IN THE COURT OF APPEALS
STATE OF GEORGIA

RUDY ROBLES et al.	)	
	)	
Appellant,	)	Appeal Case Number: A15A1566
	)	
v.	)	
	)	
PATRICIA YUGUEROS et al.	)	
	)	
Appellees.	)	

APPELLANT'S BRIEF

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INTRODUCTION

This is a medical negligence action involving the death of Appellant's wife, Iselda Moreno, following routine plastic surgery. Appellant provided extensive evidence at trial that Appellee Patricia Yugueros, M.D. ("Dr. Yugueros"), while acting within the course and scope of her practice at Appellee Artisan Plastic Surgery, LLC ("Artisan"), negligently failed to recognize clinical evidence that Ms. Moreno had an acute abdominal process and that this failure proximately caused her death. After a lengthy trial, the jury returned a defense verdict.

The Trial Court committed reversible error before the trial began in connection with rulings on several pre-trial motions, and compounded those errors with prejudicial and erroneous rulings excluding critical evidence and argument at trial. First, the Trial Court erroneously denied Appellant's Daubert and *in limine* motions ("MIL") and ruled that Appellees' experts could testify on topics outside the scope of their expertise and, that non-parties could be included on the verdict form even in the absence of competent evidence authorizing their inclusion. As a result, the jury heard prejudicial and confusing testimony and argument about these non-parties throughout the trial. The Trial Court then compounded these errors by striking critical testimony elicited by Appellant on cross-examination concerning

the standard of care applicable to a physician providing emergency medical care, and the fact that there was no breach of that standard. The Trial Court then committed reversible error by excluding deposition testimony from Artisan's O.C.G.A. § 9-11-30(b)(6) witness that the standard of care required Dr. Yugueros to order a CT scan, (which was not done) and by precluding Appellant's counsel from explaining apportionment during closing argument.

PART I

STATEMENT OF THE PROCEEDINGS BELOW

On March 17, 2011, Appellant filed his Complaint against Dr. Yugueros and Artisan in the Superior Court of Fulton County. (V. 1, R. 6-39.) (Each record volume is cited as "V. __" and corresponds to the handwritten volume number in the upper right hand corner of each volume.) Prior to trial, Appellant filed a Daubert Motion and several MILs seeking to preclude Appellees' witnesses from testifying on matters beyond the scope of their expertise, and to prevent the inclusion of several non-parties on the jury verdict form. (V. 2, R. 370-412, 418-476.) By order dated January 27, 2014, the Trial Court denied these motions. (V. 4, R. 1125-1126.) The jury returned a defense verdict on November 13, 2014. (V. 5, R. 1258-1259.) Judgment was entered on November 20, 2014. (V. 5, R.

1262.) On December 11, 2014, Appellant timely filed a Notice of Appeal, challenging the January 27, 2014 Order and the November 20, 2014 Judgment. (V. 1, R. 1-5.)

STATEMENT OF MATERIAL FACTS

Dr. Yugueros performed an abdominoplasty (a/k/a "tummy tuck") and liposuction on Iselda Moreno on Wednesday, June 24, 2009 at Northside Hospital. (T. Vol. 9, p. 142, ll. 14-18.) On Friday, June 26, 2009 Ms. Moreno developed severe abdominal pain. (Id. at p. 108, ll. 16-23.) Because it was the closest hospital, she presented to the Gwinnett Medical Center ("GMC") emergency room ("ER") on Saturday afternoon, June 27, 2009. (T. Vol. 9, p. 109, l. 14 – p. 110, l.) Dr. Violette, an ER physician examined Ms. Moreno in the GMC ER, ordered a basic abdominal X-Ray (known as a "KUB") and read it as "unremarkable." (T. Vol. 12, p. 835, ll. 11-19; p. 838, l. 21 – p. 839, l. 2; p. 864, ll. 24-25.) He diagnosed post-operative pain and discharged her, with instructions to return if her symptoms worsened. (T. Vol. 12, p. 866, l. 15 – p. 867, l. 7.)

Roughly twenty (20) minutes after Ms. Moreno was discharged, Dr. York, a radiologist, read the KUB and could not rule out the possibility of "free-air" in her abdomen. (T. Vol. 12, p. 846, ll. 5-12; V. 20, p. 49, ll. 3-11; p. 58, ll. 3-7.) Free

air could be a normal finding in a post-operative patient, or it could be an indication of a serious condition. (T. Vol. 12, p. 845, ll. 9-11; V. 20, p. 82, l. 22 – p. 83, l.4.) Dr. York recommended a CT scan. (V. 20, p. 65, ll. 18-20.) Dr. Violette had not posted his interpretation of Ms. Moreno's KUB in Ms. Moreno's electronic medical record as GMC internal policy called for and, as a result, Dr. York did not call Dr. Violette with the results. (T. Vol. 12, p. 838, l. 21 – p. 841, l. 11; p. 844, l. 19 – p. 845, l. 5.) Rather, Dr. York immediately posted his report in Ms. Moreno's electronic medical record. (V. 20, p. 67, ll. 6-21; p. 71, ll. 10-16; p. 85, ll. 8-11.) Dr. Violette did not review the radiology report, before discharging Ms. Moreno. (T. Vol. 12, p. 844, ll. 12-18.)

Roughly three hours after being discharged from the GMC ER, Ms. Moreno was still suffering from extreme abdominal pain. (T. Vol. 9, p. 112, ll. 8-9; p. 114, ll. 2-12.) Dr. Yugueros' instructed Ms. Moreno not to return to GMC, but instead instructed her to go to Northside Hospital, where Dr. Yugueros had privileges. (Id., p. 214, ll. 8-21.) Following an initial work-up in the Northside ER, Dr. Yugueros admitted Ms. Moreno for "pain control and further evaluation." (Id. at p. 217, ll. 3-5; p. 220, l. 10 – p. 221, l. 8.) Notwithstanding the fact that Ms. Moreno continued to complain of excruciating pain, Dr. Yugueros never obtained the GMC

Radiology Report or the KUB, and never ordered an X-Ray or CT to diagnose the cause of Ms. Moreno's severe abdominal pain. (T. Vol. 9, p. 209, l. 24 – p. 210, l. 4, p. 224, l. 9 – p. 225, l. 15, p. 228, ll. 23-25, p. 229, ll. 19-21; T. Vol. 10, p. 258, ll. 16-20, p, 273, 11. 20-22; T. Vol. 12, p. 850, l. 22 – p. 851, l. 21, p. 869, ll. 6-15.) Ms. Moreno "crashed" on Sunday afternoon, June 28, 2009 and died that night as a result of an abdominal compartment syndrome, a syndrome in which the pressure in the abdomen rises and decreases blood flow to the abdominal organs. (T. Vol. 9, p. 120, ll. 1-3, p. 169, ll. 12-25; T. Vol. 10, p. 281, ll. 2-4.)

Appellees denied negligence and sought to blame Dr. Violette, Dr. York and GMC. (V. 1, R. 90-137, 252-255.) In discovery, Appellees identified six (6) physicians who were expected to testify at trial: Dr. Elliott, a plastic surgeon; Dr. Miller, a general surgeon; Dr. Leeper, a pulmonologist; Dr. Morgan, a general/ vascular surgeon; Dr. Krebs, a radiologist; and Dr. Wick, a pathologist. (V. 2, R. 405-408.) At trial, Appellees presented testimony from only Drs. Elliot, Morgan and Krebs. (T. Vol. 12, pp. 692-808; pp. 885-937, T. Vol. 13, pp. 1019-1104.) None of Appellees' witnesses practiced as emergency medicine physicians, none were familiar with the standard of care applicable to an emergency medicine physician, none were competent to testify that Dr. Violette was grossly negligent,

and none testified that Dr. Violette was grossly negligent. Id. Similarly, none testified that they developed hospital communication procedures. Id.

PART II

ENUMERATION OF ERRORS

Appellant includes in his argument on each enumerated error citations to the essential parts of the record and detail the method by which each enumeration of error was preserved for consideration.

Enumeration of Error No. 1: The Trial Court committed reversible error in denying Appellant's Daubert Motion.

Enumeration Of Error No. 2: The Trial Court committed reversible error in denying Appellant's Motion *In Limine* No. 39 regarding Dr. Violette.

Enumeration of Error No. 3: The Trial Court committed reversible error in placing Dr. Violette on the Jury Verdict Form.

Enumeration Of Error No. 4: The Trial Court committed reversible error when he instructed the jury, *sua sponte*, to disregard parts of Dr. Kreb's testimony.

Enumeration Of Error No. 5: The Trial Court committed reversible error in denying Appellant's Motion *In Limine* No. 38 regarding GMC.

Enumeration Of Error No. 6: The Trial Court committed reversible error in

allowing Dr. Krebs to offer previously undisclosed testimony about GMC policies and procedures.

Enumeration Of Error No. 7: The Trial Court committed reversible error in placing GMC on the Jury Verdict Form.

Enumeration Of Error No. 8: The Trial Court committed reversible error when it excluded Artisan's O.C.G.A. § 9-11-30(b)(6) testimony on the standard of care.

Enumeration Of Error No. 9: The Trial Court committed reversible error when it precluded Appellant from addressing apportionment during closing argument.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Ga. Const. Art. VI, § V, para. III, in that the issues presented are not reserved to the Georgia Supreme Court.

PART III

ARGUMENT AND CITATION OF AUTHORITIES

A. Standard of Review.

All questions of law shall be reviewed de novo, with the Court applying the plain legal error standard of review. Southland Propane, Inc. v. McWhorter, 312 Ga. App. 812, 720 S.E.2d 270 (2011); Payne v. Harbin, 254, Ga. App. 402, 562 S.E. 2d 772 (2002). The remaining issues discussed herein shall be reviewed for an

abuse of discretion. See Homebuilders Ass'n of Georgia v. Morris, 238 Ga. App. 194, 518 S.E.2d 194 (1999)(regarding admission of evidence at trial); Vaughan v. We1lStar Health System, Inc., 304 Ga. App. 596, 696 S.E.2d 506 (2010) (regarding expert qualifications); Cartledge v. Montano, 325 Ga. App. 322, 324, 750 S.E.2d 772, 775 (2013) (regarding motions *in limine*).

Enumeration Of Error No. 1: The Trial Court Committed Reversible Error in Denying Appellant's Daubert Motion.

Prior to trial, Appellant filed his Daubert Motion to Exclude Certain Opinion Testimony of Appellees Experts. (V. 2, R. 370-412.) In both his Daubert Motion and at a pre-trial hearing, Appellant argued that all testimony from Appellees' experts should be limited to each expert's purported area of expertise pursuant to O.C.G.A. § 24-7-702, particularly Dr. Kreb's testimony as a radiologist. (Id.; MT. V. 6, p. 5, l. 22 – p. 18, l. 17.) The Daubert motion focused on the fact that none of Appellees' experts were competent to provide testimony concerning either Dr. Violette, or GMC's communication policies and procedures, and sought to preclude such testimony. (V. 2, R. 400.)

Appellant also argued in his Daubert Motion that "[a]llowing testimony of a potential violation of an inapplicable standard of care (ordinary negligence) will

confuse the jury and prejudice the Plaintiff." (V. 2, R. 399.) Appellant also argued that Dr. Krebs "should be precluded from testifying about Dr. Violette's interpretation of the KUB or that Dr. Violette violated the applicable standard of care under O.C.G.A. § 51-1-29.5 . . ." (V. 2, R. 400.)

A. The Legal Standard Under *Daubert*.

Pursuant to O.C.G.A. § 24-7-702 (c), as it relates to medical negligence actions, expert testimony will be admissible only if the purported expert had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in the active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the purportedly negligent treatment.

In Daubert, the Court charged trial judges with the responsibility to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993). Appellees bore the burden of proof as to the reliability of their expert's proffered testimony and "admissibility must be shown by a preponderance of the evidence."

Allison v. McGhan Medical Corp., 184 F.3d 1300, 1306 (11th Cir. 1999). In the context of a medical malpractice action, Bonds v. Nesbitt, 322 Ga. App 852, 858,747 S.E.2d 40, 2013 Ga. App. LEXIS 624 *14 (2013) held that: "a minimum level of knowledge in the area in which the opinion is to be given is insufficient; instead, an expert must be both familiar with the standard of care at issue and also demonstrate specific experience in the relevant practice area." Id. See also Hankla v. Postell, 293 Ga. 692, 749 S.E.2d 726 (2013).

B. The Emergency Room Physician Standard of Care in Georgia.

Emergency room physicians are held to a different standard of care than other physicians. Under O.C.G.A. § 51-1-29.5(c), in order to apportion liability to Dr. Violette for the emergency medical care at issue, Appellees were required to prove by clear and convincing evidence that Dr. Violette's actions in the care and treatment he provided to Iselda Moreno in the GMC ER showed "gross negligence." Gross negligence is not a question of law, it is the standard care applicable to those providing emergency medical care in a hospital emergency department. Id. Gross negligence is not defined by O.C.G.A. § 51-1-29.5, yet it "has a commonly understood meaning, and needs no specific definition with the statute." Gliemmo v. Cousineau, 287 Ga. 7, 12, 694 S.E.2d 75, 80 (2010), quoting

Rouse v. Dept. of Natural Resources, 271 Ga. 726, 729, 524 S.E.2d 455, 459 (1999). The Georgia Supreme Court stated in Gliemmo: "gross negligence has been defined as 'equivalent to (the) failure to exercise even a slight degree of care' ([cits.]), or a 'lack of the diligence that even careless men are accustomed to exercise.'" Gliemmo, quoting Pottinger v. Smith, 293 Ga. App. 626, 628, 667 S.E.2d 659, 661 (2008). Pottinger holds that it is appropriate and necessary for a trial judge to consider the underlying conduct supposedly giving rise to the claim to determine whether more than slight medical care was provided to a tort claimant. Pottinger, 293 Ga. App. at 628, 667 S.E.2d at 661.

C. The Trial Court Erred in Denying Appellant's Daubert Motion and Allowing a Radiologist to Testify Outside His Scope of Expertise.

During his deposition, Dr. Krebs criticized Dr. Violette. Dr. Krebs, a radiologist, has never practiced as an emergency room physician. (V. 18, p. 47, ll. 9-17.) Indeed, Dr. Krebs testified, "I'm not an ER physician so I'm not really qualified to talk about any of his standard of care treating the patient." (Id. at p. 44, ll. 15-17.) Dr. Krebs also testified that "[a]gain, I can't speak to standard of care for an ER physician." (Id. at p. 46, ll. 14-15.) Dr. Krebs did state in his deposition that he was prepared to opine on Dr. Violette's interpretation of the

KUB because "that does cross between what my area of expertise is." (Id. at p. 47, ll. 7-8.) However, to meet the standard set forth in Bonds, Dr. Krebs must be familiar with the applicable standard of care, and must practice emergency medicine or teach emergency room physicians how to perform radiological services. Because he satisfied neither requirement, the Trial Court erred in denying Appellant's Daubert Motion seeking to preclude such testimony.

Dr. Krebs also criticized GMC's emergency room policies and procedures; however these criticisms were without sufficient factual basis, as is required by O.C.G.A. § 24-7-702(b). At the time of his deposition, Dr. Krebs had not read the GMC policy on a radiologist's protocol for reporting x-ray findings to an ER physician. (Id. at p. 38, ll. 19-20.) Dr. Krebs also did not indicate that GMC's policies constituted gross negligence. Here, these policies necessarily involve the provision of emergency medical care in a hospital emergency department. (V. 7, Bates 388-390). In the absence of such a factual predicate, Dr. Krebs lacked the necessary factual basis for, and the Trial Court abused its discretion by denying Appellant's Daubert Motion seeking to preclude him from offering opinion testimony about the propriety of GMC's policies and procedures for emergency

communications pursuant to O.C.G.A. § 24-7-702(b) and (c), particularly when he had not read those policies. (V. 2, R. 400; V. 4, R. 1125-1126.)

Enumeration Of Error No. 2: The Trial Court Committed Reversible Error in Denying Appellant's Motion *In Limine* No. 39 Regarding Dr. Violette.

Appellees filed a Joint Notice of Fault of Non-Parties seeking to include Dr. Violette on the jury verdict form. (V. 1, R. 253.) Appellant filed MIL No. 39 seeking to preclude Dr. Krebs from testifying that Dr. Violette violated the applicable standard of care and to preclude Dr. Violette from being included in the jury verdict form. (V. 2, R. 430.) It is axiomatic that Motions *in limine* preserve the issues raised therein on appeal. Harley-Davidson Motor Co. v. Daniel, 244 Ga. 284, 260 S.E.2d 20 (1979). The Trial Court erroneously denied MIL No. 39, and Appellees argued throughout the trial that Dr. Violette was at fault, but without providing any competent evidence that he was grossly negligent. The Trial Court then further erred in placing Dr. Violette on the verdict form.

A. Apportionment Generally.

O.C.G.A. § 51-12-33 (c) provides: "[in] assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities 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." To date, there has been no holding in Georgia that allows for apportionment of fault to medical providers without the claimant meeting the requirements of O.C.G.A. § 24-7-702, and in the context of an emergency room physician, of O.C.G.A. § 51-1-29.5. Like all statutes dealing with related subject matter, these provisions must be read in *pari materia*.

B. No Experts Testified that Dr. Violette was Grossly Negligent.

Appellees bore the burden of establishing qualification, reliability and helpfulness of expert testimony. E.g., United States v. Frazier, 387 F.3d 1244, 1260 (11th Cir. 2004). None of the Appellees' expert witnesses testified in deposition that Ms. Moreno was stable or that Dr. Violette was grossly negligent. (T. Vol. 12, pp. 692-808, pp. 885-937; T. Vol. 13, pp. 1019-1104; and see depositions generally.) Rather, Appellees' expert opined that Ms. Moreno likely developed a perforated stomach while she was at the GMC ER. (T. Vol. 12, p. 710, ll. 21-25.) As a result, the ordinary negligence standard was not applicable in the case as to Dr. Violette. Cf. Hospital Authority of Valdosta v. Brinson, 330 Ga. App. 212, 220-21, 767 S.E.2d 811, 817 (2014) (Ms. Moreno complained of severe pain throughout her stay at the GMC ER and her actual condition likely involved a perforated stomach.) (T. Vol. 12, p. 819, ll. 9-18, p. 850, ll. 19-24, p. 710, 11. 21-

25.) Because Dr. Krebs was unfamiliar with the standard of care applicable to an emergency physician, the Trial Court erred in permitting Dr. Krebs to criticize Dr. Violette, who provided medical care to a patient complaining of excruciating pain throughout her stay at GMC's emergency room. (T. Vol. 12, p. 850, ll. 18-21; p. 918, ll. 15-21, p. 919, l. 19 – p. 920, l. 21.) The Trial Court further erred in denying MIL 39 and placing Dr. Violette on the jury verdict form because Appellees offered no competent testimony concerning any violation by him of the gross negligence standard of care.

Enumeration of Error No. 3: The Trial Court Committed Reversible Error in Placing Dr. Violette on the Jury Verdict Form.

Appellees sought to shift blame to Dr. Violette throughout the course of the trial and argued that Dr. Violette fell below an undefined "standard of care" in interpreting Ms. Moreno's KUB as normal. (T. Vol. 12, p. 918, ll. 15-21.) However, as Appellant argued in seeking to preclude such testimony in both the Daubert Motion and MIL 39, Appellees' arguments failed as a matter of law because the witness offering testimony that Dr. Violette breached the standard of care was not competent to do so. Dr. Krebs testified at trial, "I am not an emergency room physician so I don't pretend to be able to say exactly what the

standard of care is for the emergency room physician." (V. 2, R. 370-412, R. 430-440; T. Vol. 12 p. 919, ll. 21-23.) Dr. Krebs acknowledged that he could not offer testimony about an emergency room physician. (T. Vol. 12, p. 920, ll. 18-20.) Dr. Krebs testified that he could testify as to the standard of care "when an emergency room physician is functioning as a radiologist." (T. Vol. 12, p. 920, ll. 2-4.) There is no testimony that Dr. Violette was "functioning as a radiologist." Rather, Dr. Violette reviewed an abdominal film as an emergency room physician in the ER looking for an intestinal blockage. (T. Vol. 12, p. 809, 11. 16-18, p. 835, ll. 3-22.) Yet, Dr. Krebs was allowed to speculate that the undefined "standard of care" required that an emergency room physician ordering the KUB follow up on the results once they were read by a radiologist (T. Vol. 12, p. 901, ll. 1-4), and that Dr. Violette breached the undefined standard of care. (T. Vol. 12, p. 901, ll. 8-11.)

Dr. Krebs did not meet the two prong standard set forth in Bonds, supra, that (1) an expert must be both familiar with the standard of care at issue; (2) and demonstrate specific experience in the relevant practice area. Bonds, 322 Ga. App. 852,747 S.E.2d 40. Because none of the Appellees' experts were emergency room physicians, and none testified that Dr. Violette was grossly negligent, it was reversible error to deny MIL 39 to allow this testimony, and to allow him to be

placed on the jury verdict form when there was no competent evidence to warrant his inclusion.

Enumeration Of Error No. 4: The Trial Court Committed Reversible Error When He Instructed the Jury, *sua sponte,* to Disregard Parts of Dr. Kreb's Testimony.

On cross-examination, Dr. Krebs conceded that he could not state that Dr. Violette was grossly negligent. (T. Vol. 12, p. 931, l. 21 – p. 932, l. 9.) Appellees objected to a question on this issue on the grounds that it called for a legal conclusion. (Id. at p. 932, ll. 2-3.) Initially, the Trial Court properly overruled the objection. (Id. at p. 932, l. 4.) The Trial Court, however, further compounded its prior errors when, *sua sponte*, it reversed its ruling (but only after Appellant had concluded his cross-examination of Dr. Krebs and tendered the witness) and gave the following prejudicial and confusing instruction:

> Just one second, please. All right. Ladies and Gentlemen Jury, there was an objection previously about the doctor testify to a legal standard and I made the wrong call on that one. That is that should not – he is not qualified to testify as to a legal standard. He's qualified to testify to the standard of care have a physician should

utilize in an area relevant to whatever his testimony is but he is not entitled to testify about the legal standard.

The Court will provide you with the law at the end of the case and then you will apply the fact as you find them to be to the law that the Court will provide. **So I want to instruct you to disregard that testimony and do not consider it in any way in your deliberations with regards to the doctor's comments on the legal standard required of a emergency room physician.**

(T. Vol. 12, p. 936, ll. 1-16.) (emphasis added.)

Dr. Krebs did not testify as to a legal standard. Gross negligence IS the applicable standard of care for health care providers performing emergency medical care. O.C.G.A. § 51-1-29.5(c). If the jury was to determine which standard of care applied to Dr. Violette as between ordinary and gross negligence, the Trial Court erroneously directed the jury to disregard evidence as to the gross negligence standard of care. That this fundamentally incorrect instruction prejudiced the Appellant and confused the jury cannot be disputed, for the jury asked for clarification as to the definition of the standard of care once they began deliberations. (V. 8, next to last page; Tr. Vol. 14, p. 1384 l. 9 - p. 1387, l. 1.)

Enumeration Of Error No. 5: The Trial Court Committed Reversible Error in Denying Appellant's Motion *In Limine* No. 38 Regarding GMC.

Appellees' Joint Notice of Fault also sought to include GMC on the jury verdict form. Appellees asserted that GMC "was wholly or partially at fault in this case for an *inadequate system* of reporting abnormal radiology results to the Emergency Department and to patients." (V. 1, R. 252.) (emphasis added.) Appellant filed MIL No. 38 to prohibit any evidence or argument to that effect. (V. 2, R. 441.) Because Appellees had no competent evidence to support this Notice of Fault, the Trial Court abused its discretion in denying MIL 38 concerning GMC. (V. 4, R. 1125-1126.) As a result of this ruling, Appellees presented prejudicial and incompetent evidence concerning GMC's emergency department communication policies and procedures.

Appellees could have hired a competent expert to testify as to the standard of care for a hospital and whether GMC's emergency services policies and procedures for communication between radiology and the emergency department comport with the standard of care. Appellees did not do so. Rather, they identified witnesses such as a pulmonologist and a radiologist to testify as to what the standard of care for a hospital's emergency room communication policies ought to

be. (MT. V. 6, p. 23, ll. 7-17.) None of Appellees' experts testified that they developed such policies.

In Perry v. Gilotra-Mallik, 314 Ga. App. 764, 767, 726 S.E. 2d 81, 84 (2012), the Court of Appeals upheld a trial court's sustained objections about questions relating to hospital's policies because "such questions would inject prejudice regarding the collateral issue of whether hospital polices had been violated." The Court further held that "[b]ecause the hospital was not a defendant, whether its employees were negligent was not a jury issue." Id. This Court has repeatedly held that "violations of private guidelines do not establish negligence per se." Wages v. Amisub, 235 Ga. App. 156, 160, 508 S.E.2d 783, 786 (1998); see also, Luckie v. Piggly-Wiggly Southern, Inc., 173 Ga. App. 177, 325 S.E.2d 844 (1984). Here, the Trial Court ignored these well-established precedents and abused its discretion by allowing the Defendants to confuse the jury by conflating purported violations of internal policies with purported violations of the standard of care. The resulting prejudice is manifest.

Enumeration Of Error No. 6: The Trial Court Committed Reversible Error in Allowing Dr. Krebs to Offer Previously Undisclosed Testimony About GMC Policies and Procedures.

Appellees identified Dr. Krebs' anticipated testimony in their discovery responses as follows:

> Dr. Krebs will testify about the KUB done at Gwinnett Medical Center and read by Dr. James York. He believes that the KUB is so severely abnormal in that Ms. Moreno's stomach is extremely distended that these findings should not have been missed with either Dr. Violette or Dr. York. He will also testify that it was below the standard of care not to report these abnormal findings to Ms. Moreno so that she could have had a CT scan that night and to have allowed Ms. Moreno to be discharged from the ER at Gwinnett Medical Center. (V. 2, R. 459.)

During his deposition, Dr. Krebs was asked about the GMC policies and procedures, but he could not testify about them because he had not seen them. (V.18, p. 70, l. 9 – p. 71, l. 16.) Appellees did not supplement their discovery as it related to Dr. Krebs testimony. (See Record Generally.) Immediately prior to the Appellees calling Dr. Krebs at trial, Appellees notified Appellant that they intended "to use one of the Gwinnett Medical Center Policies and Procedures that we referenced several times in this trial with Dr. Krebs." (T. Vol. 12, p. 877, ll.

13-17.) Appellant objected because Appellees had not supplemented their discovery responses to reflect that Dr. Krebs had been provided the GMC policies and procedures and had not had the opportunity to examine Dr. Krebs on same. (T. Vol. 12, p. 878, ll. 11-18.) Appellees argued that the GMC policies were not produced until after Dr. Krebs' deposition. (T. Vol. 12, p. 878, ll. 19-23.) Nothing prevented Appellees from supplementing their discovery.

The Trial Court abused its discretion when it allowed Dr. Krebs to testify at trial about the GMC policies and procedures particularly when they had not been introduced into evidence. (T. Vol. 12, p. 884, l. 25.) Appellant's discovery asked for the opinions that each expert would testify about. (V. 2, R. 456.) Appellees had a duty to supplement their discovery if an expert was to offer additional expert testimony. Appellees never did this. To allow an adverse expert to provide new opinions at trial was prejudicial.

Enumeration of Error No. 7: The Trial Court Committed Reversible Error in Placing GMC on the Jury Verdict Form.

Appellants moved to preclude testimony from Dr. Krebs concerning GMC's policies and procedures in the Daubert Motion and in MIL 38. (V. 2, R. 452) ("Dr. Krebs should be precluded from offering speculative testimony that Gwinnett

Medical Center's emergency services practices and procedures were negligent, much less that such practices and procedures are grossly negligent.")

The Trial Court abused its discretion in permitting this testimony at trial and in holding that GMC was properly placed on the jury verdict form after Dr. Krebs testified. Dr. Krebs offered no testimony about his qualifications as it related to developing and implementing hospital policies and procedures. (T. Vol. 12, p. 887, ll. 10-21; T. Vol. 12, p. 885, l. 20 – p. 937, l. 11.) He did not testify that he was responsible for developing policies or procedures for communication between a hospital emergency room and a radiologist providing emergency radiology services to an emergency room patient. Id. Nor did he testify that he had actual experience in developing policies or procedures for communication between radiologist and emergency room physicians, and not one of Appellees' experts testified that GMC's system, including its emergency service policy, was grossly negligent, as is required by O.C.G.A. § 51-1-29.5(c). Id. Thus, under O.C.G.A. § 24-7-702(c), Dr. Krebs did not qualify as an expert because he did not "have actual knowledge and experience in the relevant area though either 'active practice' or 'teaching.'" Hankla v. Postell, 293 Ga. 692, 749 S.E.2d 726 (2013).

Further, when asked about whether the GMC policies complied with the standard of care required of a hospital, Dr. Krebs testified:

> A. Well, actually it has a lot of holes in it. It leaves a lot of things up to the individual clinician to make sure that he adheres to this policy. I think it's unfortunately what didn't happen in the emergency room physician side of this. Again, a system should be in place that's completely bulletproof. You shouldn't have the option for a physician to not do something that requires that's essential in the care of the [patient]. In the facts with Dr. Violette, he unfortunately didn't follow the policy here. That's a system problem as much as it is an emergency problem. (T. Vol. 12, p. 911, ll. 6-19.)

Appellees did not present evidence authenticating the GMC policies, or any competent evidence that GMC violated the standard of care with respect to their emergency services policies and procedures. (T. Vol. 12, p. 877, l. 13 - p. 884, l. 25.) Rather, Dr. Krebs' testimony as to GMC's purported violation of the standard of care applicable to a hospital once again improperly and prejudicially conflated a purported failure to comply with an internal policy with a violation of the standard of care applicable to an emergency room physician. Perry, 314 Ga. App. at 767,

726 S.E. 2d at 84. As a result, the Trial Court erred when it denied Appellant's MIL 38 seeking to preclude this testimony and when it included GMC on the verdict form because Appellees' experts did not create issues for the jury to consider concerning whether GMC's internal communication policies and procedures were "inadequate."

Enumeration Of Error No. 8: The Trial Court Committed Reversible Error When it Excluded Artisan's O.C.G.A. § 9-11-30(b)(6) Testimony on the Standard of Care.

The Trial Court abused its discretion when it excluded Artisan's founder, Dr. Alexander's deposition testimony that the standard of care required a CT scan. Artisan designated Dr. Alexander as its O.C.G.A. § 9-11-30(b)(6) witness. (Vol. 22, generally.) The twenty-second topic of the O.C.G.A. § 9-11-30(b)(6) deposition notice required Artisan to provide a person to testify regarding the "care and treatment rendered by Patricia Yugueros, M.D. to Iselda Moreno." (V. 3, R. 606, ¶ 22.) Dr. Alexander testified that the standard of care required a CT scan. (V. 22, p. 81, l. 17 – p. 82, l. 10.) Dr. Yugueros never ordered an x-ray, much less a CT. Appellant sought to introduce this deposition testimony at trial pursuant to O.C.G.A. § 9-11-32(a)(2).

During the January 17, 2014 hearing, Appellant argued that Dr. Alexander's tesimony was an admission of a party-opponent. (MT V. 6, p. 127, l. 12 - p. 129, l. 12.) The Trial Court reserved ruling on the matter until trial. (Id. at p. 131, ll. 2 – 19.) At trial, Appellant sought to introduce the testimony. (T., Vol. 10, p. 503, l. 18 – p. 510, l. 3.) The specific testimony at issue was Dr. Alexander's deposition testimony at pages 78 to 82. (T. Vol. 11, p. 526, ll. 3-6.) The Trial Court committed reversible error when it determined that the testimony was not admissible. (T. Vol. 11, p. 527, ll. 18-20.)

Dr. Alexander is an experienced plastic surgeon. (V. 22, p. 7, ll. 13-15.) Dr. Alexander satisfied both prongs of O.C.G.A. § 24-7-702(c) under the standard established in Bonds, supra. While Dr. Yugueros claimed that Dr. Alexander did not have personal knowledge of all of the underlying events and had not reviewed all of Ms. Moreno's medical records, the same can be said of many if not all of Appellee's experts. This does not impact Dr. Alexander's qualifications or the admissibility of an admission of a party opponent. Appellant should not be penalized because Dr. Alexander was insufficiently prepared.

The Trial Court committed reversible error when it prevented the jury from learning that Dr. Alexander, as part of her O.C.G.A. § 9-11-30(b)(6) testimony,

admitted that the applicable standard of care required a CT. In the absence of this testimony, Appellant was precluded from utilizing evidence to rebut Artisan's repeated ratification of Dr. Yugueros' care and treatment. The prejudice resulting from this erroneous ruling is apparent.

Enumeration Of Error No. 9: The Trial Court Committed Reversible Error When it Precluded Appellant from Addressing Apportionment During Closing Argument.

Finally, and as part of developing jury instructions, the parties agreed to craft a jury charge based on an edited version of the apportionment statute. The parties agreed to the following language:

> Where an action is brought against more than one person for injury to person ~~or property~~, the trier of fact, in its determination of the total amount of damages to be awarded, ~~if any, shall after a reduction of damages pursuant to subsection (a) of this Code section~~, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall

not be a joint liability among the persons liable, and shall not be subject to any right of contribution. (T. Vol. 14, p. 1251, l. 23 – p. 1253, l. 1.)

During the charge conference, the Trial Court ruled that the parties could argue from this "revised" apportionment statute. (T. Vol. 14, p. 1251, ll. 11-13.) During closing arguments, Appellant made the following comment, "But when you go back and talk about apportionment understand this: The Court is going to instruct you that anything you assign to these nonparties – we didn't sue them—". (T. Vol. 14, p. 1348, ll. 18-21.) Appellees objected. (T. Vol. 14, p. 1348, ll. 22-23.) The Trial Court sustained the objection, the jury left the court room and the Trial Court heard argument. (T. Vol. 14, p. 1348, l. 24 – p. 1356, l. 10.)

Appellant argued that he was entitled to argue the statute and his understanding that the Trial Court was going to read to the jury the statutory language identified above. Appellees argued that explanation of the apportionment statute would be improper. (T. Vol. 14, p. 1350, ll. 10-20.) As a threshold matter, and contrary to Appellees' assertions, Appellant is not aware of any decisions which hold such argument to be impermissible. Once the jury returned, the Trial Court again sustained the objection and instructed the jury to "disregard the last

statement made by Plaintiff's Counsel." (T. Vol. 14 p. 1356, ll. 21-25.)

After closing arguments concluded, but before the jury was charged, the parties learned that the Trial Court *sua sponte* took the last sentence of O.C.G.A. § 51-12-33(b) out of the instructions to the jury but without disclosing this to the parties. (T. Vol. 14, p. 1359, ll. 12-21.) The Court stated, "[w]e saw that and determined that we didn't think it was appropriate for it to be there and we took it out but the timing of it was we didn't have a chance to alert anybody verbally to it but we did take it out." (T. Vol. 14, p. 1359, ll. 12-17.)

The Trial Court then reversed course once again and determined that it was appropriate to read the agreed upon statutory language to the jury including the last sentence. (T. Vol. 14, p. 1360, l. 15 – p. 1361, l. 17.) However, this occurred after the conclusion of closing arguments, after the Trial Court sustained Appellees' objection, and after it instructed the jury to disregard this portion of Appellants' argument. The Trial Court committed reversible error when it sustained this objection and prejudiced the Appellant by precluding him from explaining this critical portion of the apportionment statute, and by instructing the jury to disregard Appellant's argument concerning the jury's consideration of apportionment. (T. Vol. 14, p. 1348, l. 24; p. 1356, ll. 21-25.)

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court correct the Trial Court's errors as identified herein, reverse the November 20, 2014 Judgment and order a new trial.

Respectfully submitted, this 27th day of April, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2015, I served the foregoing APELLANT'S BRIEF on counsel for Appellees, by depositing a copy of same in the United States mail with sufficient postage affixed addressed to:

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