

IN THE COURT OF APPEALS OF GEORGIA

Appeal No. A15A1566

Rudy Robles, individually and as surviving spouse and
Administrator of the Estate of Iselda D. Moreno

v.

Patricia Yugueros, M.D., and Artisan Plastic Surgery, LLC

**BRIEF OF APPELLEES PATRICIA YUGUEROS, M.D.
AND ARTISAN PLASTIC SURGERY, LLC**

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INTRODUCTION

Appellant Rudy Robles filed this lawsuit alleging Appellee Dr. Patricia Yugueros committed medical malpractice during the post-operative care of his wife, Iselda D. Moreno, who died from complications after having surgery. Robles appeals the jury verdict and judgment in favor of Dr. Yugueros and her former practice group, Artisan Plastic Surgery, LLC.

Eight of Robles's nine enumerations of error pertain to the trial court's rulings regarding the apportionment of fault to the following non-parties:

- (1) Gwinnett Medical Center, where Moreno went to the emergency room after experiencing abdominal pain two days after surgery;
- (2) Dr. Michael Violette, the emergency room physician who treated Moreno at Gwinnett Medical Center; and
- (3) Dr. James York, the radiologist who read a kidney, ureter and bladder x-ray ("KUB") taken of Moreno at Gwinnett Medical Center.

The trial court properly admitted expert testimony that these non-parties breached the standard of care and concluded there was a rational basis for the jury to apportion fault to them. Further, Robles cannot show prejudice because the jury

found in favor of Dr. Yugueros and Artisan Plastic Surgery and thus never reached the issues of damages or apportionment of fault.

In the only enumeration of error that deals with an issue other than apportionment, Robles challenges the exclusion of opinion deposition testimony from Dr. Alexander, the 30(b)(6) representative for Artisan Plastic Surgery, that the standard of care required a CT scan. The trial court did not abuse its discretion because Dr. Alexander was not a participant or observer of the care rendered to Moreno by Dr. Yugueros, had not reviewed any of Moreno's medical records, and had received only third-hand information as to what took place. Moreover, Dr. Alexander's testimony was not in response to a proper hypothetical question as to when a CT scan should have been ordered. Finally, Robles cannot show any prejudice because he had the opportunity to call Dr. Alexander to testify at trial and failed to do so. This Court should affirm the trial court's judgment in favor of Dr. Yugueros and Artisan Plastic Surgery.

STATEMENT OF THE PROCEEDINGS BELOW

Statement of the facts relevant to the appeal

On June 24, 2009, Dr. Yugueros operated on Moreno at Northside Hospital. (Vol. 1, T-143.) Moreno was kept overnight after the procedure and discharged on

June 25, 2009, with a post-operative visit scheduled for June 29, 2009. (Vol. 1, T-129-130, 199-200, 203.)

Two days after being discharged, Moreno called Dr. Yugueros at approximately 7:15 a.m. and told her she was experiencing pain in her upper abdomen and not eating well. (Vol. 1, T-203-204.) Dr. Yugueros believed she was experiencing gastritis as a result of her narcotic pain medication and told her to stop taking the narcotics and to take only Tums and Tylenol. (Id.) Robles, called Dr. Yugueros a few hours later and said his wife was still in pain and he wanted to take her to the hospital. (Vol. 1, T-206-207.) Dr. Yugueros suggested they go to Northside Hospital where she had hospital privileges. (Id.) Instead, about an hour and a half after Robles spoke with Dr. Yugueros, Moreno arrived at Gwinnett Medical Center's Emergency Department complaining of severe abdominal pain, nausea and vomiting. (Vol. 1, T-208-209; Vol. 4, T-825, 850-851.)

Gwinnett Medical Center – Saturday, June 27, 2009

Moreno was treated in Gwinnett Medical Center's emergency room by Dr. Michael Violette, an emergency room physician, and Gwen Lampley, a physician's assistant. (Vol. 4, T-816-818.) Dr. Violette ordered a KUB, which he read as unremarkable. (Vol. 4, T-864.) He also examined Moreno's abdomen and ordered

anti-nausea and pain medication. (Vol. 4, T-861, 874.) Dr. Violette ordered labs which were normal and caused no concern. (Vol. 4, T-828-832, 860-861, 874.)

While Moreno was at Gwinnett Medical Center, Dr. Yugueros twice spoke with Dr. Violette and Lampley. First, Lampley called Dr. Yugueros to explain that Moreno's vital signs were stable, and Dr. Yugueros explained the surgery that she performed. (Vol. 1, T-207, 210.) Dr. Violette later called Dr. Yugueros to explain that Moreno's labs and KUB were normal and that she was feeling better. (Vol. 1, T-211-213.)

Moreno was discharged from GMC about eight hours after she arrived at the emergency room with prescriptions for pain medications and instructions to return if she did not get any better. (Vol. 4, T-846, 866-867.) Her final diagnosis was post-operative abdominal pain. (Vol. 4, T-822.)

Gwinnett Medical Center radiologist Dr. James York read the same KUB of Moreno that Dr. Violette had earlier read as unremarkable and found a suspicion of "free air" in her abdomen. (Depo. York T-48, 58-59; Vol. 4, T-844-846.) About fifteen minutes after Moreno was discharged from Gwinnett Medical Center, Dr. York's dictation note was transcribed. (Depo. York T-48, 58-59; Vol. 4, T-844-846.) Neither Dr. York nor anyone else from Gwinnett Medical Center contacted

Moreno, Dr. Yugueros or Dr. Violette to inform them of Dr. York's findings, however. (Vol. 1, T-132, 211-213; DT-20, February 8, 2012, Deposition of Dr. York, p. 70:10-16.¹) Dr. York's abnormal finding was not directly communicated to Dr. Violette. (Vol. 4, T-844, 873-874.) Instead, Dr. York's findings were faxed to Gwinnett Medical Center's emergency department, which was not checked until the following Monday. (Vol. 4, T-914-915.)

Northside Hospital – Sunday, June 28, 2009

About three hours after being discharged from Gwinnett Medical Center, Moreno arrived at Northside Hospital's emergency room with abdominal pain, an elevated heart rate and received pain medications. (Vol. 1, T-216-219; Vol. 3, T-610-612, 617-618.) Emergency room physician Dr. Schwegman called Dr. Yugueros after evaluating Moreno. Dr. Yugueros admitted Moreno to Northside Hospital for further evaluation and pain control and ordered that she move about, receive an incentive spirometer to assist her lung, and diet as tolerated. (Vol. 1, T-143, 221-222, 229, 233-234.) Moreno later received pain medications per Dr. Yugueros's order. (Vol. 1, T-235.)

¹ Dr. York's deposition was presented by video at trial, but not transcribed.

Around 5:15 a.m., nurse Marlene Anderson called Dr. Yugueros to tell her that the prescribed pain medication was not sufficient for Moreno's pain and that Moreno had concentrated urine and hypoactive bowel sounds. (Vol. 1, T-236, 242-244.) Dr. Yugueros ordered a different pain medication, baseline IV fluids, and medication to help move Moreno's bowels. (Vol. 1, T-243-244.)

Around 10:00 a.m., Dr. Yugueros came to Northside Hospital and observed Moreno for approximately two hours while she ate lunch and walked in the hallway. (Vol. 1, T-238-240; Vol. 2, T-261, 274.) Around 2:30 p.m., a nurse contacted Dr. Yugueros because Moreno's legs were numb and she had to be carried out of the bathroom to bed. (Vol. 2, T-275-278.) Dr. Yugueros instructed the nurse to contact the rapid response team. (Vol. 2, T- 276.) The rapid response team called Dr. Yugueros, and they decided to order an abdominal x-ray, an electrocardiogram, and blood tests. (Vol. 2, T-276-278.) Dr. Yugueros also ordered abdominal pressure measurements to rule out abdominal compartment syndrome and an internist consult. (Vol. 2, T-278-280.)

Around 4:00 p.m., internal medicine physician Dr. Santana called surgeon Dr. George Shaak to perform a consult with Moreno due to the free air finding on her x-ray. (Vol. 4, T-940-942.) Dr. Shaak, with the assistance of Dr. Yugueros, later

took Moreno to surgery and found that her stomach was necrotic (i.e. dead) and perforated. (Vol. 1, T-144; Vol. 4, T-949-952.) Dr. Shaak was unable to stabilize Moreno, and she passed away at that evening. (Vol.1, T-144.)

STATEMENT OF THE PROCEEDINGS BELOW

Robles filed a Complaint against Dr. Yugueros and Artisan Plastic Surgery alleging professional and ordinary negligence arising out of Dr. Yugueros's medical care and treatment of Moreno. (Vol. 1, R-6-39.) Notably, Robles did not criticize Dr. Yugueros's performance of surgery on Moreno or any of the care Dr. Yugueros provided to Moreno before she arrived at Northside Hospital on June 28, 2009. Robles also did not name as defendants Gwinnett Medical Center or any of its physicians or physician's assistants who provided care to Moreno. Dr. Yugueros and Artisan Plastic Surgery filed timely notices designating Gwinnett Medical Center, Dr. Violette, and Dr. York as non-parties at fault. (Vol. 1, R-252-255.)

Robles filed a Daubert motion to exclude expert testimony regarding the standard of care for Dr. Violette and criticisms of Gwinnett Medical Center's emergency room policies². (Vol. 2, R-370-412.) The trial court denied the motion because physicians could testify outside of their specialty regarding an issue that

² Appellant does not assert that the admission of Dr. Krebs' testimony regarding Dr. York was error.

crosses specialties, such as x-rays, and as to a general protocol that would apply to all specialties, such as reporting x-ray abnormalities immediately. (MT-24-29.)³

Robles filed several motions in limine arguing that non-parties Gwinnett Medical Center and Dr. Violette should not be placed on the verdict form because Dr. Yugueros and Artisan Plastic Surgery, LLC had not proffered witnesses competent to testify they had breached the standard of care in the medical care provided or in their policies and procedures. (Vol. 2, 418-429, 430-440, 441-467.) The trial court denied these motions because jury instructions could be crafted to handle these issues and the jury could determine the relevant standard and apply the law to resolve these issues. (MT-189-190; Vol. 4, R-1125-1126.)

Dr. Yugueros also moved to exclude testimony on the standard of care from Dr. Alexander's deposition because she had no personal knowledge of Dr. Yugueros's care and treatment of Moreno, had not reviewed her medical records, and was deposed as a § 9-11-30(b)(6) witness for Artisan Plastic Surgery, LLC, not as an expert. (MT-123-124). The trial court denied the motion without prejudice, stating the issue could be further evaluated based on the evidence at trial and what Dr. Alexander would testify to if she read the medical records. (MT-131.)

³ Robles has abandoned any challenge to the rulings on the other issues in his Daubert motion by failing to develop any argument regarding them in his brief.

After a jury trial, a verdict was entered in favor of Dr. Yugueros and Artisan Plastic Surgery. (Vol. 5, R-1258-1259.) Robles filed this appeal.

ARGUMENT AND CITATION OF AUTHORITY

Enumeration of Error 1-7 and 9 are harmless because they are limited to the issue of apportionment

Robles raises eight enumeration of errors challenging the trial court's admission of evidence pertaining to non-parties Gwinnett Medical Center and Dr. Violette and the trial court's decision to place them on the verdict form. Notably, Robles did not move for a directed verdict on Dr. Yugueros and Artisan Plastic Surgery's arguments to apportion fault or object to the verdict form or the jury instruction on how to complete the verdict form. (Vol. 5, T-1185, Vol. 6, T-1381.)

More importantly, these arguments all fail because the jury found for Dr. Yugueros and Artisan Plastic Surgery and thus never reached the issues of damages or apportionment. The trial court instructed the jury that it did not need to address damages or apportionment of fault if it found for the Defendants, as follows:

If you do not think the Plaintiff is entitled to recover based upon the evidence presented, you should find for the Defendant and the form of your verdict would be, we, the jury, find for the Defendants. If you find for the Defendants, do not fill in the second sheet of the verdict.

... You will have a verdict form and there are two parts. And as I am explaining to you now, it's pretty much self-explanatory. So if you find for the Defendants, you don't go any further.

If you find for the Plaintiff, go to the second sheet of the verdict form and fill in the amount of damages you award to Rudy Robles. You must then apportion a percentage of the fault to the individuals and/or entities named on the verdict form.

(Vol. 6, T-1378.) The verdict form given to the jury stated, as the judge instructed, in bold font on the first page:

VERDICT

Part I

_____ We, the Jury, find for the Plaintiff.

OR

_____ We, the Jury, find for the Defendants.

If you find for the Defendants STOP here. Sign and date the form and DO NOT complete any further pages. If you find for the Plaintiff, continue to Part II.” (Vol. 5, R-1258-1259.)

Georgia law is clear that an error must be harmful to be reversible error. Witcher v. Level 3 Communications, LLC, 272 Ga. App. 611, 613 (2005). See also

City of Brunswick et al. v. Atlanta Journal & Constitution, 214 Ga. App. 150, 153, (1994); Plyer v. Smith, 193 Ga. App. 114 (1989); Shackelford v. Whatley, 172 Ga. App. 127, 129 (1984); Leverett v. Flint Fuel, Inc., 183 Ga. App. 75, 78 (1987); Mercer v. Woodward, 166 Ga. App. 119, 126; Waters v. Narcarti, 239 Ga. 545 (1977).

This is similar to raising damage issues as error when the jury found for the Defendant and, thus, never reached the issue of damages. A jury instruction or evidentiary ruling that goes only to damages is harmless error where a verdict is returned for the defendant. U.S. Industries, Inc. et al. v. Austin, 197 Ga. App. 74,75 (1990).

The issues raised in Enumerations of Error 1-7 and 9 also address legal questions regarding the admissibility of expert testimony, with particular regard to Georgia's emergency room statute.

Questions of whether a witness is qualified to render an opinion as an expert is a legal determination for the trial court and will not be disturbed absent a manifest abuse of discretion. Georgia Department of Transportation v. Owens, 330 Ga. App. 123, 127 (2014); see also Bonds v. Nesbitt, 322 Ga. App. 852, 857 (2013). The trial court must have considerable leeway in deciding whether a

particular expert's testimony is reliable. Kumho Tire Company, Ltd. v. Carmichael, 526 U.S. 137, 152 (1999).⁴

Under Georgia's apportionment statute, in assessing percentages of fault, the trier of fact shall consider the fault of all persons who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit. O.C.G.A. § 51-12-33(c). Defendants have the burden to show only a rational basis to apportion fault to non-parties. Double View Ventures, LLC v. Polite, 326 Ga. App. 555, 562 (2014).

There is no requirement that expert testimony be proffered at trial specifically stating that the emergency medicine practitioner was "grossly negligent" in order to submit the issue to the jury. Johnson v. Omondi, 294 Ga. 74, 77-78 (2013). In fact, when there is an issue of fact with respect to whether an emergency care physician was grossly negligent, "the right to draw the inference is within the exclusive province of the jury." Abdel-Samed v. Dailey, 294 Ga. 758, 765 (2014). Importantly, an expert witness may not state a legal conclusion as to the ultimate issue. Diplomat Const. Inc. v. State Bank of Texas, 314 Ga. App. 889, 895 (2012).

⁴ O.C.G.A. § 24-7-702(f) states "in interpreting and applying this Code section, the courts of this state may draw from the opinions of ... Kumho Tire [supra]"

Likewise, the trial court's ruling on Daubert motions permitting defense experts to testify about deviation from the standard of care of non-parties and their inclusion on the verdict form was relevant only to the apportionment of fault. Because the jury found for the defendants and never considered apportioning fault to these non-parties, any alleged error in these rulings was harmless and is not grounds to reverse the trial court's judgment.

Enumeration of Error No. 1

The trial court properly exercised its broad discretion under Daubert and O.C.G.A. § 24-7-702 in denying Robles's motions to exclude testimony regarding the standard of care for Dr. Violette and Gwinnett Medical Center. (Vol. 2, R-370-412; see also MT, Jan. 17, 2014.) Dr. Krebs is a qualified radiologist with sufficient training to offer expert radiology opinions. His opinions focused on Dr. Violette's failure to identify "free air" on the KUB that he ordered and read for Moreno, Dr. York's failure to communicate his abnormal finding of "free air" on Moreno's KUB directly to Dr. Violette, and Gwinnett Medical Center's policies not requiring Dr. York to communicate this abnormal finding to Dr. Violette. (Vol. 4, T-833, 836-837, 844, 864, 873-874; Dr. Krebs's opinion, as a radiologist, addressed what a reasonable physician reading a KUB should have identified, how the abnormal

findings should have been communicated directly to the treating physician, and how the hospital's procedures should have required abnormal findings to be communicated directly to treating physicians. (Vol. 4, T-900-918.) These opinions were well within Dr. Krebs's expertise.

Robles argues that Dr. Krebs was required to testify that Dr. Violette was grossly negligent in order for his testimony to be admissible. However, there is no requirement that an expert testify that the emergency care rendered was "grossly negligent" to submit the issue to the jury. In Johnson v. Omondi, 294 Ga. at 77-78, the Georgia Supreme Court concluded that the finder of fact decides whether there is clear and convincing evidence that an emergency medicine practitioner was grossly negligent. Notably, in Omondi, the patient's expert testified that the emergency physician did not meet "the standard of care in the medical profession generally under like and similar circumstances" and made no reference to gross negligence. Id. Further, Justice Blackwell stated in his concurrence that "generally accepted standards of care still have a significant role to play in cases to which [O.C.G.A. § 51-1-29.5] applies." Id. at 293 n.1 (concurring, J. Blackwell).

Finally, Robles's reliance on Bonds v. Nesbitt is misplaced. The Bonds court stated that an expert may testify not only to his particular specialty but also where

he has “knowledge and experience in the practice or specialty that is relevant to the acts or omissions that the plaintiff alleges constitute malpractice and caused the plaintiff’s injuries.” Bonds, 322 Ga. App. at 857. The Bonds court also emphasized that the trial court’s decision with respect to expert testimony is not to be disturbed except in cases of manifest abuse of discretion. Id.

Thus, the trial court properly denied Robles’s Daubert motion because Dr. Krebs was qualified to provide standard of care opinions regarding reading the KUB and communicating radiological findings. Any alleged error in denying the Daubert motion was harmless and is not reversible error because the jury never considered whether to apportion fault to any of the non-parties.

Enumeration of Error No.2

Robles challenges the trial court’s denial of his motion in limine challenging the admissibility of Dr. Krebs’s testimony regarding Dr. Violette and placement of Dr. Violette on the verdict form, which are essentially a reiteration of his first and third Enumerations of Error. In short, Enumeration of Error No. 2 fails for the reasons described in response to Enumerations of Error No. 1 and No. 3 and because any alleged errors were harmless.

Enumeration of Error No. 3

The trial court properly placed Dr. Violette on the verdict form because Dr. Yugueros and Artisan Plastic Surgery met their burden of showing a rational basis for the jury to apportion fault to Dr. Violette. See Double View Ventures, LLC, 326 Ga. App. at 562. The jury could conclude Dr. Violette was grossly negligent based on Dr. Krebs's expert testimony and the testimony of Moreno's treating physicians Dr. York, Dr. Schwegman, and Dr. Yugueros. (Vol. 1, T-143; Vol. 2, T-284; Vol. 3, T-606; Vol. 4, T-886.) Robles did not move for a directed verdict on the grounds that there was not a rational basis to apportion fault to Dr. Violette. (Vol. 5, T-1185.)

Furthermore, Dr. Yugueros and Artisan Plastic Surgery were not required to present expert testimony that Dr. Violette, an emergency room physician, was grossly negligent to place him on the verdict form. See Omondi, 294 Ga. at 77-78. Dr. Violette was criticized for his failure to read Moreno's KUB properly after ordering it.

Finally, again, it was not reversible error to place Dr. Violette on the verdict form because the jury never considered whether to apportion fault to him.

Enumeration of Error No. 4

The trial court did not err in excluding testimony from expert witness Dr. Krebs about the legal standard required for an emergency room physician. An expert witness may not state a legal conclusion as to the ultimate issue. Adel-Sumed, 294 Ga. at 765; Diplomat Const., Inc. v. State Bank of Texas, 314 Ga. App. 889, 895 (2012). Rather, it is the role of the trial court, not expert witnesses, to instruct the jury on legal standards, which the trial court did. If the jury reached the issue of apportionment, then the jury would have decided if Dr. Violette was “grossly negligent.” See Omondi, 294 Ga. at 77-78. The trial court correctly ruled that the jury should disregard Dr. Krebs’s testimony on legal standards. Also, the jury did not reach the issue of apportioning fault to Dr. Violette, and any alleged error in excluding Dr. Krebs’s testimony was not reversible error.

Enumeration of Error No. 5

The trial court properly exercised its discretion to deny Robles’s motion in limine to exclude evidence of the negligence of Gwinnett Medical Center where Moreno was treated after her surgery with Dr. Yugueros and before her admission at Northside Hospital where she died the next day. (MT Generally, Jan. 17, 2014.) ; Vol.4, T-825, 850-851.) Importantly, Dr. Yugueros did not have privileges at

Gwinnett Medical Center and was unaware of its policies and procedures. (Vol. 1, T-156.)

Gwinnett Medical Center's policies and procedures were relevant to Moreno's medical treatment and outcome because they led to Dr. Yugueros not being informed of the abnormal findings on Moreno's KUB. Dr. York identified an abnormal finding of free air on Moreno's KUB and recommended a CT scan, but did not communicate either the abnormal finding or the recommendation to Dr. Violette. (DT-20, February 8, 2012, Deposition of Dr. York, p. 70:10-16.) According to Dr. York, Gwinnett Medical Center's policy did not require him to directly contact the treating physician with his abnormal findings or recommendations. Id. Rather, under Gwinnett Medical Center's policy, radiology reports were sent by fax to the treating physician's department. (Vol. 4, T-915.) As a result of this policy, at least in part, Dr. York's abnormal findings and recommendation never reached Dr. Violette or Moreno's subsequent treating physicians. (Vol. 1, T-211-213; Vol. 3, T-613-614; DT-20, February 8, 2012, Deposition of Dr. York, p. 70:10-16).

Gwinnett Medical Center's policies and procedures were also relevant because Robles alleged that Dr. Yugueros failed to obtain adequate diagnostic

testing. Dr. Yugueros did not have privileges at Gwinnett Medical Center and was unaware of its policies and procedures. (Vol. 1, T-156.) Dr. Yugueros and the emergency department physicians at Northside Hospital did not obtain certain diagnostic tests because Dr. Violette told them that the results of the diagnostic testing at Gwinnett Medical Center were normal. (Vol. 1, T-211-213; Vol. 3, T-613-614.) Because of Gwinnett Medical Center's policies, Dr. Violette was not aware of Dr. York's abnormal finding on Moreno's KUB.

Dr. Yugueros and Artisan Plastic Surgery presented sufficient evidence to show a rational basis for the jury to apportion fault to Gwinnett Medical Center because its policies and procedures were inadequate. Dr. Krebs opined that these procedures were below the standard of care. (Vol. 4, T-898-899, 904). Gwinnett Medical Center's applicable procedure was admitted into evidence for the jury's consideration. (Transcript of Trial Exhibits, Vol. 1, p.57-59 (unnumbered)).

The Gwinnett Medical Center policies and procedures had a direct bearing on Moreno's medical treatment and outcome, which were the primary issues in the case. As a result of the Gwinnett Medical Center policies and procedures, Dr. Yugueros was not informed of the abnormal findings on the KUB or Dr. York's recommendation, which affected her treatment of Moreno. Therefore, the Gwinnett

Medical Center procedures were not a collateral issue. The Gwinnett Medical Center policies and procedures were relevant because it was alleged that Dr. Yugueros failed to obtain adequate diagnostic testing. Dr. Yugueros, as well as the emergency department physicians at Northside Hospital, did not obtain certain diagnostic tests because they were told by Dr. Violette that the results of the diagnostic testing completed at Gwinnett Medical Center were normal. (Vol. 1, T-211-213; Vol. 3, T-613-614.)

Radiology reports under the Gwinnett Medical Center policies were sent by fax to the treating physician's department, rather than having the results communicated directly to that physician. (Vol. 4, T-915.) According to Dr. York, the Gwinnett Medical Center procedure did not require him to directly contact the treating physician with abnormal findings or recommendations. (DT-20, February 8, 2012, Deposition of Dr. York, p. 70:10-16). Most importantly, it was undisputed that the abnormal findings and recommendations of Dr. York, never reached Dr. Violette. (DT-20, February 8, 2012, Deposition of Dr. York, p. 70:10-16).

Appellant asserts that the evidence of Gwinnett Medical Center's applicable procedure was improperly admitted for the following reasons: (1) there was not sufficient evidence that the policies and procedures were inadequate; (2) the

Gwinnett Medical Center policies and procedures were a collateral issue; and (3) violations of private guidelines do not establish negligence per se.

Finally, Robles's argument that violations of these private hospital guidelines do not establish negligence per se is irrelevant. There is no requirement that the elements of negligence per se be proven as to a non-party to introduce evidence of that non-party's fault. Rather, Dr. Yugueros and Artisan Plastic Surgery needed to show only a rational basis to apportion fault. Double View, 326 Ga. App. at 562.

The trial court properly admitted this relevant evidence pertaining to the negligence of Gwinnett Medical Center. Moreover, any error in admitting evidence of these policies and procedures was not reversible error because the jury never considered whether to apportion fault to Gwinnett Medical Center.

Enumeration of Error No. 6

The trial court properly admitted testimony from Dr. Krebs about Gwinnett Medical Center's policies and procedures. Dr. Krebs's opinion regarding these policies and a radiologist's communication of abnormal findings was identified in both written discovery and during his deposition. (DT-18, June 24, 2012, Deposition of Dr. Krebs, p. 37:10-42:24,70:9-18). Dr. York also testified about Gwinnett Medical Center's policies and procedures for abnormal findings well

before trial. (DT-20, February 8, 2012, Deposition of Dr. York, p. 70:10-16.) After Dr. Krebs's deposition, the specific policies and procedures were produced to both parties and identified in the Consolidated Pre-trial Order. (R-1077.)

Dr. Krebs's trial testimony about Gwinnett Medical Center's policies and procedures was not a surprise to Robles. (Vol. 4, T-898-899, 904.) And any error in admitting Dr. Krebs's testimony was not reversible error because the jury never considered whether to attribute fault to Gwinnett Medical Center.

Enumeration of Error No. 7

The trial court did not err in including Gwinnett Medical Center on the verdict form. Dr. Yugueros and Artisan Plastic Surgery timely filed a proper notice before trial designating Gwinnett Medical Center as a non-party at fault. (Vol. 1, T-252-255.) Numerous treating and expert physicians testified that Gwinnett Medical Center's policies and procedures caused Dr. York's abnormal finding on Moreno's KUB not to be communicated to her other treating physicians. (DT-20, February 8, 2012, Deposition of Dr. York, p. 70:10-16; Vol. 4, T-898-899; 904.) This was sufficient evidence to establish a rational basis to apportion fault to Gwinnett Medical Center. Double View, 326 Ga. App. at 562. Robles failed to move for a

directed verdict to challenge the sufficiency of the evidence against Gwinnett Medical Center. (Vol. 5, T-1185.)

The trial court did not err in placing Gwinnett Medical Center on the verdict form. Any error in placing Gwinnett Medical Center on the verdict form was not reversible error because the jury never considered whether to attribute fault to it.

Enumeration No. 8

The trial court properly exercised its discretion in excluding a specific portion of Dr. Alexander's deposition testimony that it was within the standard of care for Dr. Yugueros to order a CT scan. (Vol. 3, T-527-528; DT-22, September 12, 2011, Deposition of Dr. Alexander, p. 79-82.) Questions of whether a witness is qualified to render an expert opinion will not be disturbed absent a manifest abuse of discretion. Owens, 330 Ga. App. at 127; see also Bonds, 322 Ga. App. at 857. A witness qualified as an expert may offer opinion testimony if it is based upon sufficient facts or data and is the product of reliable principles and methods and if the witness has applied the principles and methods reliably to the facts of the case. O.C.G.A. § 24-7-702(b).

The trial court determined that the deposition testimony of Dr. Alexander was not based upon sufficient facts or data to be admissible opinion testimony.

(DT-22, September 12, 2011, Deposition of Dr. Alexander, p. 79-82.). The trial court noted that Dr. Alexander's testimony was falsely premised on a misunderstanding that Dr. Yugueros had indeed ordered a CT Scan and was based on "passing on hearsay to Dr. Alexander which gets to be double hearsay and then if you get into some of the documents it might even be triple hearsay." (Id.) The trial court further noted that Dr. Alexander's opinion testimony was not in response to a hypothetical question that was "sufficiently detailed with all the facts and information" and that none of her opinions were rendered to a reasonable degree of medical certainty or probability. (Id.)

The trial court made the correct decision. Dr. Alexander had no first-hand knowledge of the care rendered to Moreno because she was out of town at the time. She never spoke with Dr. Yugueros about the care rendered to Moreno and never reviewed any medical records. Dr. Alexander learned of Moreno's case only from speaking with Dr. Ashraf, who had discussed Moreno's condition with Dr. Yugueros. (DT-22, September 12, 2011, Deposition of Dr. Alexander, p. 79-82.) Dr. Alexander's testimony reflects that she was not familiar the care provided to Moreno because she said she suspected Dr. Yugueros ordered a CT scan, when, in fact, no CT scan was ordered for Moreno. (Id.) Further, Dr. Alexander did not

discuss or mention when a CT scan should have been ordered or that it made any difference. Dr. Alexander merely stated “a CT would be - - it would provide more information.” (Id.) This statement is so general that it could have referred to any time a patient presents with any list of symptoms.

Robles never perfected the record as to why he was harmed by his ability to read the deposition testimony of Dr. Alexander. After the trial court issued its ruling, Robles failed to present any argument as to why Dr. Alexander’s testimony was indeed based on sufficient facts and data. He also did not call Dr. Alexander to testify as a live witness, even though she was under subpoena for the entirety of trial. The trial court’s ruling did not prevent Robles from calling Dr. Alexander live and asking similar non-objectionable questions. Instead, he merely objected by reference to his previous arguments. (Vol. 3, T-528.).

The trial court properly exercised its discretion in excluding these excerpts from Dr. Alexander’s deposition testimony based on the information, evidence or arguments before it. Robles failed to present evidence or arguments showing that Dr. Alexander’s opinion testimony was sufficiently reliable to be admissible under O.C.G.A. § 24-7-702(b).

Enumeration of Error No. 9

The trial court did not abuse its discretion in precluding Robles's counsel from making comments regarding apportionment during closing arguments. Robles's counsel stated during closing argument that "we didn't sue them," in reference to the non-parties on the verdict form. (Vol. 6, T-1348.) This comment was intended to alert the jury that the non-parties would not be required to satisfy any judgment.

Evidence of a party's financial condition is irrelevant, inadmissible, and so prejudicial that its admission is often grounds for a mistrial. Struther v. S. Expressway Radio, 132 Ga. App. 771 (1974); U.G. Southern RR Co. v. Black, 57 Ga. App. 592 (1938). Similarly, the issue of whether any of the designated non-parties at fault would be required to satisfy a judgment has no probative value.

Appellant cites no authority in Georgia law in support of this assertion. Further, the trial court did not preclude Appellant from addressing apportionment during closing arguments, as is asserted. The Court merely limited Appellant's inappropriate comments and provided curative instructions after those inappropriate comments were made.

The trial court correctly exercised its discretion to limit these irrelevant and prejudicial comments relating to the party's financial condition and provide a curative instruction to prevent a mistrial. (Vol. 6, T-1352-1356.) It was certainly within the trial court's discretion to limit such comments to avoid unfair prejudice and prevent a mistrial.

Finally, even if it were a technical error to "preclude" Appellant from making these comments regarding apportionment during closing arguments was not reversible error because the jury never considered attributing fault to any non-parties.

CONCLUSION

For the within and foregoing reasons, Artisan and Dr. Yugueros respectfully request the Court affirm the trial court's entry of judgment for the Defendants.

This 18th day of May, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **BRIEF OF APPELLEES ARTISAN PLASTIC SURGERY, LLC AND PATRICIA YUGUEROS, M.D.** upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

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