532 S.W.2d 263 (Tenn. 1976).....	21
<i>Thompson v. Methodist Hospital</i> , 367 S.W.2d 134 (Tenn. 1963).....	28
<i>Ward v. Glover</i> , 206 S.W.3d 17 (Tenn. Ct. App. 2006).....	29, 46
<i>White v. Baptist Memorial Hospital</i> , 363 F.2d 37 (6 th Cir. 1966).....	28
<i>Williams v. St. Claire Medical Center</i> , 657 S.W.2d 590 (Ky. App. 1983).....	33

Statutes and Rules

3 HOSPITAL LAW MANUAL, §2-3, Violation of Hospital Rules and Bylaws, p. 28 (2009).....	37
Rules of Tennessee Department of Health Board for Licensing Health Care Facilities, 1200-8-1.07(5)(d)(3).....	9, 34
Tenn. Constitution, Art. I, §6.....	24
TCA §16-4-108(a)(1).....	18
TCA §20-9-302.....	52
TCA §29-26-102(4) (repealed 1985).....	29
TCA §29-26-115.....	7, 25, 27, 29, 32, 33, 36
TCA §29-16-115(a).....	29
TCA §29-26-117 (formerly TCA §23-3416).....	52, 53

TRAP 3(e).....	49
TRAP 36(a).....	20
US CONST, Amend. V.....	21
US CONST, Amend. XIV §1.....	21

Other

Ability of Patients to Identify Their In-Hospital Physician, ARCHIVES OF INTERNAL MEDICINE, 2009:169(2), pp. 199-201	31
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STATEMENT OF JURISDICTION AND STATEMENT OF
ISSUES PRESENTED FOR REVIEW

The Court granted Debra Barkes' Rule 11 application on August 24, 2009 to present the following issues for resolution:

1. Whether the Court of Appeals erred in *sua sponte* deciding issues not presented to the trial court and not preserved for an appeal, upon which it gave the parties no meaningful opportunity to be heard.
2. Whether the Court of Appeals violated Debra Barkes' constitutional right to a jury trial by disregarding the evidence in the record which supports the jury's verdict and substituting its own judgment on liability for the testimony of Plaintiff's expert witnesses and the jury's determination of liability.
3. Since there is material evidence in the record which supports the finding that the hospital breached the recognized standard of acceptable professional practice for emergency rooms in McMinnville, Tennessee or a similar community on July 26, 2000, which proximately caused the death of Wayne Barkes, whether that jury's verdict should be affirmed.
4. Whether the Court of Appeals' determination that the hospital owed a duty limited to known conditions of a patient is contrary to the provisions of TCA §29-26-115, which requires that a hospital conform to the recognized standard of acceptable practice in its community or a similar community.
5. Whether the jury's finding in this case that the hospital was 100 percent at fault for the death of Wayne Barkes is inconsistent with its finding that Dr. Stone, Nurse Practitioner Kinkade or Dr. Weeks were not at fault.
6. Whether material evidence in this record supports the jury's finding that the hospital's negligent conduct proximately caused the death of Wayne Barkes.
7. Whether the trial court abused its discretion in denying a new trial based upon statements made in closing argument by Plaintiff's counsel.

The first five issues relate to the action taken by the Court of Appeals in erroneously reversing a jury verdict which had been approved by the trial judge sitting as a thirteenth juror. The last two issues were pretermitted by the Court of Appeals. Debra Barkes successfully requested the Court to hear the pretermitted issues because the events that gave rise to this litigation occurred in July, 2000; this case was tried in January, 2006; and the appeal was argued in the Court of Appeals in June, 2007.

STATEMENT OF THE CASE

A. The Trial Court

On July 26, 2001, Debra M. Barkes filed a medical malpractice action for the wrongful death of her husband, Jewell Wayne Barkes, against River Park Hospital Inc., River Park Hospital (TN) and numerous other health care defendants.¹ R. Vol. 1. p. 1-15.

On October 8, 2001, the hospital filed an answer denying liability and asserting that other health care providers, including Mark Weeks M.D., Rosa Stone D.O. and Sherry Kinkade, were comparatively at fault. R. Vol. 1, pp. 41, 46.

On December 27, 2002, Plaintiff voluntarily dismissed the defendants McMinnville Emergency Services, LLC; PhyAmerica Group, Inc.; PhyAmerica Physician Services of Midwest, Inc. and PhyAmerica Physician Service, Inc., from this case because these entities had filed for Chapter 11 Bankruptcy. R. Vol. 1, p. 88.

On July 17, 2003, the trial court granted the motion of Sherry Kinkade, the nurse who treated Wayne Barkes in the Emergency Room on July 26, 2000, to stay this litigation “pending the outcome of coverage issues regarding the bankruptcy of PhyAmerica and the insolvency proceedings against Western Indemnity Insurance, Inc.” R. Vol. 1, pp. 101-102.

On January 27, 2004, Plaintiff voluntarily dismissed a number of the defendant physicians who were placed in the hospital emergency room by PhyAmerica. R. Vol. 1, p. 104.

On February 26, 2004, River Park Hospital filed a Motion for Partial Summary Judgment

¹ The 20 volumes of the Record include the Technical Record, contained in Vol. 1-9, and the Transcript of the Evidence, found in Vol. XI-XX. Vol. X is the transcript of the argument on the post-trial motions. There is one supplemental volume of the Technical Record. Appellant will follow the Clerk’s numbering system, denoting a citation to the Technical Record as “R. Vol. (number), p. (number),” and a citation to the Transcript of the Evidence as “R. Vol. (Roman numeral), p. (number).” Exhibits will be cited as “Exh.,” followed by the appropriate number. The defendants will be referred to as “the hospital.”

on the ground that PhyAmerica's Plan for Reorganization had been confirmed on December 17, 2003, that PhyAmerica's contracts with hospitals generally contain an indemnity clause that indemnifies the hospital for losses resulting from vicarious liability on account of physicians contracted by and placed in the hospital by PhyAmerica and that Debra M. Barkes' claims asserted in the case at bar were subject to the PhyAmerica's Plan for Reorganization. R. Vol. 1, pp. 107-118.² The hospital asserted that the PhyAmerica Plan for Reorganization precluded any claim against a health care provider that could give rise to a claim of indemnification or contribution against PhyAmerica or its affiliates. R. Vol. 1, p. 117. Thus, the hospital argued that all claims for vicarious liability based upon the conduct of PhyAmerica physicians, including Mark Weeks, M.D.; Rosa Stone, D.O.; and the nurse Sherry Kinkade, F.N.P., "must be denied." R. Vol. 1, p. 117. According to the hospital's motion, the only remaining valid claim against the hospital was the vicarious liability claim based on the conduct of its employee, Jeffrey Jolly. R. Vol. 1, p. 117.

On April 12, 2004, Plaintiffs filed a Motion for Permission to File an Amended Complaint which alleged that the hospital was liable under several different theories of corporate negligence, including its failure to ensure compliance with its policies and procedures in its staffing and operation of its emergency room, failure to operate its emergency room in compliance with its own procedures, and violation of hospital policies and procedures in the failure to have Wayne Barkes examined and assessed by an emergency physician. R. Vol. 2, pp. 174-175, 176-177.

² The Motion for Partial Summary Judgment is not in the Record. The citation is to the Memorandum filed in support of that motion. There is no question the motion was filed because it was argued on May 11, 2004 and granted by the Court in an order entered on May 28, 2004. R. Vol. 2, pp. 202-205.

On May 27, 2004, the trial court entered an order which granted the hospital's motion for partial summary judgment and dismissed any claim that "seeks to hold River Park Hospital for the actions or alleged inactions of PhyAmerica, its affiliates, or any health care provider affiliated with PhyAmerica." R. Vol. 2, pp. 202-203. The trial court additionally granted Plaintiff permission to file her Amended Complaint except for one claim concerning advertising. R. Vol. 2, p. 203.

On September 21, 2004, Plaintiff nonsuited Sherry Kinkade, the nurse who examined Wayne Barkes in the hospital Emergency Room, from the lawsuit. R. Vol. 2, p. 234.

On September 25, 2004, Plaintiff voluntarily dismissed Jeffrey Jolly, the hospital employee who triaged Wayne Barkes in the Emergency Room, from this lawsuit. R. Vol. 3, p. 438.

This case was tried before the Honorable Larry Stanley Jr. for six days in January, 2006. During defendants' motion for a directed verdict at the close of proof, the hospital conceded that Plaintiff had a valid legal theory that the hospital was directly negligent for failing to enforce its policies and procedures, but argued that Plaintiff's case failed on the element of causation. R. Vol. XVII, pp. 1212-1213. ("They've got the legal theory. They have argued it very well, but they don't have the evidence to allow the jury to say that the policy more likely than not caused the case to come out one way or the other." R. Vol. XVII, p. 1213). The trial court sustained the hospital's motion for a directed verdict as to the hospital "maintaining a safe environment, negligent hiring or oversight of physicians or other health care providers," but not as to the hospital's failure to enforce its policies and procedures. R. Vol. XVII, p. 1222. The case was submitted to the jury on the claims that the hospital was liable under a theory of direct negligence and under a theory of vicarious liability for the conduct of its employee, Jeffrey Jolly,

and the hospital's comparative fault claims against Dr. Rosa Stone, Nurse Sherry Kinkade, Dr. Mark Weeks and EMT Jeffrey Jolly. R. Vol. 4, pp. 492-493.

On appeal the hospital claims that the jury's verdict was inconsistent because it found the hospital liable for Wayne Barkes' death but assessed no comparative fault against other health care providers on the comparative fault defense raised by the hospital. Even though the hospital had the burden of proof in this defense, the Court should note that the hospital argued to the jury that the other health care providers were not comparatively at fault. R. Vol. XVII, pp. 1387-1390.

After spending part of January 24, all of January 25 and part of January 26, 2006 in deliberations, the jury determined that the hospital was at fault and awarded \$7,206,907.80 in damages. It determined that the hospital employee, Jeffrey Jolly, was not at fault. R. Vol. 4, pp. 492-493. In regard to the comparative fault issues raised by River Park Hospital, the jury determined the hospital was 100 percent at fault. R. Vol. 4, pp. 492-493. It found no fault on the part of Dr. Rosa Stone, nurse practitioner Sherry Kinkade, or Mark Weeks, the co-medical director of the Emergency Department, who was on vacation on the day Plaintiff's decedent, Wayne Barkes, went to the hospital Emergency Department for treatment, was released shortly thereafter and collapsed within two hours of his release.

In its 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 health care to its patients.³ R. Vol. 5, pp. 590-647.

³ Defense counsel could not properly assert that in Tennessee a hospital owed no duty to enforce its policies and procedures because the hospital had conceded that this was a valid legal theory when it argued its motion for a directed verdict at the close of proof. R. Vol. XVII, p. 1213.

On May 12, 2006, the trial court heard the hospital's post-trial motions. R. Vol. X, pp. 1-95. On May 16, 2006, the trial court denied the hospital's Motion for a Judgment Notwithstanding the Verdict, Motion for a New Trial and Suggestion for a Remittitur. R. Vol. 9, pp. 1194-1195. Sitting as a thirteenth juror, the trial court held 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, this Court finds that the weight of the evidence preponderates in favor [of] the Court's finding that the judgment in this case is correct.”

R. Vol. 9, pp. 1194-1195

In regard to its denial of the hospital's request for a remittitur, the trial court held that:

“The Court has also given great consideration to the request for a remittitur by the Defendants – an issue which obviously has no clear line differentiating between a reasonable amount and an unreasonable amount to adequately compensate for the loss in a wrongful death action. The Court has reviewed statutory law and the verdicts in other cases of this type as provided by counsel, along with all the proof in this case dealing with losses brought about by the death of the decedent, including the proof regarding loss of consortium and medical expenses. This Court finds that the jury's award was not so excessive as to indicate that it was formed with sympathy and passion. This Court further finds that the award was not beyond the range of reasonableness for the loss of the life of the decedent. Therefore the Court finds that a suggestion [for a] remittitur is not warranted and their motion to this effect is hereby denied.”

R. Vol. 9, p. 1195

The hospital received a fair trial before an able and conscientious trial judge, who, acting as thirteenth juror, affirmed the jury's verdict in all respects.

The hospital filed a Notice of Appeal on June 8, 2006. R. Vol. 9, p. 1196.

B. The Court of Appeals

The hospital did not raise any issue in the Court of Appeals regarding: (1) any evidentiary ruling made by the trial court concerning expert witness testimony; (2) the trial court's denial of the request for a remittitur and (3) whether Tennessee courts recognized a direct negligence

claim against a hospital for failing to ensure that its policies and procedures were enforced. Hospital Opening Brief, p. iv. In fact, the hospital in its opening brief⁴ filed in the Court of Appeals acknowledged that Tennessee courts have recognized that a hospital has a legal duty to adopt and enforce rules and policies designed to ensure that patients receive quality care, stating that:

“Except for four limited factual scenarios in which a hospital has a recognizable ‘legal duty,’ Tennessee has not recognized a doctrine of corporate negligence that allows direct liability to be established against a hospital. Bryant v. McCord, 1999 WL 10085, *11 (Tenn. App. 1999) vacated by Bryant v. HCA Health Services of Tennessee, Inc., d/b/a/ Centennial Medical Center, 15 S.W.3d 804, 810-811 (Tenn. 2000) (vacating Court of Appeals ruling and affirming Trial Court’s dismissal on duty to obtain informed consent) (a copy is included within the Appendix). The only four legal duties a hospital has are to use reasonable care (1) to maintain their facilities and equipment in a safe condition, (2) to select and retain only competent physicians, (3) to supervise the care given to patients by hospital personnel, and (4) to adopt and enforce rules and policies designed to ensure that patients receive quality care. Bryant, 1999 WL 10085 at 11. During trial, the Trial Court granted a directed verdict to the Hospital on any claims related to the first, second and third of these four legally recognizable duties. The only claim of direct liability against the Hospital that survived the Motion for Directed Verdict was that the Hospital purportedly did not use reasonable care ‘to adopt and enforce rules and policies designed to ensure that patients receive quality care’.”

Hospital Opening Brief, p. 32⁵
(Our Emphasis)

⁴ By quoting from Defendant’s opening brief filed in the Court of Appeals, Plaintiff in no way endorses the views expressed in the quotation. Plaintiff submits that in the case at bar, the hospital’s liability is properly determined by the expert witness proof submitted to the jury pursuant to TCA §29-26-115.

⁵ The hospital incorrectly stated that this Court vacated the *Bryant* opinion. This Court’s opinion in *Bryant v. HCA Health Services of Tennessee*, 15 S.W.3d 804 (Tenn. 2000) did not vacate the ruling of the Court of Appeals in that case. It affirmed the Court of Appeals’ determination that under the circumstances of that case, the hospital owed no duty to obtain Rhonda Bryant’s informed consent, which was the only issue before it. The case was remanded to the trial court for further proceedings on the direct negligence claim against the hospital for failure to supervise and monitor the use of investigational medical devices, a claim that was recognized in the decision by the Court of Appeals.

While also raising issues concerning causation and improper closing argument by Plaintiff's counsel, the principal thrust of the hospital's appeal was that in order for the hospital to be found directly negligent, the jury must find underlying liability on the part of a physician, nurse or other health care⁶ provider in regard to Wayne Barkes' death. Since the jury exonerated Dr. Stone, Nurse Practitioner Kinkade and Dr. Weeks, the hospital contended in the Court of Appeals that the jury's verdict was inconsistent because it found the hospital to be 100 percent at fault. As has been previously noted, in its argument to the jury, the hospital argued that these health care providers were not comparatively at fault. R. Vol. XVIII, pp. 1387-1390.

Without requesting any briefing on the issue, without raising the issue in oral argument and without giving the parties any notice, the Court of Appeals decided this case on an issue that was never presented to the trial court and never preserved for an appeal, holding that "[h]aving determined that Tennessee has not adopted the corporate negligence doctrine, we find no basis upon which River Park Hospital can be held directly liable to the Plaintiff based upon the facts of this case." Opinion, p. 10. Since the Court of Appeals held that there was no claim for direct negligence against the hospital, it determined that Appellant's only viable claim against the hospital was for vicarious liability. Opinion, p. 11. The Court of Appeals determined that the jury's verdict was inconsistent because it found the hospital 100 percent at fault with no finding of fault on the part of the hospital employee, Jeffrey Jolly or any other health care provider. The Court of Appeals opinion is included in the Appendix to this brief.

Debra Barkes filed a Rule 11 Application for Permission to Appeal, which was granted by the Court in an order entered on August 24, 2009.

⁶ The hospital sought a jury charge to this effect, which the trial court properly declined to give. This was the basis for the issue the hospital raised about the jury charge given by the trial court.

STATEMENT OF THE FACTS

The Court of Appeals' statement of facts in this case represents the factual contentions of the hospital, which the jury rejected in this case. An appropriate statement of the facts in this case as mandated by the applicable material evidence standard of review follows.

A. River Park Hospital, Its Certificate of Need and Policies and Procedures

Prior to 1993, Warren Regional Hospital and River Park Hospital were located in McMinnville, Tennessee. On September 22, 1993, River Park Hospital filed a Certificate of Need, No. 9306-041, which sought permission from the Tennessee Health Facilities Commission to consolidate both hospitals into one expanded, modernized hospital with an emergency room, which emerged as River Park Hospital. Exh. 2, CN 9306-041.

From 1996 through 2000, the Tennessee Department of Health, Division of Healthcare facilities, issued a license to River Park Hospital to operate a hospital in McMinnville, Tennessee. Exh. 3.

The rules of the Tennessee Department of Health Board for Licensing Health Care Facilities require a hospital which operates an emergency room to establish policies and procedures governing medical care provided in the hospital emergency room through its medical staff. These policies and procedures are required to "define how the hospital will assess, stabilize, treat and/or transfer patients." Rules of Tennessee Department of Health Board for Licensing Health Care Facilities, 1200-8-1-.07(5)(d)(3).

The chief executive officer of River Park Hospital in 2000, Terry Gunn, testified on direct examination 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 assessed by a

physician. Mr. Gunn further testified on direct examination that the Emergency Department on July 26, 2000 was expected to follow the “new and improved” system and that it was “just a question of paperwork” to remove the outdated 1997 policies from the hospital manual and replace them with the “great process” the hospital had in place in 1999-2000. R. Vol. XV, pp. 708-710.

Exhibit 5C is a hospital policy which states that its purpose is “[t]o indicate JCAHO certification and indicate procedure for treating patients presenting.” JCAHO is the Joint Commission of Accredited Healthcare Organizations, whose certification is required before hospitals can be paid by Medicare or Medicaid. R. Vol. XV, p. 725. Thus the hospital had a policy requiring a physician to examine each patient who presented in its Emergency Room for the purpose of JCAHO accreditation but in this suit presented testimony that it “really was not its policy.” The jury rejected this inconsistent and self-serving position.

On cross-examination, Mr. Gunn testified that the policy admitted into evidence as Exhibit 5C, adopted in March 1994 and requiring that each patient be seen by the appropriate physician, was reviewed in May 2001 by the hospital and left unchanged. R. Vol. XV, pp. 712-713. This meant that Exhibit 5C was, in fact, the policy and procedure of the hospital when Mr. Barkes was treated in the hospital Emergency Department on July 26, 2000 and impeached Mr. Gunn’s prior testimony that this was not hospital policy in July, 2000 and that it “was just a matter of housekeeping” to remove it from the hospital manual and insert “the new improved process.”

On redirect examination, Mr. Gunn changed his testimony yet again to testify that “the ER/ICU committee, the medical executive committee, the board of directors, the board of trustees all understood and approved the ‘new process’ put in place in ‘this ER’ that allowed nurse practitioners to see patients.” R. Vol. XV, p. 726. The Court of Appeals gave credence to

this testimony at page 3 of its opinion by stating “[t]he 1999 policy was approved by the medical staff of the hospital, the ER/ICU Committee (which oversees the care in the emergency room) and the Board of Trustees.” In doing so, the Court of Appeals ignored Mr. Gunn’s later testimony, which established that the “new improved process” had never been approved.

On recross examination, Mr. Gunn testified that he “couldn’t recall” if the medical staff, the committee and the hospital board actually voted on “this new improved process.” R. Vol. XV, p. 727. He then admitted the written policies for the Emergency Department requiring that each patient be seen and assessed by a physician never changed. R. Vol. XV, p. 729. Mr. Gunn testified that what he meant by testifying that all these boards approved the “new improved” process in the Emergency Department was that nurse practitioners were granted privileges to practice in the hospital Emergency Department “under the license of a physician.” R. Vol. XV, p. 729.

The fact that nurse practitioners were allowed to see patients is not a bone of contention in this case. The standard of care proven in this case and accepted by the jury permits a hospital to use nurse practitioners. However, in an Emergency Room, it requires a physician to examine and assess each patient because of a physician’s greater knowledge and diagnostic ability which, in this case, would have, more likely than not, led to Wayne Barks being treated for a cardiac problem on the afternoon of July 26, 2000 and saved his life.

B. The July 26, 2000 Event

Wayne and Debra Barks were the parents of five children, four of whom were living at home on July 26, 2000. R. Vol. XV, pp. 773-774, 783-789. Wayne Barks was a “very devoted father;” “his children were his hobby.” R. Vol. XV, p. 550. He was very active with his children in any school activity in which they were involved. R. Vol. XIII, p. 493. Mr. Barks’ devotion to

his wife and children is reflected by the fact he wrote to them every day when he was overseas serving in Operation Desert Storm. A poem he wrote at that time expressing his love for his children was admitted into evidence as Exhibit 16, R. Vol. XIII, pp. 410-411.

With help from others, Mr. Barkes built his home in the Harrison Mountain community and helped his brother-in-law build a home next door. R. Vol. XIII, pp. 405-407; R. Vol. XV, pp. 539-540. Mr. Barkes was very active in his community, helping to raise funds and build a community center in Harrison Mountain. R. Vol. XV, pp. 543-544. Mr. Barkes was a volunteer fireman who helped garner support and raise money to build a fire hall in the Harrison Mountain community. R. Vol. XV, pp. 543-544. Although the fire hall was completed after Mr. Barkes died, a plaque in that building is dedicated to his memory. R. Vol. XV, pp. 544-545.

Mr. Barkes was employed full time by the Tennessee National Guard as a Sergeant in the 212 Engineer Company in Dunlap, Tennessee. R. Vol. XV, p. 515 and R. Vol. XIII, p. 405. Mr. Barkes had a distinguished military career, serving in Vietnam and in Operation Desert Storm. R. Vol. XV, p. 525. He received a Silver Star, a Bronze Star, a Meritorious Service Ribbon, four Army Commendations and three Army Achievement Medals. R. Vol. XV, pp. 522-525. Mr. Barkes planned to retire from the Tennessee National Guard in October, 2000. R. Vol. XIII, p. 418. On July 26, 2000, he was at home exhausting his accumulated vacation days and sick days before he was to retire several months later. R. Vol. XIII, pp. 418-419.

On the morning of Wednesday, July 26, 2000, Wayne and Debra Barkes were cleaning brush, debris and broken tree limbs from their yard. R. Vol. XIII, pp. 424-425. They were using a chainsaw, an ax and a rake. *Id.* Mr. Barkes was right-handed. *Id.*

After taking a break and resuming work, Wayne Barkes complained that his left arm was hurting and went into the house. R. Vol. XIII, p. 426.

Mrs. Barkes continued to work in the yard until “one o’clock, 1:30,” when she went inside to see why her husband had not returned to the yard work. R. Vol. XIII, p. 427. She found Wayne Barkes soaking his left arm in the sink. R. Vol. XIII, pp. 427-428.

Mrs. Barkes returned to the yard. Later, when she reentered to the house, Wayne Barkes had showered and was sitting in a chair with an ice pack on his arm. R. Vol. XIII, p. 428.

After taking her shower, Mrs. Barkes checked on her husband again. While Mr. Barkes was not normally a complainer, he continued to say his arm was hurting. Vol. XIII, p. 430. She told him that he needed to go to the emergency room because Mrs. Barkes “thought something was broke or somehow injured.” R. Vol. XIII, p. 430. Mr. Barkes was “extremely quiet, which was unusual for him.” R. Vol. XIII, p. 435. Mr. Barkes’ arm was hurting, and he felt sick to his stomach. R. Vol. XIII, p. 431.

After stopping at the nearby home of their pastor’s mother to drop something off as promised, Mrs. Barkes drove her husband to the Emergency Department at River Park Hospital. R. Vol. XIII, pp. 432-435.

They arrived at the Emergency Room at 4 p.m. R. Vol. XIII, p. 437. At 4:18 p.m., Wayne Barkes and Debra Barkes met with Jeffrey Jolly, who “triaged” Wayne Barkes. R. Vol. XIV, p. 211. Mr. Jolly was told that Wayne Barkes’ left arm was hurting from the left elbow to the left wrist and that he was “sick to his stomach.” R. Vol. XIII, p. 438. Mr. Jolly obtained information from Wayne Barkes which indicated that he had a prior history of Graves disease, that he was allergic to codeine, and that he was on Synthroid, a medication to treat his thyroid, and a weight control aid. Exhibit 1, p. 2 and p. 5. The history obtained by Mr. Jolly stated: “PT. HAS BEEN WORKING PHYSICALLY CLEARING LAND, MOVING ROCKS AND USING ROCKS.” Exh. 1, medical records, p. 6. Mr. Barkes had a pulse rate of 100. *Id.*

The triage lasted four minutes. R. Vol. XIV, p. 212. Afterward, Mr. Jolly took Wayne and Debra Barkes to another room where at 4:30 p.m. Nurse Practitioner Kinkade met them. R. Vol. XIII, p. 439-440, R. Vol. XIV, p. 221. Ms. Kinkade asked what the problem was. Wayne Barkes said his left arm was hurting from his elbow to his wrist. R. Vol. XIII, p. 440. Ms. Kinkade asked what he had been doing. Mr. Barkes said he had been working on his honey-do list. R. Vol. XIII, p. 440. After learning Mr. Barkes had been working in his yard, Nurse Practitioner Kinkade looked at his arm and moved the wrist back and forth. She then moved her hand up his arm, remarking on Mr. Barkes' strong arms. R. Vol. XIII, p. 440. She stated that she did not think Mr. Barkes broke his wrist. R. Vol. XIII, p. 441. Nurse Practitioner Kinkade prepared discharge papers, which diagnosed Mr. Barkes as having a "sprain" and prescribed ibuprofen for him. Exh. 1, medical records, p. 9. After preparing the discharge papers and having Wayne Barkes sign them, Nurse Kinkade talked with Dr. Rosa Stone, informing her that she was releasing a 48-year-old male who complained of left forearm pain for one day, that he had been working out in the yard since noon, using an ax, and that the pain was confined to his left forearm. R. Vol. XIV, p. 296-297. Nurse Kinkade told Dr. Stone "it" was a sprain, and she was prescribing ibuprofen. *Id.* Dr. Stone testified that she asked Nurse Kinkade if Wayne Barkes had a prior cardiac history, if he was short of breath, or if he had other pain. *Id.* Each question was answered in the negative. Dr. Rosa Stone signed her name to the chart. Wayne Barkes was released at 4:45 p.m. *Id.* Less than two hours later Mr. Barkes collapsed at home. R. Vol. XIII, p. 443, 446. Debra Barkes made a 911 call at 6:20 p.m. EMS was dispatched and returned Wayne Barkes to River Park Hospital at 7 p.m., where he was pronounced dead. R. Vol. XIV, p. 232. Mr. Barkes died of a myocardial infarction and sudden cardiac death. Exh. 9 (death certificate).

C. Abundant Material Evidence in This Record Supports the Jury Finding of Hospital Liability

There is abundant proof in the record which supports the jury's finding that the hospital was at fault for Wayne Barkes' death. Plaintiff presented expert witness testimony that on July 26, 2000, it was the required standard of acceptable professional practice in McMinnville, Tennessee or similar communities that each patient presenting to an emergency room should be examined by a physician. R. Vol. XVI, pp. 854-855; R. Vol. XV, pp. 628-630; R. Vol. XIII, pp. 334, 349-350, 354.⁷ On July 26, 2000, no physician examined Wayne Barkes, which violated the applicable standard. R. Vol. XIV, p. 291. Additional evidence of the hospital's breach of the applicable standard of care was presented through the hospital's own policies and procedures, which were in full force and effect on July 26, 2000, but were violated that day when Wayne Barkes was not examined by a physician. Exh. 5A-D. The CEO of the hospital, Terry Gunn, was responsible for the "overall administrative operation" of the hospital's Emergency Service. 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. This had been the case since 1999 when the hospital employed a "new improved" process in its Emergency Department. A jury could infer from this that the CEO of the hospital, who was responsible for the "overall administrative operation" of the hospital's Emergency Service, knew its policies were being violated before Wayne Barkes had the misfortune to seek emergency medical care at the hospital Emergency Department on July 26, 2000. Further, the medical care providers working in the hospital

⁷ Even Dr. Rosa Stone testified that the recognized standard of acceptable professional practice for emergency rooms in McMinnville, Tennessee or similar communities was for a physician to examine a patient who was classified as urgent. R. Vol. IV, pp. 309-310. Wayne Barkes was classified as "urgent" when he presented to the emergency room on July 26, 2000. R. Vol. XVI, p. 1028.

emergency room were not informed or otherwise educated as to the hospital policies. R. Vol. XIV, pp. 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).

There is also abundant evidence in the record on causation to support the jury’s finding of fault on the part of the hospital. 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. Indeed, Dr. Rosa Stone’s own testimony supports this conclusion. Dr. Stone testified that when she was informed Wayne Barkes had pain “in the left,” she wanted to exclude a cardiac-related illness. R. Vol. XIV, p. 297. When informed of information concerning Wayne Barkes that was not provided to her on July 26, 2000, and was not obtained by Nurse Practitioner Kinkade, such as that Mr. Barkes was a smoker, was obese, had high cholesterol and had a family history of cardiac problems, Dr. Stone testified that if she had had this information on July 26, 2000, “[w]e have to reevaluate him.” R. Vol. XIV, pp. 297-

299. 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.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN *SUA SPONTE* DECIDING ISSUES NOT RAISED IN THE TRIAL COURT AND NOT PRESERVED FOR AN APPEAL

A. The Court of Appeals Committed Reversible Error By Deciding Issues Not Raised in the Trial Court and Not Preserved For An Appeal

The Court of Appeals reversed the jury verdict which had been approved by the trial judge by determining that the hospital had no duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for patients. Opinion, p. 10 (“Having determined that Tennessee has not adopted the corporate negligence doctrine, we find no basis upon which River Park Hospital can be held directly liable to Plaintiff based upon the facts in this case.”)⁸ Once it found no duty on the hospital upon which it could be held directly liable to Plaintiff, the Court of Appeals reversed the jury verdict because the sole basis for the hospital’s liability was vicarious liability and none of the health care providers who treated Wayne Barkes were found to be at fault. Opinion, p. 16. The Court of Appeals determined “the jury’s verdict was based upon inconsistent and irreconcilable findings...” Opinion, p. 16. The action by the Court of Appeals in raising an issue that was not presented to the trial court or preserved for appeal is harmful error because it deprived Plaintiff of her verdict.

⁸ We demonstrate below that Tennessee statutory law, Tennessee regulatory law and Tennessee case law recognize that the hospital owed a direct duty to Wayne Barkes to promulgate and enforce its policies and procedures to ensure quality health care. *Supra.*, pp. 25-34. Moreover, this is a nondelegable duty. *Scott v. Ashland Health Care Center, Inc.*, 49 S.W.3d 281 (Tenn. 2001).

The law in Tennessee is well settled that an appellate court will not address issues not raised in the trial court.⁹ *Kelley v. Middle Tennessee Emergency Physicians*, 133 S.W.3d 587, 597-598 (Tenn. 2004). “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) “Issues not raised or complained of in the trial court will not be considered on appeal.” *Id.* This rule applies to issues of law. In the leading case of *Street v. Calvert*, 541 S.W.2d 576, 585-586 (Tenn. 1976), the Tennessee Supreme Court refused to address the issue of whether the doctrine of contributory negligence was obsolete and should be replaced by the doctrine of comparative fault because this issue was not raised in the trial court and was raised for the first time on appeal. In *Street*, this Court held that: “We do not deem it appropriate to consider making such a change unless and until a case reaches us wherein the pleadings and proof present an issue of contributory negligence accompanied by advocacy the ends of justice will be furthered by adopting the rule of comparative negligence.” 541 S.W.2d at 586.

The reason for this rule as it applies to the Tennessee Court of Appeals is that “[t]he jurisdiction of the Court of Appeals is appellate only. . .” TCA §16-4-108(a)(1). This limitation on an appellate court’s jurisdiction is also buttressed by the rule that “a party in the Appellate Court will not be permitted or heard to assume a position contrary to and inconsistent with the position [she] took in the Trial Court.” *Clement v. Nichols*, 209 S.W.2d 23, 24 (Tenn. 1948) (holding Court of Appeals had no jurisdiction to amend a complaint to add a defendant to the case.)

⁹ This case does not involve the issue of subject matter jurisdiction, which is the exception to this rule of law and can be raised on appeal even though it was not raised at trial. The reason for this is that if there is no subject matter jurisdiction, the trial court decision is a nullity.

In the trial court the hospital conceded that it had a duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for patients. During a motion for directed verdict at the close of the proof, defense counsel admitted that his client, the hospital, had such a duty but argued the hospital was entitled to a directed verdict on that theory because Plaintiff failed to prove causation. R. Vol. XVII, pp. 1212-1213. (“They’ve got the legal theory. They have argued it very well, but they don’t have the evidence to allow the jury to say that the policy more likely than not caused the case to come out one way or the other.”) The trial court sustained the motion for a directed verdict by the hospital on its duty to maintain a safe environment, negligent hiring or oversight of physicians or other health care providers, but not on the hospital’s duty to enforce rules and policies designed to ensure patients receive quality care. R. Vol. XVII, p. 1222.

In its 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 health care to its patients. R. Vol. 5, pp. 590-647.

Moreover, the hospital in its opening brief filed in the Court of Appeals acknowledged that under Tennessee law a hospital had a duty to adopt and enforce rules and policies designed to ensure patients receive quality care. Hospital Opening Brief, filed in Court of Appeals, at p. 32.

The issue of whether the hospital had a duty to adopt and enforce rules and policies designed to ensure that patients receive quality care was never raised in the trial court and was conceded in the trial court. This case was tried based on the hospital’s concession it had a duty to enforce its rules and policies. As an appellate court, the Court of Appeals committed reversible error by interjecting an issue in this case that had been conceded at trial and not raised

on appeal.¹⁰ *Alexander v. Armentrout*, 24 S.W.3d 267, 271 (Tenn. 2000) (reversing Court of Appeals for misapplying material evidence standard of review and interjecting the issue of estoppel into the appeal which had not been preserved for an appeal).

Under our system of justice, a party cannot concede an issue in the trial court, suffer an adverse jury verdict and then contend on appeal its concession in the trial court was reversible error. TRAP 36(a). This rule applies with even more force to the Tennessee Court of Appeals because its jurisdiction is appellate only; it cannot consider issues not raised in the trial court, and its power by definition is limited to the issues properly before it on appeal. If the Court of Appeals had authority to address any issue it desired without regard to whether it was adjudicated in the trial below, it would become a legislative body that is not subject to the will of the people.

B. The Court of Appeals Committed Reversible Error by *Sua Sponte* Deciding the Duty Owed by the River Park Hospital to Wayne Barkes Without Providing the Parties with a Meaningful Opportunity to be Heard on This Issue

As has been previously noted, the first notice Plaintiff received that the Court of Appeals was ruling on the duty owed by the hospital to Wayne Barkes was when her counsel received the December 29, 2008 opinion. This issue was conceded in the trial court by the hospital. Adjudicating an issue without providing the parties any notice and any meaningful opportunity to be heard violates a citizen's right to fundamental due process and constitutes reversible error.

The few cases in Tennessee that have addressed the unfairness involved in a *sua sponte* ruling by a tribunal have involved trial courts. Tennessee courts have recognized that a trial court should grant summary judgment *sua sponte* to a nonmoving party "only in rare cases and with

¹⁰ In the event the Court should determine that the Court of Appeals properly addressed the duty issue in this appeal, in a later portion of the brief, we will demonstrate that the Court of Appeals' analysis of a hospital's duty is fatally flawed. *Supra.*, at pp. 25-34.

meticulous care.” *March Group Inc. v. Bellar*, 908 S.W.2d 956, 958-959 (Tenn. Ct. App. 1995); see also *Thomas v. Transport Ins. Co.*, 532 S.W.2d 263 (Tenn. 1976). This should be done “only when the party opposing summary judgment has been given notice and a reasonable opportunity to respond to all the issues considered by the court.” *March Group Inc. v. Bellar*, *supra*. The policy considerations which support this rule are that such *sua sponte* action is not in accordance with our traditional adversarial system of justice because it places the trial court in the role of a proponent rather than an independent arbiter, is unfair to litigants and ultimately wastes rather than saves judicial resources. See *Stewart Title Guaranty Company v. The Cadle Company*, 74 F.3d 835, 836-837 (7th Cir. 1996). These policy considerations are even more forceful in an appellate setting because the wronged party does not have an appeal as of right, which raises the distinct probability that the wronged party may never be heard on the issue raised without notice and decided by the appellate court.

The Fifth and Fourteenth Amendments to the United States Constitution guarantee that citizens shall not be deprived by the federal or state governments of life, liberty or property without due process of law. US CONST, Amends. V, XIV §1. It is axiomatic that the right of due process, at a minimum, guarantees citizens the right “to be heard” – that is, a meaningful opportunity to present objections and arguments with regard to governmental actions that may result in a deprivation of their life, liberty or property. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313; 705 S. Ct. 652, 656-657; 94 L.Ed.2d 865 (1950) (“...there can be no doubt that at a minimum they [the words of the Due Process Clause] require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case”) and *Richards v. Jefferson County, Alabama*, 517 U.S. 793,

797, fn 4; 116 S. Ct. 1761, 1765; 135 L.Ed.2d 76 (1996) (“The opportunity to be heard is an essential requisite of due process of law in judicial proceedings.”). Due process requires that, once the state has created a right of appeal, it must offer each party a fair opportunity to obtain an adjudication on the merits of an appeal. *Evitts v. Lucey*, 469 U.S. 387, 401; 105 S. Ct. 830, 839; 83 L.Ed.2d 821 (1985) (holding that once a state acts to grant an appeal as a matter of right, “it must nonetheless act in accord with the dictates of the Constitution – and in particular in accord with the Due Process Clause.”). The United States Supreme Court has recognized that a civil cause of action is the type of property interest which is protected by the Due Process Clause. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-430; 102 S. Ct. 1148, 1154; 71 L.Ed.2d 265 (1982) and *Mullane v. Central Hanover Bank & Trust Co.*, *supra.*, 339 U.S. at 313, 70 S. Ct. 656-657, 94 L.Ed.2d 865.

In the case at bar, the Court of Appeals never gave notice that it was addressing the issue of the duty owed by the hospital to Mr. Barkes in this case at any time before it issued its opinion and never presented the parties with an opportunity to brief that issue. Since the duty issue had been conceded in the trial court and not preserved for an appeal, this lack of notice and an opportunity to be heard was extraordinarily harmful. In short, Debra Barkes had no meaningful opportunity to be heard on an issue conceded in the trial court which the Court of Appeals deemed was determinative in her case.

The hospital argues that Plaintiff could have been heard on the duty issue by filing a Petition for Rehearing. Plaintiff submits that this is not a reasonable opportunity to be heard on an issue that was conceded in the trial court and had never been raised in the case until the appellate court addressed it without any notice to the parties because this so-called “opportunity

to be heard” occurred after the appellate court has decided the issue. As the Supreme Court of California noted in an analogous situation:

“Not only was it error to order judgment on the pleadings but the manner in which it was done deprived defendant of due process, namely, a right to be heard. The law favors the trial of causes on the merits. It hears before it condemns, and even though a litigant be present, to deny him the right to speak is no better than to judge him in absentia. When the court summarily disposed of the case, defense counsel was given no opportunity to defend his pleading nor even a chance to request the privilege of amending, if that appeared to be desirable. It is true that he could have asked the court to recall its decision and listen to argument, but this opportunity, as every lawyer knows, is a poor substitute for the right to be heard before the decision is announced.”

Moore v. California Minerals Products Corp., 115 Cal.App.2d 834, 252 P.2d 1005, 1007 (Cal. 1953)

Petitioning the Tennessee Court of Appeals to rehear this case after it issued its opinion on December 29, 2008 would have been an exercise in futility given the fact that in its opinion the Court of Appeals addressed an issue conceded in the trial court, misapplied the material evidence standard of review in this case and violated Ms. Debra Barkes’ right to a trial by jury.

Plaintiff acknowledges that since this Court did grant her permission to appeal from the December 29, 2008 opinion rendered by the Tennessee Court of Appeals, this Court’s action in providing Debra Barkes with a meaningful opportunity to be heard on the issue raised *sua sponte* by the Court of Appeals which resulted in the loss of her jury verdict may moot the due process issue. However, Debra Barkes and her counsel are greatly concerned that a Tennessee appellate court would raise an issue conceded in the trial court and decide a case based upon its resolution of that issue without providing the parties with any notice or a meaningful opportunity to be heard.

II. THE COURT OF APPEALS VIOLATED DEBRA BARKES' CONSTITUTIONAL RIGHT TO A TRIAL BY JURY BY OVERLOOKING ABUNDANT MATERIAL EVIDENCE IN THE RECORD SUPPORTING THE JURY FINDING OF HOSPITAL LIABILITY

The Court of Appeals substituted its own judgment for the testimony of Plaintiff's expert witnesses and the judgment of the jury. Opinion, p. 10. This action by the Court of Appeals was reversible error because it violated Debra Barkes' right to trial by jury.

Art. I, §6 of the Tennessee Constitution provides, in pertinent part, that "the right of trial by jury shall remain inviolate. ..." Debra Barkes has the constitutional right "to have all issues of fact decided by a jury if the evidence was in conflict on the issues." *Morgan v. Tennessee Central Railway Company*, 216 S.W.2d 32,37 (Tenn. Ct. App. 1948). The Tennessee Court of Appeals "has no constitutional right to disturb a judgment of the trial court, on the question of liability, when that judgment is based upon a jury verdict and the verdict is supported by material evidence." *Finks v. Gillum*, 273 S.W.2d 722, 727 (Tenn. Ct. App. 1954). In reviewing jury verdicts, "[a]ppellate courts shall neither reweigh the evidence nor decide where the preponderance of the evidence lies. If the record contains 'any material evidence to support the verdict, [the jury's finding] must be affirmed; if it were otherwise, the parties would be deprived of their constitutional right to a trial by jury.'" *Barnes v. Goodyear Tire and Rubber Company*, 48 S.W.3d 698, 704-705 (Tenn. 2000) *citing with approval Crabtree Masonry Co. v. C&R Construction, Inc.*, 575 S.W.2d 4, 5 (Tenn. 1978).

This case was a battle of the experts which the jury resolved by accepting the testimony presented by Plaintiff's expert witnesses and rejecting the testimony of the hospital's expert witnesses.

In compliance with TCA §29-26-115, the Plaintiff introduced into evidence the testimony of several expert witnesses: (1) Morton Kern, M.D., a cardiologist, who testified that the recognized standard of acceptable professional practice for emergency medicine for McMinnville, Tennessee or a similar community on July 26, 2000 required that Wayne Barkes be examined by a physician; R. Vol. XVI, p. 854-855; (2) Dr. Roy Keys, an emergency physician, who testified that at the relevant time the recognized standard of acceptable professional practice when a patient presented to an emergency room in Ashland, Kentucky, which is a similar community to McMinnville, Tennessee, is that a patient be seen by a physician; R. Vol. XV, pp. 628-630; and (3) Alan L. Markowitz, a hospital administrator, who testified that based on his knowledge of hospitals in similar communities, legal requirements and the hospital policies and procedures, the recognized standard of acceptable professional practice for emergency room medicine in McMinnville, Tennessee or a similar community on July 26, 2000, required that Mr. Barkes be examined by a physician; R. Vol. XIII, pp. 334, 349-350, 354. This proof was supplemented by the testimony of the hospital's corporate representative, Jeffrey Jolly, who admitted that the standard of care in McMinnville or similar communities in 2000 was for the hospital to follow its own written policies. R. Vol. XIV, pp. 190-191, 196.

The hospital presented expert witness testimony that the recognized standard of acceptable practice for emergency rooms in McMinnville, Tennessee or similar communities did not require that a physician examine Wayne Barkes on July 26, 2000. See R. Vol. XVI, pp. 907, 1916 (testimony of Dr. Kevin Bonner, emergency room physician); R. Vol. XVI, p. 1091 (testimony of Kevin Spivey, registered nurse) and R. Vol. XVII, p. 1182 (testimony of Jennifer Ezell, nurse practitioner).

In its opinion, the Court of Appeals paid lip service to the material evidence standard of review by merely reciting it, but it never applied the applicable standard of review to the facts in this case. Instead, it dismissed all of the expert witness testimony in the record that supported the jury verdict and exonerated the hospital, stating that:

“In the case at bar, Plaintiff sought to hold several health care providers and River Park Hospital liable for medical malpractice because Mr. Barkes was seen by a nurse practitioner without being seen by a physician. This argument suggests that the hospital breached a standard of care by allowing Mr. Barkes to be examined, treated and discharged by a nurse practitioner without requiring that he be ‘seen’ by a physician. To appreciate the fallacy of this argument, to the extent that it suggests a standard of care was violated because a physician did not ‘see’ Mr. Barkes, requires an appreciation of three facts. One, hospitals may not control the ‘means and methods by which physicians render medical care and treatment to hospital patients.’ *Thomas v. Oldfield*, No. M2007-01693, 2008 WL 2278512, at * (Tenn. Ct. App. June 2, 2008) (citing Tenn. Code Ann. §§63-6-204(f)(1)(A) and 68-11-205(b)(1)(A)). Two, Nurse Practitioner Kinkade and the Emergency Room physician with which she consulted, Dr. Stone, were not employees of River Park Hospital; instead they were employees of PhyAmerica Physicians, Inc. Moreover, Tennessee Code Annotated sections 63-6-204(f)(1) and 68-11-205(b)(6) preclude hospitals from employing emergency physicians such as Dr. Stone. Three, like other nurse practitioners in Tennessee, Nurse Practitioner Kinkade was authorized to render health care services without being under the omnipresent supervision or direction of a physician.”

Opinion at p. 13.
(our emphasis)

The Court of Appeals employed the term “argument” when in fact this was the testimony of Plaintiff’s expert witnesses, which the jury deemed to be credible and adopted. No issue on appeal was presented concerning the admissibility of Plaintiff’s expert witness proof. Plaintiff’s expert witness proof, which established the recognized standard of acceptable professional practice, which governed the issue of liability, was accepted by the jury. Yet the Court of Appeals rejected that testimony and the jury’s finding as “fallacious.” In doing so, the Court of Appeals substituted its own opinion on the recognized standard of acceptable professional practice for hospitals in McMinnville, Tennessee or a similar community in July, 2000. This

violated Debra Barkes' constitutional right to a jury trial because Mrs. Barkes had the right to have contested factual issues decided by a jury, not by the Tennessee Court of Appeals.

This case was tried under TCA §29-26-115 of the Tennessee Medical Malpractice Act in which the jury was presented with starkly contrasting and contradictory expert witness testimony on whether the recognized standard of acceptable professional practice for hospital emergency rooms in McMinnville, Tennessee or a similar community on July 26, 2000 required that the hospital provide a physician to examine Wayne Barkes.

Under Tennessee law, “[t]he weight of the theories and the resolution of legitimate but competing expert opinions are matters entrusted to the trier of fact.” *Brown v. Crown Equipment Corporation*, 181 S.W.3d 268, 275 (Tenn. 2005). By finding the hospital at fault, the jury in this case rejected the testimony of the hospital’s expert witnesses and accepted the testimony of Plaintiff’s expert witnesses. R. Vol. 4, pp. 492-493. The trial court, sitting as a thirteenth juror, approved the jury’s verdict after duly considering and weighing all the evidence. R. Vol. 9. pp. 1194-1195. Under the applicable standard of review, the Court of Appeals was 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).

In short, the Court of Appeals was required to affirm the jury’s verdict in this case¹¹ because the record contained material evidence: (1) on the applicable recognized standard of acceptable professional practice for an emergency room in McMinnville, Tennessee or a similar

¹¹ Unless it determined that the trial court committed an error of law, which Appellant will demonstrate the trial court did not do.

community on July 26, 2000, (2) that the hospital breached that standard and (3) that such breach proximately caused Mr. Barkes' death, which would not have otherwise occurred, R. Vol. XV, pp. 628-630, 642-644, 649-650 (testimony of Dr. Keys), R. Vol. XVI, pp. 827, 833, 854-855 (testimony of Dr. Morton Kern) and R. Vol. XIII, pp. 334, 349-350, 354 (testimony of Alan Markowitz). Additionally, the record establishes that the hospital knew in July, 2000 a patient presenting to the hospital Emergency Room would not be examined and assessed personally by a physician and that its policies and procedures were not being followed. R. Vol. XV, p. 724.

III. IF THE COURT OF APPEALS PROPERLY ADJUDICATED THE DUTY ISSUE, IT ERRED IN LIMITING A HOSPITAL'S DUTY TO KNOWN CONDITIONS OF A PATIENT

If the Court determines that the Court of Appeals properly adjudicated the issue of a hospital's duty owed to a patient, the Court of Appeals erroneously limited a hospital's duty to exercise reasonable care toward a patient as the patient's known condition may require and the extent and character depends upon the circumstances of each case. Opinion, p. 7, citing *O'Quin v. Baptist Memorial Hospital*, 201 S.W.2d 694 (Tenn. 1947). This holding by the Court of Appeals is harmful error because it contradicts clear and established Tennessee law.

Before the Tennessee Medical Malpractice Act was passed, Tennessee decisions were split as to the standard of care owed by a hospital to its patients. *White v. Baptist Memorial Hospital*, 363 F.2d 37 (6th Cir. 1966) (analyzing Tennessee cases and noting different standards). One group of cases, the *O'Quin* decision and its progeny, limited the standard of care to known conditions, while a later Tennessee Supreme Court decision, *Thompson v. Methodist Hospital*, 367 S.W.2d 134, 138 (Tenn. 1963) held that "[t]he measure of duty of a hospital is to exercise that degree of care, skill and diligence used by hospitals generally in that community and required by the express or implied contract of the undertaking."

This split in was resolved by the promulgation of the Medical Malpractice Review Board and Claims Act of 1975. While Sections 29-26-101 through 29-26-114 of this legislation were repealed in 1985, including the definitions section, courts have held that “the repealed sections must be looked to for definitions and understanding of those unrepealed sections.” *Estate of Doe v. Vanderbilt University*, 824 F.Supp. 746, 748 (M.D. Tenn. 1993); see *Burriss v. Hospital Corporation of America*, 773 S.W.2d 932 (Tenn. Ct. App. 1989).

Under the Act a “health care provider” is defined as “including but not limited to physicians (including osteopaths), dentists, ... hospitals, nursing homes and extended care facilities.” TCA §29-26-102(4) (repealed 1985). Further, that legislation defines a “medical malpractice action” as:

“an action for damages for personal injury or death as a result of any medical malpractice by a health care provider, whether based upon tort or contract law. The term shall not include any action for damages as a result of negligence of a health care provider when medical care by such provider is not involved in such acts.”

In *Ward v. Glover*, 206 S.W.3d 17, 26-27 (Tenn. Ct. App. 2006), the Court of Appeals held that a claim that hospital policies were not enforced involved conduct which “constitutes a substantial relationship to the rendition of medical treatment by a medical professional” and, as such, is governed by TCA §29-26-115.

Since the case at bar involves a claim that the hospital failed to enforce its medical rules and policies, and the hospital falls within the definition of a “health care provider,” the liability of the hospital in this case is governed by TCA §29-26-115(a), which provides that:

**29-26-115. Claimant’s burden in malpractice action – Expert testimony –
Presumption of negligence – Jury instructions. –**

(a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided by subsection (b):

(1) The recognized standard of acceptable professional practice in the

profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time of the alleged injury or wrongful action occurred;

(2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and

(3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

In sum, the hospital owed Wayne Barkes a statutory duty to comply with the recognized standard of acceptable professional practice for emergency rooms in McMinnville, Tennessee or a similar community on July 26, 2000. This was no surprise to either party in this case because this case was tried in the trial court on this basis. Unfortunately, the Court of Appeals in its December 29, 2008 opinion completely ignored this statutory duty owed by the hospital to Mr. Barkes.

Furthermore, the truncated duty adopted by the Court of Appeals which limits a hospital's liability to known conditions eliminates the concept of foreseeability. *See Foley v. Bishop Clarkson Memorial Hospital*, 173 N.W.2d 881, 884-885 (Neb. 1970). This ruling is directly contrary to the prior decisions of this Court which employ the concept of foreseeability in a common law duty analysis. *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995). ("A risk is unreasonable and gives rise to a duty to act with due care if the foreseeable probability and gravity of harm posed by defendant's conduct outweigh the burden upon defendant to engage in an alternative conduct that would have prevented the harm.")

Plaintiff submits that the opinion rendered by the Court of Appeals in this case attempts to return the law governing a hospital's duty owed to a patient to the state in which it existed in 1947. This law has substantially changed since the *O'Quin* case was decided. This change in the law reflects a hospital's central role in providing health care to patients. Beginning with *Bing v. Thunig*, 143 N.E.2d 3 (N.Y. 1957), courts have recognized that the days when hospitals were

charitable institutions which merely provided space for physicians to perform operations are long gone. As the *Bing* court noted:

“...Present day hospitals, as their manner of operation plainly demonstrates, do far more than furnish facilities for treatment. They regularly employ on a salary basis a large staff of physicians, nurses and interns, as well as administrative and manual workers, and they charge patients for medical care and treatment, collecting for such services, if necessary, by legal action. Certainly, the person who avails himself of ‘hospital facilities’ expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility.”

143 N.E.2d at 8

Since the *Bing* case was decided in 1957, the role of the hospital in the health care system has become paramount. People look to a hospital as the provider for their health care. This is demonstrated by a research study published on January 26, 2009 in the Archives of Internal Medicine in which 2,807 adults admitted to the University of Chicago Hospital over a 15-month period were questioned about the roles of various physicians attending to them. Seventy-five percent of the patients were unable to identify a single doctor assigned to their care. Ability of Patients to Identify Their In-Hospital Physician, ARCHIVES OF INTERNAL MEDICINE, 2009; 169(2), pp. 199-201. As the Supreme Court of Washington noted, the public perceives “the modern hospital as a multifaceted health care facility responsible for the health care and treatment rendered. The community hospital has evolved into a corporate institution, assuming ‘the role of a comprehensive health center ultimately responsible for arranging and coordinating total healthcare.’ ” *Pedroza v. Bryant*, 677 P.2d 166, 169 (Wash. 1984).

In *Blanton v. Moses H. Cone Memorial Hospital, Inc.*, 354 S.E.2d 455, 457 (N.C. 1987), when presented with the issue of whether it should recognize the doctrine of corporate negligence regarding a hospital’s liability to its patients, the Supreme Court of North Carolina noted that such a doctrine is simply an application of common law negligence principles. In

recognizing that a hospital had a duty to enforce its own policies, the North Carolina Supreme Court noted prior North Carolina decisions which recognized that hospitals owed an independent duty of care to a patient. 354 S.E.2d at 457-458. The *Blanton* court recognized that the hospital owed its patients a duty to enforce the standards of the Joint Commission on the Accreditation of Hospitals and to exercise due care in granting clinical privileges to a physician. *Id.*

The Court of Appeals determined that its decision in *Bryant v. McCord*, No. 01A01-9801-CV-00046, 1999 WL 100085 (Tenn. Ct. App. January 12, 1999), “has no precedential value.” Opinion at p. 6. While we respectfully disagree with the Court of Appeals on this point, the simple fact is that the Court of Appeals in *Bryant v. McCord* merely recognized that it was unnecessary for it to adopt the doctrine of corporate negligence because “it was already the law in this state that hospitals have a duty to use reasonable care to maintain their facilities and equipment in a safe condition, to select and retain only competent physicians, to supervise the care given to patients by hospital personnel and to adopt and enforce rules and policies designed to ensure that patients receive quality care.” *Supra.* at 11. (Copy of case included in Appendix to this brief. The authorities relied upon by the *Bryant* court in so holding are well recognized Tennessee case law.

This Court does not need to determine if the doctrine of corporate liability should be adopted in Tennessee. Tennessee law already recognizes the duties upon which the hospital’s liability is predicated in this case.

As has been previously noted, this case was tried pursuant to TCA §29-26-115. This statute 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. The Plaintiff’s evidence of the hospital’s violation of its

own policies was not conclusive evidence of the standard of care. It was introduced as evidence that the hospital violated the recognized standard of acceptable professional practice. Courts recognize that while internal policies cannot be conclusive of the standard of care, breach of such policies is relevant evidence of negligence because such policies demonstrate that the hospital foresaw the risk of harm and had the ability to avoid the harm. *Johnson v. St. Bernard's Hospital*, 399 N.E.2d 198, 205 (Ill. App. 1979); *Williams v. St. Claire Medical Center*, 657 S.W.2d 590, 594-595 (Ky. App. 1983); *Boland v. Garber*, 257 N.W.2d 384, 386 (Minn. 1977); *Denton Regional Medical Center v. La Croix*, 947 S.W.2d 941 (Ct. App. Texas 1997); and *Hodge v. VMC of Puerto Rico, Inc.*, 933 F.Supp. 145, 148-149 (D. P.R. 1996) (“Courts in the United States have almost universally held that hospital rules, regulations and policies alone do not establish the standard of medical care in the medical community but may be used as evidence of that standard of care,” citing cases.) In this case Plaintiff provided competent expert witness evidence which complied with the requirements of TCA §29-26-115 which the jury accepted in finding liability on the part of the hospital. *Infra.*, pp. 12-13.

In addition to the duty created by TCA §29-26-115, hospitals in Tennessee are obligated to promulgate policies and procedures to promote quality health care. In *Scott v. Ashland Health Care Center, Inc.*, 49 S.W.3d 281 (Tenn. 2001), the Tennessee Supreme Court recognized that the holders of a certificate of need and a license to operate a health care facility, such as the defendants in this case, have a nondelegable duty to operate their facility. The certificate of need and license issued to the defendants are contained in the record as Exhibits 2 and 3. The *Scott* court noted that the purpose of Tennessee’s certification and licensing statutes and rules that apply to health care facilities is “for ensuring adequate, orderly and economical health care for the citizens of Tennessee.” *Scott, supra.*, 49 S.W.3d at 286. The Rules of the Tennessee

Department of Health Board for Licensing Health Care Facilities require a hospital which operates an emergency room to establish policies and procedures governing medical care provided in the hospital emergency room through its medical staff. These policies and procedures are required to “define how the hospital will assess, stabilize, treat and/or transfer patients.” Rules of Tennessee Department of Health Board for Licensing Health Care Facilities, 1200-8-1-.07(5)(d)(3). Accordingly, the Tennessee Legislature has declared the public policy of Tennessee to require hospitals to promulgate and enforce policies and procedures governing how the hospital will assess, stabilize, treat and transfer patients in an Emergency Room. Based upon this legislative and administrative background, hospitals in Tennessee have a duty to enforce their policies and procedures which define how a hospital will assess, stabilize, treat and/or transfer patients in an Emergency Room.

Tennessee courts have also recognized that a hospital has a duty to promulgate and enforce rules and policies to ensure quality care for patients. In *Prince v. Coffee County Medical Center*, 1996 WL 221863 (Tn. Ct. App. filed May 3, 1996) (copy in Appendix to this brief), the Tennessee Court of Appeals reversed a summary judgment granted to the hospital, finding that there was a disputed issue of fact as to whether the hospital was negligent in failing to implement proper anesthetic standards and procedures. In *Prince*, the plaintiff underwent an operation at the hospital during which a certified nurse anesthetist (CRNA) administered a regional anesthetic. As a result of injuries sustained because of the CRNA’s actions, Plaintiff was taken by ambulance to St. Thomas Hospital in Nashville, underwent surgery and endured numerous skin grafts. She sustained a compartment syndrome and peripheral nerve injury and incurred \$140,000 in medical bills. In reversing summary judgment, the court noted that Plaintiff had opposed the summary judgment with expert witness testimony which included the opinion of a

professional hospital administrator that the hospital was negligent in failing to establish rules and regulations for anesthesia services and surgeon supervision of CRNAs. In sum, for years from three different sources, Tennessee law has recognized that in Tennessee a hospital can be held liable for a failure to promulgate or enforce policies and procedures designed to promote good health care.

Rather than recognizing the application of TCA §29-26-115 in this case, other Tennessee law defining a hospital's duty owed to a patient in an emergency room, the fact that evidence of the hospital's policies merely evidenced the standard of care as established by expert witness testimony, and the fact that the breach of such policies evidenced that the hospital was negligent, the Court of Appeals relied on a decision by the Maine Supreme Court, *Gafner v. Down East Community Hospital*, 735 A.2d 969 (Me. 1999), which interpreted Maine common law to reverse the jury's verdict in this case.

In *Gafner* the Maine Supreme Court declined to recognize a claim against a hospital for failing to have in place at the time of plaintiff's birth a written policy requiring mandatory consultation with a specialist in high-risk births. 735 A.2d at 976. The *Gafner* court noted that the Maine legislature had not placed such a duty on hospitals and that plaintiffs were requesting that court "to recognize a duty on the part of hospitals to adopt rules and policies controlling actions of independent physicians practicing within its walls." 735 A.2d 976. The Maine Supreme Court refused to recognize a duty because the legislature has not chosen to place upon hospitals a specific duty to regulate the medical decisions of physicians practicing within the facility.

For a number of reasons, the Court of Appeals' reliance on the *Gafner* decision is misplaced. First, it has no application in Tennessee because it interpreted Maine common law.

In the case at bar, the hospital's liability was governed by the Tennessee Medical Malpractice Act, specifically TCA §29-26-115. The jury in this case determined that the hospital had violated its statutory duty owed to Wayne Barkes which resulted in his death which would not have otherwise occurred. There is material evidence in this record which supports the jury's verdict in this case. Neither the Tennessee Court of Appeals nor the Maine Supreme Court can declare Tennessee public policy. This is the role of the Tennessee Legislature. The Tennessee Court of Appeals has no authority to create a judicial exception to the application of TCA §29-26-115 merely because it disagrees with the testimony of Plaintiff's expert witnesses which the jury adopted in finding the hospital liable in this case.

Second, the *Gafner* decision interprets Maine law, which is very different from Tennessee law. Unlike Maine, in Tennessee hospitals are legally obligated to promulgate and enforce policies and procedures governing how the hospital will assess, stabilize, treat and transfer patients in an Emergency Room. *Infra.*, at pp. 29-30.

Third, the Plaintiff's claim in this case is not that the defendant should have promulgated some policy it never considered or enacted, which is the claim asserted in *Gafner*. Plaintiff's claim is that the hospital breached the recognized standard of acceptable professional practice for emergency rooms in McMinnville, Tennessee, or a similar community by failing to have a physician examine Wayne Barkes when he presented to its Emergency Room on July 26, 2000. Its failure to enforce an existing hospital policy, which required that this be done, is evidence of the standard of care and of the hospital's negligence. This claim is entirely consistent with the Tennessee Medical Malpractice Act and, specifically, TCA §29-26-115. The significance of the hospital having adopted and placed into effect a policy is explained by a leading treatise as follows:

“A hospital’s internal rules, as contained in protocols, policies, procedures, manuals, and bylaws, also can be used as evidence of the standard of care required in the circumstances of a particular case. [footnote omitted] Although an individual hospital’s rules and regulations do not alone establish the standard of care the facility owes a patient, failure to follow such rules can be evidence of negligence [footnote omitted]; a facility’s noncompliance with its own guidelines is often very damaging in the eyes of a judge or jury.

“When the hospital’s own rules exceed what is required by the standard of care, the hospital has effectively elevated the standard of care. Where hospital policy adopts accreditation standards, for example, the hospital may be held liable for deviations from those standards, even if participation is voluntary.”

3 HOSPITAL LAW MANUAL, §2-3,
Violation of Hospital Rules and Bylaws, p. 28 (2009)

In other words, once the hospital enacted a policy which required each patient that presented to its Emergency Service to be assessed by a physician, its failure to enforce that policy is evidence of its own negligence.

Fourth, the *Gafner* decision is inconsistent with Tennessee case law, specifically *Prince v. Coffee County Medical Center, supra.*, which recognized that a hospital has a duty to promulgate rules and policies to ensure quality care for patients.

Fifth, the imposition of liability in this case does not involve the hospital in the practice of medicine. In *Johnson v. St. Bernard Hospital*, 399 N.E.2d 198, 205 (Ill. App. 1979), plaintiff sued the hospital alleging his medical injury was caused by its negligence in failing to enforce its policies. The court noted that “[i]t requires not medical expertise, but administrative expertise 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 have agreed to operate.” 399 N.E.2d at 205. The hospital’s argument that “it cannot practice medicine” has no application in this case.

In summary, the Court of Appeals erroneously truncated a hospital's duty owed to its patients by relying on a 1947 decision rendered by the Tennessee Supreme Court which was overruled by the promulgation of the Tennessee Medical Malpractice Act. The truncated duty recognized by the Court of Appeals owed by a hospital to its patients contradicts Tennessee statutory law, Tennessee case law, and Tennessee regulatory law. Accordingly, Plaintiff submits that the opinion rendered by the Court of Appeals should be reversed.

IV. THE JURY'S VERDICT IS NOT INCONSISTENT

The issue that the hospital raised in its appeal to the Court of Appeals was whether the verdict is inconsistent because the jury did not find a health care provider who treated Mr. Barkes on July 26, 2000 liable for medical malpractice while finding the hospital 100 percent at fault under a theory of direct liability. The Court of Appeals never addressed this issue because it determined Plaintiff had no claim against the hospital for direct or institutional negligence. The Court of Appeals concluded that the Plaintiff's claim against the hospital was for vicarious liability, which by definition requires a finding of liability on the part of a servant.

Prior to demonstrating that the jury's verdict in this case is consistent, Plaintiff wishes to highlight the fact that the hospital asserted comparative fault claims against Dr. Mark Weeks, Dr. Rosa Stone and Nurse Kinkade. R. Vol. 1, pp. 41,46. Of course, the hospital had the burden of proof in establishing the comparative fault of these individuals since comparative fault is an affirmative defense. Plaintiff dismissed all of these individuals from the case prior to trial. R. Vol. 1, p. 104; R. Vol. 2, p. 234; R. Vol. 2, p. 438. Accordingly, it was contrary to Plaintiff's interests to argue there was any fault on the part of Dr. Weeks, Dr. Stone or Nurse Kinkade because a jury finding of fault on the part of these individuals would have reduced her recovery. It was in the hospital's interest to argue comparative fault on the part of these individuals

because a jury finding of fault would have reduced the hospital's liability. However, in closing argument to the jury, defense counsel argued there was no comparative fault on the part of these individuals. Defense counsel's argument follows:

"...That's why we've included Dr. Weeks, who is not a paid witness, Mr. Jolly and Ms. Kinkade. They actually know what the process was. They know that it was appropriate to use EMT paramedics in the setting.

"Appropriate and timely triage by Mr. Jolly? Yes. Then Ms. Kinkade's history, examination and treatment, appropriate to use nurse practitioners in Emergency Departments? You know who these people are. You've heard their background, their training, their experience. I'm not going to belabor that point with you. It was only yesterday or even this morning. When you consider their expertise, their knowledge, their understanding of how things are done in similar communities, compare that to the people we talked about earlier in this presentation as to what they actually knew, what they actually did, and most of all, what they didn't know and what they didn't do.

"Was this an appropriate use of nurse practitioners, the system in place in July 2000? Yes. It was an appropriate history, examination, and treatment by Ms. Kinkade. Same thing for, (sic) Is it an appropriate diagnosis, interaction with Dr. Stone, discharge instructions? Yes.

"When you pull these various things together, you see that this is not a cardiac presentation.

"Seen and treated by the appropriate health care professionals? Triage and then treated appropriately? And then the diagnosis of the left forearm strain was appropriate under these circumstances. ..."

R. Vol. XVIII, p. 1387, line 5 to p. 1388, line 16

...

"...We chose appropriate, competent, and experienced professionals to work in the Emergency Department. We chose a process, to use a process, with the help of Dr. Weeks and the physicians who actually worked in the Emergency Department that provided quality care to more patients in less time; and to use a process that far exceeded, as I said earlier, the state's requirements regarding review and supervision of nurse practitioners' care. ..."

R. Vol. XVIII, p. 1388, line 24 to p. 1389, line 9

...

“... Were Mr. Barkes’ condition and complaints consistent with a cardiac problem? No. Was the care provided during the visit reasonable and acceptable? Yes. Was his death caused by the actions or claimed inactions of these people? No.

“So here we get back to the verdict form. As you will see, the very first question on the verdict form that you will receive from Judge Stanley after he does his charge...”

R. Vol. XVIII, p. 1389, line 20 to p. 1390, line 5

...

“...Do you find River Park Hospital to be at fault? Should be no. Sorry. I’ve read too many of these forms in my mind.

“If you answer no, sign the verdict form and return to the courtroom. If you answered yes, then you proceed to the other questions. I put to you that your answer should be simply and unequivocally no. ...”

R. Vol. XVIII, p. 1390, lines 14-22

Plaintiff submits that defense counsel injected the comparative fault issue into this case with no intent to establish such an affirmative defense. Instead, defense counsel argued to the jury there was no comparative fault in a cynical attempt to manipulate the court system. By arguing that there was no comparative fault, defense counsel hoped to provide his client with a means to have an adverse verdict finding the hospital 100 percent at fault reversed on appeal. This Court should not countenance such cynical gamesmanship in our judicial system.

Defense counsel’s manipulation of our judicial system will not save the hospital from the consequences of its negligent conduct. A hospital’s duty to provide quality health care, which involves enforcing its policies and procedures, is a nondelegable duty. *Scott v. Ashland Healthcare Center, Inc.*, 49 S.W.3d 281 (Tenn. 2001). Courts that have been presented with the issue of whether a jury verdict is inconsistent and a nullity because a hospital was found to be at fault under a theory of direct or institutional negligence while the treating physicians and nurses were exonerated, have held that there is no inconsistency in the verdict because the hospital has a

separate, stand-alone duty which is separate and distinct from any duty owed by the physician or nurse. *Longnecker v. Loyola University Medical Center*, 891 N.E.2d 954 (Ill. App. 2008) and *Denton Regional Medical Center v. LaCroix*, 947 S.W.2d 941, 949 (Ct. App. Tx. 1997).

In *Denton v. Regional Medical Center*, a patient undergoing a C-section was administered an anesthesia by a certified registered nurse anesthetist (CRNA) without being supervised by a physician, in violation of the hospital anesthesia department's written policies and procedures. The patient suffered severe brain damage. The jury found the hospital to be 100 percent at fault and exonerated the certified registered nurse anesthetist and treating physicians.

The Texas Court of Appeals rejected the hospital's argument that it could not be held liable unless another health care provider was found to have been negligent, holding that:

“Despite the hospital's accurate recitation of several well-established points of law where liability is vicarious, we hold that these points are inapposite to the LaCroix's direct liability claims against the hospital addressed below. The LaCroix's pleadings and their appellate briefs show that their primary claim against the hospital is that the hospital, by entering into the contract with DAA that controverted its own anesthesia department policies and procedures governing CRNA supervision by an anesthesiologist or by an other, qualified physician, breached a direct duty owed to Kathy [LaCroix]. This claim is not dependent on the negligence of the health care providers; rather, it is independent of the conduct of the health care providers because it is based on the hospital's independent, direct duty owed to Kathy, thereby causing the plaintiff's injuries.”

947 S.W.2d 941, 949 (Tex. Ct. App. 1997).

The Texas court also rejected the hospital's argument that since the conduct of the nurse and the treating physicians was not the proximate cause of plaintiff's injuries, the jury could not have found the patient's injuries were caused by the hospital's failure to provide competent anesthesia care. The court viewed this argument as being premised on the vicarious liability theory it had rejected and noted that the hospital's argument “ignores the evidence ... showing the hospital had a direct duty to provide Kathy [LaCroix] with anesthesia care independent of the

care that the evidence established was required of the other defendants.” 947 S.W.2d at 949. The controlling consideration was what was not done as required by the hospital’s policies – the plaintiff never received the care from an anesthesiologist as required by hospital policies. In sum, the *Denton Regional Medical Center* court held that “[b]ecause we hold the hospital can be held directly liable to Kathy [LaCroix] for its own negligence, the jury’s failure to find culpability on the part of other medical providers is immaterial to the issue of the hospital’s liability.” 947 S.W.2d at 949.

In *Jennison v. Providence St. Vincent Medical Center*, 174 Or. App. 219, 25 P.3d 358 (Ore. Ct. App. 2001), the court upheld a 100 percent negligence verdict against a hospital even though there was no finding of independent negligence against individual health care providers. In *Jennison*, a patient brought a medical malpractice action against a hospital and physician after the patient suffered severe brain injury while recovering from surgery. The trial court entered judgment on the multimillion-dollar verdict for the plaintiff. At trial there were three defendants: two physicians and a hospital. The jury’s verdict exonerated the treating physicians but found the hospital was 100 percent negligent. *Id.* at 244, 361. The court affirmed the judgment because the evidence supported that the hospital was negligent in failing to have policies and procedures controlling verification and placement of central venous lines in the hospital’s post-anesthesia care unit. As here, the plaintiff’s case alleged that the hospital was negligent in failing to follow a hospital policy:

“Plaintiff alleges St. Vincent Hospital was negligent in one or more of the following particulars... c) in failing to follow a hospital policy in taking and reading of x-rays which could confirm the location of the central line catheter shortly after the placement in violation of the hospital’s own standards.”

Id. at 238.

Simply stated, different duties are owed by treating physicians, treating nurses and the hospital when sued for direct negligence. The liability of one defendant stands separate and distinct from the liability of the other defendants.

In *Longnecker v. Loyola University Medical Center*, Carl Longnecker needed a heart transplant. The hospital had a transplant procedure in which the transplant cardiologist makes an evaluation on a donor's history and test results to preliminarily accept or decline the donor's heart for a transplant. If preliminarily accepted, a procuring surgeon travels to the donor hospital where he opens the donor's sternum and visually inspects the heart and feels for defects. 891 N.E.2d at 958. The procuring surgeon then makes "the final phone call" during which his findings are reported to the transplant surgeon, who decides whether to accept or reject the heart. If accepted, the heart is cut, out of the donor, flushed, and transported to Loyola University Medical Center, where it is transplanted into the patient.

In Carl Longnecker's case, 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.

The jury exonerated Dr. Parvathaneni in 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

In summary, in this case River Park Hospital owed a nondelegable duty directly to Wayne Barks that was entirely separate, apart and distinct from any duty owed by a treating physician or nurse. The fact that any health care provider fulfilled their duty to Wayne Barks is immaterial to the issue of whether the hospital complied with the duty it owed directly to Mr. Barks. Throughout the course of this litigation, the hospital has not cited a single case in which a verdict against a hospital under a direct liability theory of failing to enforce its policies and procedures was deemed by an appellate court to be inconsistent with a jury verdict which exonerated a treating physician or nurse.

In the trial court and in the Court of Appeals, the hospital relied on negligent credentialing cases to support its argument that the jury verdict was inconsistent in this case. Courts which have recognized a direct negligence claim against a hospital for negligent credentialing have held

that it is based on a duty entirely separate and apart from the duty owed by a treating physician. Such a negligent credentialing claim is unrelated to the concept of derivative or vicarious liability. *Larson v. Wase Miller*, 738 N.W.2d 300, 309 (Minn. 2007) and *Shilling v. Humphrey*, ___ N.E.2d ___, 2009 WL 2634561 (Ohio Sup., filed on August 26, 2009) (copy attached in this brief's Appendix) at *4. There is no doubt that in a negligent credentialing case, in order to prove that the hospital's negligence caused an injury, the plaintiff must demonstrate that an incompetent physician proximately caused an injury by committing medical malpractice. This is necessary because the claim is that an incompetent physician should not have been allowed to practice in the hospital because it is foreseeable that an incompetent physician would commit medical malpractice. This logic doesn't apply in a failure to enforce hospital policy case. In order to establish proximate cause in a failure to enforce hospital policy claim, the failure to enforce the policy must proximately cause an injury to the plaintiff. *Daniels v. Durham County Hospital Corporation*, 615 S.E.2d 60, 65 (N.C. Ct. App. 2005) (holding plaintiff has burden to prove that failure to have a proper policy in place proximately caused injury. "Without ... evidence of what a proper policy would have stated, it is impossible to determine whether such a policy would have precluded the delivery in this case and thus whether the lack of a policy was a contributing factor to the baby's injuries.")

The hospital presents a flawed argument in asserting that the jury's exoneration of Dr. Weeks from fault is fatally inconsistent with its determination that the hospital was at fault. First, the hospital's duty is nondelegable. It cannot be delegated to Dr. Weeks. Second, Dr. Weeks' responsibilities as Medical Director of the Emergency Services Department were defined by his contract, which is located in the record as Exhibit 4, p. 8, Service Agreement, Exclusive Provider No. 2, Director of Services. This contract does not place upon Dr. Weeks the

responsibility for ensuring that the hospital's policies and procedures are followed. In fact, Exhibit 5A, hospital policy 780-01-005, provides that "[t]he overall administrative operation of the Emergency Operation is the responsibility of the Chief Executive of the hospital."

In *Ward v. Glover, supra.*, the plaintiff sued Dr. Gary Glover in his capacity as Medical Director of the OB unit at Baptist Hospital of East Tennessee, alleging that he was negligent in failing to adopt and enforce appropriate OB policies and procedures for the hospital. The Tennessee Court of Appeals affirmed the grant of summary judgment to Dr. Glover, holding that Dr. Glover was not issued a certificate of need and a license to operate a health care facility. Thus he had no obligation to promulgate hospital policies. The entity with that obligation was Baptist Hospital of East Tennessee, the holder of the certificate of need and license to operate a health care facility. 206 S.W.3d at 27. The *Ward* Court further noted that Dr. Glover's duties were defined by contract and that the contract with the hospital did not place on him the responsibility of adopting and ensuring the enforcement of OB policies for the hospital. 206 S.W.3d at 29-33.

The hospital's claim of comparative fault against Dr. Weeks fails as a matter of law because the hospital, as the holder of the certificate of need and the license to operate the hospital, had the nondelegable duty to adopt and ensure the enforcement of policies and procedures for its Emergency Service. *Scott v. Ashland Health Care Center*, 49 S.W.3d 281 (Tenn. 2000).

Allowing the hospital to foist this obligation upon Dr. Weeks would undermine the purpose of the certificate of need and health care facility licensing statutes, which is to ensure adequate, orderly and economical health care for the citizens of Tennessee. *Scott v. Ashland Health Care Center, supra.*, 49 S.W.3d at 286. Allowing the hospital to promulgate policies and procedures

as required by the certificate of need and licensing statutes and regulations promulgated thereunder but avoid responsibility for the failure to enforce such policies and procedures by casting blame upon a third party, such as Dr. Weeks, would render the certificate of need and licensing process meaningless.

Under Tennessee law, in resolving a claim that a jury verdict is inconsistent, an appellate court must give “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 Corporation, Inc.*, 255 S.W.3d 60, 73 (Tenn. Ct. App. 2007).

In the case at bar, the jury determined that the hospital violated its nondelegable duty to enforce its policies and further that the failure to enforce its policy and to have Wayne Barkes examined by a physician caused his death. This is entirely consistent with the jury’s determination that, as argued by defense counsel, the other health care providers complied with the recognized standard of acceptable professional practice for their specialty in McMinnville, Tennessee, or a similar community on July 26, 2000. The duties owed by the hospital and by the physicians and nurse in this case were entirely separate and distinct. Thus, the jury’s verdict is entirely consistent in exonerating the nurse and emergency technician who met face to face with Mr. Barkes and the physician who merely approved Wayne Barkes’ discharge based upon information provided by the nurse and finding the hospital negligent.

V. MATERIAL EVIDENCE IN THE RECORD SUPPORTS THE JURY’S FINDING THAT THE HOSPITAL’S NEGLIGENCE PROXIMATELY CAUSED THE DEATH OF WAYNE BARKES

The Court of Appeals pretermitted the issue raised by the hospital in its appeal of whether there is any material evidence that the hospital proximately caused the death of Wayne Barkes.

As has been previously noted, “[a]ppellate courts shall neither reweigh the evidence nor

decide where the preponderance of the evidence lies. If the record contains any material evidence to support the verdict, [the jury's findings] must be affirmed; if it were otherwise the parties would be deprived of their constitutional right to trial by jury." *Barnes v. Goodyear Tire and Rubber Company, supra.*, 48 S.W.3d 698, 704 (Tenn. 2000).

There is abundant evidence in the record that the hospital's negligence proximately caused the death of Wayne Barkes. 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 "heart attack," 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. Indeed, Dr. Rosa Stone's own testimony supports this conclusion. Dr. Stone testified that when she was informed Wayne Barkes had pain "in the left," she wanted to exclude a cardiac-related illness. R. Vol. XIV, p. 297. When informed of information concerning Wayne Barkes that was not provided to her on July 26, 2000, and was not obtained by Nurse Practitioner Kinkade, such as that Mr. Barkes was a smoker, was obese, had high cholesterol and had a family history of cardiac problems, Dr. Stone testified that if she had had this information on July 26, 2000, "[w]e have to reevaluate him." R. Vol. XIV, pp. 297-

299. 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.

VI. 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

Another issue that the Court of Appeals pretermitted was the hospital's contention that it was entitled to a new trial because of comments made by Plaintiff's counsel during closing argument and during opening statement. Plaintiff submits that the trial court observed the trial closely, provided a curative instruction when requested and when appropriate and did not abuse its discretion in denying the hospital's motion for a new trial.

The hospital argues that five statements by Plaintiff's counsel constitute a basis to reverse the trial court and to grant it a new trial.

The first statement by Plaintiff's counsel in closing argument which is relied on by the hospital follows:

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

Hospital Opening Brief
Filed in the Court of Appeals at p. 46

The hospital never raised this statement by Plaintiff's counsel as a ground for a new trial. R. Vol. 5, pp. 590, 620-623. Accordingly, this ground is waived. TRAP 3(e). Hospital's counsel did not even object when Plaintiff's counsel made this statement to the jury. R. Vol. XVIII, p. 1336. The law is clear in Tennessee that a failure to object to a statement made during closing argument precludes appellate review of the propriety of the statement. *Marress v. Carolina*

Direct Furniture, 785 S.W.2d 121, 126 (Tenn. Ct. App. 1989); *see Morgan v. Duffey*, 94 Tenn. 686, 30 S.W. 735 (1895).

The second statement the hospital relies upon made by Plaintiff's counsel during closing argument is:

"The Plaintiff did not sue anyone but the hospital."

Hospital Opening Brief
Filed in the Court of Appeals at p. 45

The hospital incorrectly states what Plaintiff's counsel told the jury. The record reflects the following statements made by Plaintiff's counsel concerning parties and nonparties:

"Parties are another one of those tricky words. A party is who is involved in this lawsuit. And in this lawsuit the parties are Ms. Barks and River Park Hospital. So when you see the word 'party,' that's who's involved in this lawsuit. The non-party, those are people that have not been sued."

R. Vol. XVIII, pp. 1353-1354

Defense counsel immediately objected to this comment by Plaintiff's counsel as "inappropriate."

R. Vol. XVIII, p. 1354. The trial court gave the following curative instruction:

"THE COURT: Ladies and gentlemen, if you'd please disregard the last statement. Don't worry about why. The last statement regarding whether or not any of these people have or have not been sued, it's not to be considered. Strike that."

R. Vol. XVIII, p. 1355

The trial court gave a curative instruction. There is simply no basis here to conclude that the trial court abused its discretion in denying the hospital a new trial when it gave a curative instruction on such a benign statement.

The third aspect of the issues raised by the hospital focuses upon Plaintiff's counsel's closing argument. The hospital's opening brief filed in the Court of Appeal states that "counsel for the plaintiff requested three specific amounts of money, including an award of \$7,000,000 for

loss of consortium.” Hospital Opening Brief filed in the Court of Appeals, p. 46.

During closing argument, Plaintiff’s counsel analyzed the evidence and suggested based on that analysis that the jury return damages in the amount of \$8,909.80 for the “funeral and headstone bill.” R. Vol. XVII, p. 1359. Plaintiff’s counsel also suggested based on the testimony of Dr. Fuisinelli, an economist, that the jury return \$197,990 in loss of earning support and loss of household services due to the death of Wayne Barkes. R. Vol. XVIII, p. 1359. Finally, after analyzing for the jury the loss of consortium suffered by Mr. Barkes’ daughter LeShay, R. Vol. XVIII, pp. 1362-1365, Plaintiff’s counsel stated, “It’s not just LeShay, she has four other siblings.” R. Vol. XVIII, p. 1365. Plaintiff’s counsel then briefly discussed Debra Barkes and stated:

“Debra Barkes’ loss is double the children’s loss. Fixing the amount of money, you know, you’re the ones that determine. I suggest to you that you determine a minimum amount of what is reasonable, what is acceptable, and then decide from there. I suggest to you that a million dollars for each child and two million dollars for Debra Barkes is an appropriate amount of compensation.”

R. Vol. XVIII, p. 1365

Defense counsel never objected to these remarks made by Plaintiff’s counsel in closing argument. In Tennessee, the failure to object to a statement made in closing argument precludes appellate review of the propriety of the statement. *Marress v. Carolina Direct Furniture, supra.*, 785 S.W.2d at 126. Moreover, Plaintiff’s counsel had the right to analyze the evidence for the jury and to suggest to the jury an appropriate amount for damages to be awarded to his client.

The hospital relies upon TCA §29-26-117, which states in its entirety:

“Plaintiffs demands; admissibility

In a medical malpractice action the pleading filed by the plaintiff may state a demand for a specific sum, but such demand shall not be disclosed to the jury during a trial of the case; notwithstanding the provisions of §20-9-302 to the contrary.”

(Our emphasis)

In 1975 when the Legislature promulgated TCA §29-26-117, TCA §20-9-302 had been in full force and effect for a number of years. This statute provided that:

“Declaration; jury

In the trial of any civil suit, counsel shall be permitted to read his entire declaration, including the amount sued for, to the jury at the beginning of the lawsuit, and may refer to the same in argument and summation to the jury.”

TCA §20-9-302 gave the plaintiff the right in every civil action filed in Tennessee to read to the jury the complaint and to inform the jury of the amount sued for in the complaint. TCA §29-26-117 merely creates an exception to the application of TCA §20-9-302 in medical malpractice actions. This is clear from the language of TCA §29-26-117, which states at the end: “notwithstanding the provision of §20-9-302 to the contrary.” Under TCA §29-26-117’s plain, unequivocal, unambiguous language, a plaintiff cannot inform the jury of the amount sued for in the complaint. This statute simply has no application to a closing argument in which an attorney analyzes the evidence for the jury and based upon that evidence, suggests an amount of damages to be awarded to his client by the jury.

In *Runnels v. Rogers*, 596 S.W.2d 87, 91 (Tenn. 1980), the Tennessee Supreme Court interpreted TCA §29-26-117 (formerly TCA §23-3416) to mean exactly what it says, stating that: “Section 23-3416 T.C.A. provides that in medical malpractice actions, the complaint may state a demand for a specific sum but that this shall not be disclosed to the jury.” 596 S.W.2d at 91. In that case the Supreme Court held that disclosure of the amount sued for in the complaint to the jury was harmless error.

Essentially, Defendants are requesting this Court to rewrite TCA §29-26-117 and to expand its application far beyond its clear and unambiguous language. Of course, this violates

principles of statutory construction. *Haley v. University of Tennessee – Knoxville*, 188 S.W.3d 518, 524 (Tenn. 2006). (“If the words of a statute plainly mean one thing, they cannot be given another meaning by judicial construction.” 188 S.W.3d at 524.)

The Complaint filed in this case requested \$15,000,000 for the wrongful death of Wayne Barkes. R. Vol. 1, p. 14. This figure was never mentioned by Plaintiff’s counsel during closing argument and never revealed to the jury at any time in this case. Plaintiff’s counsel complied with the requirements of TCA §29-26-117.

Next, the hospital complains that in his opening statement, Plaintiff’s counsel stated that “The hospital is liable if Mr. Barkes had a heart attack.” Hospital’s Opening Brief filed in Court of Appeals, p. 43.

What Plaintiff’s counsel in fact said in opening statement follows:

“As you all know, this is a civil lawsuit. Ms. Barkes needs only to present enough evidence to prove more likely than not that her husband died of a heart attack that was not timely diagnosed and treated. There can be doubts. But if the proof and the evidence shows Mr. Barkes died of a heart attack is more right than wrong, she prevails. ...”

R. Vol. XII, p. 63, line 23-p.64, line 6

After objection by defense counsel, the trial court gave the following curative instruction:

THE COURT: Ladies and gentlemen, there was some question as to the precise wording of Mr. Schmidt’s last couple of statements. I’m not saying if they were correct or incorrect. What I’d like for you to do is disregard the last couple of statements regarding if the plaintiff proves X, Y and Z, they must prevail. And we’ll start over from there.”

R. Vol. XII, p. 65, line 22-p. 66, line 5

After closing argument, the trial court instructed the jury that “[y]ou must decide the case solely on the evidence before you and the law given to you.” R. Vol. XVIII, p. 1401. The trial court further 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, p. 1402.

The trial court closely observed this trial and denied the hospital a new trial. Plaintiff’s counsel’s comment, which was cured by the trial court, is no basis to hold that the trial court abused its discretion in denying the hospital a new trial.

Finally, the hospital complains that Plaintiff’s counsel in opening statement told the jury: “The hospital did not live up to its responsibility after the death.” Hospital Opening Brief, p. 44.

What Plaintiff’s counsel said in opening statement follows:

“The fourth reason, the fourth reason, why Ms. Barkes is suing the hospital is its refusal to live up to its responsibility to Ms. Barkes for the wrongful death of her husband.

“Now before we came to trial, we had to determine if indeed Mr. Barkes died of a heart attack that was not timely diagnosed and treated. Because had Mr. Barkes not died of a heart attack, then River Park Hospital would not be the legal cause of his death. And we’ll hear that the physician who prepared the Death Certificate and described the cause of death as myocardial infarction, he gave a deposition.”

R. Vol. XII, p. 59, line 18-p. 60, line 7

Defense counsel objected on the ground that:

“[t]here is no theory against us that we failed to somehow admit the cause of this man’s death which forced them to prove the cause of death. ...”

R. Vol. XII, p. 60, lines 15-18

Mr. Schmidt responded:

“I disagree. I’m talking now about why Mr. Barkes died and a copy of the Death Certificate. One of the arguments is that the emergency room doctor didn’t give a physical. I don’t know why this man died. They’re all cardiologists and expert disclosure. He’s putting down the disclosure he doesn’t know why this man died. The only way to decide is an autopsy. That’s a defense. I think I have a right to discuss that.”

R. Vol. XII, p. 61, lines 14-24

The Court agreed with Mr. Schmidt that there was a causation defense in regard to what killed Mr. Barkes. R. Vol. XII, p. 61, line 25-p. 62, line 1. At that point in time in this lawsuit the hospital had disputed that Mr. Barkes had died from a heart attack on July 26, 2000.

Here again, the trial court was in the best position to determine if this argument was appropriate or if it improperly influenced the jury. There is no basis in this record to find that the trial court abused its discretion in denying the hospital a new trial.

In summary, the hospital received a fair trial in this matter. In no way did the trial court, which took the post-trial motions under advisement after the May 12, 2006 argument before issuing its order on May 16, 2006, abuse its discretion in denying the hospital a new trial.

CONCLUSION

After a fair trial was conducted, the jury resolved all of the issues concerning the hospital's liability in favor of the Plaintiff. The December 29, 2008 opinion issued by the Tennessee Court of Appeals is a miscarriage of justice and should be reversed. Plaintiff respectfully requests this Court to reinstate the jury's verdict in this case.

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 September, 2009.

David Randolph Smith

APPENDIX

1. December 29, 2008 Court of Appeals Opinion
2. *Prince v. Coffee County, Tennessee*, No. 01A01-9508 CV-00342 (Tenn. Ct. App. filed May 3, 1996)
3. *Larson v. Wasemiller*, 738 N.W.2d 300 (Minn. 2007)
4. *Schelling v. Humphrey*, ___ N.E.2d ___, 2009 WL 2634561 (Ohio, filed August 26, 2009)
5. *Bryant v. McCord*, No. 01A01-9801-CV-00046 (Tenn. Ct. App. filed January 12, 1999)