IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 14, 2015 Session

DONNA FAYE SHIPLEY EX REL. FRANK SHIPLEY v. ROBIN WILLIAMS

Appeal from the Circuit Court for Davidson County
No. 02C3204 Joseph P. Binkley, Jr., Judge

No. M2014-02279-COA-R3-CV – Filed May 19, 2016

Health care liability action filed in November 2002 in which patient alleges that physician was negligent in failing to assess her condition, failing to provide proper medical care, failing to admit her to the hospital or refer her to another doctor, and failing to properly follow-up with her. The trial court granted summary judgment on all claims and, following an appeal to this court in which we reversed the grant of summary judgment on all claims, the Supreme Court reinstated summary judgment on the failure to admit claim and remanded the case for trial on the remaining claims. On remand, on the patient's motion, the trial court set aside the summary judgment on the failure to admit claim, applying the "substantially different evidence" exception to the law of the case doctrine; following further discovery, the court reinstated summary judgment on that claim. After a trial, the jury found that the physician did not breach the standard of care and judgment was entered in her favor. Patient appeals, contending that the court erred in granting partial summary judgment on the failure to admit claim in 2006 and in reinstating the claim on remand; in restricting and excluding certain evidence at trial; in allowing evidence designed to shift blame from the physician to the patient and others; and in awarding sanctions against counsel for the patient. Finding no error or abuse of discretion, we affirm the judgment in all respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and W. NEAL MCBRAYER, J. joined.

Joe Bednarz, Jr., and Joe Bednarz, Sr., Hendersonville, Tennessee, for the appellant, Donna Faye Shipley.

Wendy Lynne Longmire and T. William A. Caldwell, Nashville, Tennessee, for the appellee, Robin Williams, M.D.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

This case comes before us for the second time. It arises from a healthcare liability action filed by Donna Shipley, ("Ms. Shipley") and her husband, Frank Shipley, against Dr. Robin Williams ("Dr. Williams"), Dr. Leonard Walker ("Dr. Walker"), and HCA Health Services, Inc., d/b/a/ Summit Medical Center ("HCA").[1] The complaint alleged that Ms. Shipley initially presented to the emergency room on November 18, 2001,at Summit Medical Center with an abnormally high white blood cell count and complaining of abdominal pain; that she was released without treatment; that she returned to the emergency room three days later and was admitted and diagnosed with sepsis and acute renal failure. The complaint asserted, *inter alia*, that Dr. Williams was negligent in failing to assess Ms. Shipley's condition; in failing to provide proper medical care; in failing to admit her to the hospital or refer her to another doctor; and in failing to properly follow-up with her.

On June 22, 2006, Dr. Williams moved for partial summary judgment on the failure to admit claim; the court granted the motion on September 1, 2006. Dr. Williams subsequently filed a motion, styled "Defendant's Motion For Summary Judgment To Exclude Stephen Rerych, M.D., and Ronald Shaw, M.D.," wherein she sought to exclude Ms. Shipley's expert witnesses from offering opinions to establish a *prima facie* case of malpractice, and on the basis of that exclusion, be granted summary judgment. The trial court entered an order on February 6, 2007, excluding the testimony of Dr. Rerych and Dr. Shaw because they failed to meet the requirements of Tenn. Code Ann. § 29-26-115 and Tenn. R. Evid. 702 and 703; the court granted summary judgment on the remaining claims. The Shipleys appealed, and this court reversed both summary judgment orders. *Shipley v. Williams*, No. M2007-01217-COA-R3-CV, 2009 WL 2486199 (Tenn. Ct. App. Aug. 14, 2009). Dr. Williams appealed to the Supreme Court, which reinstated the grant of summary judgment on the failure to admit claim and affirmed our reversal of the grant of summary judgment on the remaining claims; the case was remanded for trial. *Shipley v. Williams*, 350 S.W.3d 527 (Tenn. 2011).

[1] HCA and Dr. Walker were granted summary judgment and dismissed from the suit; no issue related to their participation in the suit is raised on appeal. Mr. Shipley died while the case has been pending and the case has been prosecuted by Ms. Shipley.

On remand, Ms. Shipley moved to set aside the September 1, 2006, order granting partial summary judgment to Dr. Williams on the failure to admit claim, asserting, *inter alia*, that "the theories and the testimony have been changed substantially enough that partial summary judgment is no longer appropriate." The court granted the motion, holding that "this issue falls under an exception to the law of the case doctrine that applies when substantially different proof is offered after remand." Following the taking of additional discovery, Dr. Williams moved the court to reinstate the 2006 order granting summary judgment on the failure to admit claim, asserting that "after being ordered to establish the substantially different evidence exception to the law of the case, the Plaintiff has failed to do so." On August 23, 2013, the court granted the motion.

The case was set for trial on September 9, 2013, and when the case was called for trial Ms. Shipley's counsel moved for a continuance; the court granted the motion orally and entered an order memorializing its ruling on September 23. Pursuant to leave granted by the court when the continuance was granted, Dr. Williams moved for an award of expenses and fees incurred as a result of the continuance, and in due course Ms. Shipley's counsel was ordered to pay $10,500 in expert witness cancellation fees and $3,000 in loss of income incurred by Dr. Williams as a result of the continuance as sanctions.

The case went to trial on July 14, 2014 and, following a ten day trial, the jury returned a verdict in favor of Dr. Williams, finding that she did not breach the standard of care. Ms. Shipley filed a motion for a new trial, which was denied. Ms. Shipley appeals, articulating the following issues:

1. Whether the trial court erred in granting the Motion for Partial Summary Judgment on the failure to admit claim in 2006.
2. Whether the Tennessee Supreme Court erred in reinstating the partial summary judgment.
3. Whether after setting aside the partial summary judgment in 2013, the trial court erred in reinstating the partial summary judgment.
4. Whether exceptions to the law of the case doctrine exist giving the trial court the right to reexamine the partial summary judgment despite the Supreme Court's decision to reinstate the partial summary judgment.
5. Whether the trial court erred in restricting factual and expert testimony regarding Mrs. Shipley's visit to the emergency room on Sunday, November 18, 2001.
6. Whether the trial court erred in allowing the Defendant to present a variety of evidence designed to shift the blame in this case from Dr. Williams to several other non-parties, despite the fact that there were no allegations of comparative fault.

7. Whether the trial court erred in restricting the Plaintiff's cross-examination of Dr. Williams on those issues to which she had just testified.
8. Whether the trial court erred in excluding evidence of *respondeat superior*.
9. Whether the trial court erred in awarding sanctions against Plaintiff's counsel related to the request for a continuance on September 9, 2013.

II. DISCUSSION

As an initial matter, we address Dr. Williams' argument that Ms. Shipley failed to properly preserve issues 1, 2, 4, and 5 by raising them in her Motion for New Trial, and therefore, pursuant to Tenn. R. App. P. 3(e), those issues are waived on appeal.

Tenn. R. App. P. 3(e) states, in relevant part:

> [I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instruction granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived.

Ms. Shipley's Motion for New Trial stated the following grounds:

1. The Defendant presented a variety of evidence in an effort to shift blame in this case from Dr. Williams to several other individuals which deprived the Plaintiff the opportunity for a fair trial.
2. After finding that blame shifting was occurring, the Court erred in restricting the cross-examination of Dr. Williams on those issues to which she had just testified.
3. The verdict rendered by the jury was against the weight of credible evidence and the Court should exercise its duty as thirteenth juror and set the verdict aside.
4. The Court erred in limiting evidence that Dr. Williams was negligent in not properly supervising Grace Hooper and excluding evidence of respondeat superior.
5. Allowing unreliable opinion testimony related to Tenn Care rules and regulations and excluding reference to the law which was in effect at the time.
6. The Court erred in reinstating the Partial Summary Judgment on the issue of failure to admit.

7. That Court erred in awarding sanctions against Plaintiff's counsel related to the continuance on September 9, 2013.

As we consider this issue we are mindful of the instruction in *State v. King* that "[t]he grounds relied upon in a Motion for new trial must be specified with reasonable certainty so as to advise the trial court and opposing counsel of the alleged error." *King*, 622 S.W.2d 77, 79 (Tenn. Crim. App. 1981). Moreover, appellate courts review a motion for new trial under Tenn. R. App. P. 3(e) "in the light most favorable to the appellant, and…should resolve any doubt as to whether the issue and its grounds were specifically stated in favor of preserving the issue." *Fahey v. Eldridge*, 46 S.W.3d 138, 144 (Tenn. 2001).

Viewed in the light most favorable to Ms. Shipley, we are of opinion that the grounds set forth in the new trial motion were stated with sufficient particularity to inform Dr. Williams, the trial court, and this court of the alleged error. Issues 1, 2, 4 and 5 each pertain in some manner to Ms. Shipley's claim that Dr. Williams committed malpractice in failing to admit her to the hospital on November 18, 2001, which is covered in ground 6 of the motion.

In the interest of clarity and completeness, issues 1, 2, 3, 4 and 5 will be addressed in our discussion of the law of the case doctrine.[2] The remaining issues will be addressed in the order presented.

A. The Law of the Case Doctrine

In *Memphis Pub. Co. v. Tennessee Petroleum Underground Storage Tank Bd.*, our Supreme Court articulated the law of the case doctrine:

> [U]nder the law of the case doctrine, an appellate court's decision on an issue of law is binding in later trials and appeals of the same case if the facts on the second trial or appeal are substantially the same as the facts in the first trial or appeal. The doctrine applies to issues that were actually before the appellate court in the first appeal and to issues that were necessarily decided by implication.
> ***
> Therefore, when an initial appeal results in a remand to the trial court, the decision of the appellate court establishes the law of the case which generally must be followed upon remand by the trial court, and by an appellate court if a

[2] Some of the testimony referenced in issue 5 will also be addressed in our discussion at Section B of this opinion.

> second appeal is taken from the judgment of the trial court entered after remand.

975 S.W.2d 303, 306 (Tenn. 1998) (internal citations omitted).

Ms. Shipley argues that the trial court erred in granting Dr. Williams' motion for partial summary judgment on the failure to admit claim in 2006 and seeks our review of that decision. The propriety of that ruling was resolved by the Supreme Court when it reinstated the grant of summary judgment on the claim in 2011; that has become the law of the case. We will not revisit the merits of the original grant of summary judgment on this claim. For the same reason, we will not address Ms. Shipley's argument that the Supreme Court erred in reinstating the summary judgment previously granted.[3]

Ms. Shipley also contends that exceptions to the application of the law of the case doctrine existed and justified setting aside the 2006 summary judgment on the failure to admit claim. The three exceptions identified in *Memphis Pub. Co.*, are:

> (1) [T]he evidence offered at a trial or hearing after remand was substantially different from the evidence in the initial proceeding;
> (2) the prior ruling was clearly erroneous and would result in a manifest injustice if allowed to stand; or
> (3) the prior decision is contrary to a change in the controlling law which has occurred between the first and second appeal.

Memphis Pub. Co., 975 S.W.2d at 306. Ms. Shipley argues that: (1) her experts unequivocally stated that the standard of care required her to be admitted to the hospital on November 18, 2001; (2) that taken in the light most favorable to her, the expert testimony shows that Dr. Williams failed to negate an essential element of the failure to admit claim; and (3) that the Supreme Court "deprived the parties and the trial court the opportunity to brief and argue the issues under the *Hannan* standard."

Upon our review of the motion Ms. Shipley filed on February 22, 2013, to set aside the partial summary judgment, it does not appear that she clearly contended at the trial court level that the second and third exceptions to the law of the case doctrine applied in this case. However, inasmuch as Dr. Williams has not specifically argued that applicability of the second and third exceptions has been waived on appeal, and in the interest of resolving all issues presented, we will proceed to address each exception.

[3] In any event, this Court cannot reverse a decision of the Supreme Court. *Barger v. Brock*, 535 S.W.2d 337, 341 (Tenn. 1976).

In support of her motion, Ms. Shipley relied on the affidavit of Dr. Doerhoff signed March 7, 2007, Dr. Doerhoff's affidavit signed in February of 2013, the Tenn. R. Civ. P. 26.02(4) disclosure statements of Dr. Jeffrey Young and Dr. Stephen Rerych,[4] excerpts from the depositions of Dr. Rerych taken January 17, 2006, Dr. Williams taken October 22, 2003, and Dr. Leonard Walker taken October 22, 2003. Dr. Williams filed a response opposing the motion. A hearing on the motion was held, in the course of which the court stated:

> The motion to set aside partial summary judgment is granted. I – I believe that this is an exception to the law of the case, the limited circumstance being, number one, evidence offered at a trial or hearing after remand substantially different. I don't know whether it's substantially different or not. I think you…I have to give you an opportunity to show me which means we'll re – after you get your proof done, your experts' depositions taken, then we'll – Ms. Longmire can refile her motion for summary judgment and we'll see if the evidence offered at a trial here after remand is substantially different from the evidence in the initial proceeding. I think that's - - I think I have to give you that opportunity to show me if that exception applies and so I'm - - I'm going to allow - - allow that to occur.

The court thereafter entered an order memorializing the oral ruling.

Dr. Williams re-filed her motion for partial summary judgment, supported by a statement of undisputed facts and thirty-two exhibits, in which she argued that Ms. Shipley had failed to establish the first exception to the law of the case doctrine.

The court granted the motion, holding:

> 1. That in *Shipley v. Williams*, 350 S.W.3d 527, 557 (Tenn. 2011), the Supreme Court's reinstatement of summary judgment in Dr. Williams' favor on the failure to admit claim was the law of the case.
>
> 2. That *Memphis Pub. Co. v. Tennessee Petroleum Underground Storage Tank Bd.*, 975 S.W.2d 303, 306 (Tenn. 1998), set out the exceptions to the law of the case. This Court sought to determine if Exception #1 was applicable.
>
> 3. That in reviewing Plaintiff's Rule 26 Expert Dr. Doerhoff's evidentiary

[4] Dr. Young's disclosure statement is undated but bears a service date of August 31, 2012, and a filing date of February 22, 2013. Dr. Rerych's disclosure statement is also undated, and bears a service date of February 23, 2004, and filing date of February 22, 2013.

> deposition, taken at the Court's instruction, it was determined that Exception #1 had not been met as there did not exist substantially different evidence as set out in the above case.
>
> Based upon the applicable law, the arguments of counsel and the pleadings filed in this matter, it is the Court's order that [its] April 1, 2013 Order setting aside the partial summary judgment with respect to failure to admit, shall be vacated. As a result, the claim for failure to admit Ms. Shipley to the emergency room on November 18, 2001 is dismissed and is no longer part of the case.

In her discussion of the first exception to the law of the case doctrine in her brief, Ms. Shipley refers this court to three questions and answers contained at pages 15-16 in an evidentiary deposition of Dr. Doerhoff. Contrary to the requirement at Tenn. R. App. P. 27(g) Ms. Shipley has not cited to the pages of the record where the deposition is found. We have searched the record and, in a separate volume of the record in which several other transcripts are located, have found the transcript of an evidentiary deposition of Dr. Doerhoff taken on April 26, 2013; this deposition includes the pages which contain the questions and answers quoted in Ms. Shipley's brief. These pages are not included in the materials filed in support of or in opposition to the motion. Of particular concern is the fact that Dr. Williams' counsel objects to the line of questioning and there is no indication that the objection was ruled upon by the court. For these reasons, we will not consider the questions and answers quoted in Ms. Shipley's brief but will consider the materials filed in support of and in opposition to the motion.[5]

We have reviewed the testimony of Dr. Doerhoff cited by Dr. Williams along with Ms. Shipley's response to the statement of material facts filed in support of Dr. Williams' motion, and agree that there is no evidence that qualifies as "substantially different from the evidence in the initial proceeding" for purposes of invoking the first exception to the law of the case doctrine, as articulated in *Memphis Pub. Co*. Significantly, Dr. Doerhoff testified in April 2013 that his medical opinions have not changed; and that nothing new has occurred to cause him to change his opinion.

As respects the second exception to the law of the case doctrine, Ms. Shipley argues that the original decision granting summary judgment on the failure to admit claim was clearly erroneous because the opinions of her experts do not support the finding that Dr.

[5] In her response to Dr. Williams' motion at the trial court, Ms. Shipley filed two depositions of Dr. Doerhoff, the deposition of Dr. Gerald Donowitz, and a response to the statement of material facts; she does not mention either of these in her discussion of this issue on appeal.

Williams negated an essential element of the claim. Her contention in this regard is an attempt to reargue the merits of the decision to grant summary judgment. As noted earlier, the propriety of the grant of summary judgment was resolved by the Supreme Court, and we will not revisit that decision. *See Barger v. Brock*, 235 S.W.2d 337, 341 (Tenn. 1976).

It is not clear from her brief what Ms. Shipley contends relative to the third exception to the law of the case doctrine.[6] This court applied the summary judgment standard set forth in *Hannan v. Alltel Publ'g Co*., 270 S.W.1 (Tenn. 2008) in the first appeal. Likewise, the Supreme Court applied the *Hannan* standard when it affirmed the Court of Appeals' determination that Dr. Williams had successfully negated an essential element of the failure to admit claim and reversed the determination that Ms. Shipley could not prove an essential element of her remaining claims at trial, the grant of which had been predicated upon the trial court's ruling excluding Ms. Shipley's experts, Drs. Rerych and Shaw, as expert witnesses. Accordingly, this argument is without merit.

B. Evidentiary Matters

With respect to issues 6, 7, and 8, Ms. Shipley argues that the trial court erred in the admission or exclusion of certain evidence. Specifically, she argues that the court erred in allowing Dr. Williams to introduce evidence of blame shifting; in restricting the scope of her examination of Dr. Williams; and in excluding evidence of *respondeat superior*.

Decisions regarding the admission or exclusion of evidence are entrusted to the trial court's discretion and will not be disturbed on appeal unless the trial court abused its discretion. *State v. Banks*, 271 S.W.3d 90, 116 (Tenn. 2008) (citing *State v. Robinson*, 146 S.W.3d 469, 490 (Tenn. 2004); *State v. James*, 81 S.W.3d 751, 760 (Tenn. 2002)). An abuse of discretion occurs when the court applies an incorrect legal standard, reaches an illogical

[6] The entirety of her argument on this exception is:

> **The prior decision is contrary to a change in the controlling law, which has occurred between the first and second appeal**. While the change in the law actually occurred between the granting of the summary judgment and the opinion of the Court of Appeals, this secondary issue fell between the cracks. The Supreme Court was obviously more concerned with the locality rule and the full summary judgment. They obviously did not fully consider the issue nor the consequences of the decision. The way that it was done deprived the parties and the trial court the opportunity to brief and argue the issues under the *Hannan* standard. This would have essentially put the Plaintiff in the position of attacking her own experts and could have provided the court with the explanations of the experts opinions why it was inappropriate for the Defendant to rely upon them as they did. Because of the procedural position of the case at the time the Supreme Court reviewed the case, it was not possible to explain why the opinions did not negate an essential element for the claim.

conclusion, or employs reasoning that causes an injustice to the complaining party. *Banks*, 271 S.W.3d at 116 (citing *Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008)). When we review the trial court's exercise of discretion, we presume that the court's decision is correct and review the evidence in the light most favorable to upholding the decision. *Lovelace v. Copley*, 418 S.W.3d 1, 16-17 (Tenn. 2013) (citing *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105-06 (Tenn. 2011)). As noted in *White v. Vanderbilt Univ.*:

> Appellate courts will set aside a discretionary decision only when the trial court has misconstrued or misapplied the controlling legal principles or has acted inconsistently with the substantial weight of the evidence. Thus, a trial court's discretionary decision should be reviewed to determine: (1) whether the factual basis for the decision is supported by the evidence, (2) whether the trial court identified and applied the applicable legal principles, and (3) whether the trial court's decision is within the range of acceptable alternatives. Appellate courts should permit a discretionary decision to stand if reasonable judicial minds can differ concerning its soundness. . . . The erroneous exclusion of evidence will not require reversal of the judgment if the evidence would not have affected the outcome of the trial even if it had been admitted.

21 S.W.3d 215, 223 (Tenn. Ct. App. 1999). Moreover, evidentiary errors are preserved pursuant to Tenn. R. Evid. 103, which requires that the complaining party must have made an offer of proof or objection.[7]

[7] Tenn. R. Evid. 103 states, in relevant part:

> (a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) *Objection*. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection if the specific ground was not apparent from the context; or
>
> (2) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context.
>
> Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error on appeal.

As an initial matter, we note that our analysis of this issue is made more difficult by the manner in which Ms. Shipley's brief is written. Tenn. R. App. P. 27 requires that an appellant's brief contains "an argument … with citations to the authorities and appropriate references to the record …" Tenn. R. App. P. 27(a)(7). While portions of Ms. Shipley's brief contain the appropriate citations to the record, much of it does not. In the absence of the appropriate citations, this court will not search the voluminous record for evidentiary support for Ms. Shipley's arguments.

1. Blame shifting[8]

Prior to trial, Ms. Shipley filed a motion *in limine* to exclude evidence of comparative fault. Citing the Tenn. R. Civ. P. 26.02(4) Disclosures of Dr. John Drummond, Dr. Guy Voeller, Dr. George Woodman, Dr. Kerry Cleveland, who were expert witnesses on behalf of Dr. Williams, as well as the disclosure of Dr. Williams, Ms. Shipley argued that the experts "have subtly tried to shift blame … to everyone but Dr. Williams." She asked the court to enter an order prohibiting Dr. Williams "from attempting to shift the blame or presenting any testimony that someone else is responsible for Ms. Shipley's injuries." At the hearing on the motion, Dr. Williams' counsel stated that Dr. Williams did not intend to offer proof of comparative fault; that the testimony in question was factual; and that Dr. Williams did not want to be "precluded factually from showing what happened and why Dr. Williams acted the way she did."[9] At the conclusion end of the argument, the court ruled:

> But my ruling is that I believe that George versus Alexander stands for the proposition that you can't even infer a blame shifting with facts. So my

[8] In this case, the term "blame shifting" had its genesis in Ms. Shipley's Motion *in Limine* No. 1 to Exclude Evidence of Comparative Fault. In the "Law and Argument" section of her motion, Ms. Shipley makes reference to *George v. Alexander*, 931 S.W.2d 517 (Tenn. 1996). In *George*, our Supreme Court states, "'blame-shifting' in a negligence context actually has to do with the element of causation in fact. Once the defendant introduces evidence that another person's conduct fits this element, it has effectively shifted the blame to that person." 931 S.W.2d at 521. In the present case, the court and both parties use the term "blame shifting" as it is defined in *George*.

[9] With reference to the specific Rule 26 statements cited by Ms. Shipley, counsel for Dr. Williams stated:

> We're not alleging comparative fault. With respect to those disclosures, that was after Your Honor had brought failure to admit back into the case and we amended our Rule 26 to talk about it was a joint responsibility, and that it was not the responsibility of Dr. Williams. We had to do that. It's not the responsibility of Dr. Williams to admit this patient. Now, that the failure to admit is no longer a part of this case, we're not going to be talking about whose duty it was to admit to the ER on Sunday. Absolutely not.

> position is you all can – I mean, get into some facts if you're not inferring blame shifting when you do get into those fact[s.] Because there is no comparative fault, everybody's agreed. [Tenn. R. Civ. P.] 8.03 sets out affirmative defenses that are required to be pled, one of them is comparative fault and everybody agrees comparative fault has not been pled…you also cannot have inferences of blame shifting with questions that are being asked of the experts in this case.
> ***
> So any inferences of blame shifting will not be allowed. So you got to be careful how you ask the questions, defense counsel. In order to be able to comply with the Court's ruling, and I can't say you can't do this and you can't do that until I hear the question. That's the Court's ruling.

The court thereafter entered an order memorializing its ruling:

> While this Court does not expressly find that any evidence or opinions discussed at the hearing should be excluded, this Court is of the opinion that opinions and inferences of comparative fault should not be allowed. Therefore, it is proper to withhold ruling on any testimony referenced in this Motion until trial.

In her brief Ms. Shipley lists a number of what she refers to as "themes" which Dr. Williams' defense used, all of which she contends entailed shifting blame to someone other than Dr. Williams. Unfortunately, her discussion of these asserted themes is argumentative and conclusory and does not substantially assist in our evaluation this issue. We have tallied 79 instances of alleged blame shifting cited in her brief; of those, five were preserved at trial by Ms. Shipley's objection or by the court *sua sponte*: (1) two portions of testimony from Dr. Woodman; (2) testimony of Grace Hooper, Dr. Williams' medical assistant; (3) one *sua sponte* ruling in which the court excluded two items of evidence.

The first instance was Dr. Woodman's testimony in response to a question regarding the proper protocol for a doctor to follow under the circumstances presented:

> Q. Where do you look for guidance when you are determining what the patient is to do when you're evaluating a case like this?
> A. I mean, that's a complex question, but as a surgeon who received a call from a patient, my duty and the standard of care is for me to send her to the emergency room or to be evaluated in some way that day, which was done, and to be evaluated by a skilled practitioner who is a medical doctor and somebody who is skilled in identifying emergency problems.

***

[I]f somebody is in the emergency room and they need to be seen in an urgent period, let's say 12 hours in their opinion, well, that person has no business being sent home from an emergency room. They're already there. If they need to be seen by a surgeon, they're going to be seen right then.

Q. What's your understanding about Dr. Williams' understanding about when this patient would be seen?

A. Dr. Williams wrote in the medical records that [the] patient [was] to call Dr. Williams' office the next morning and schedule - -

Counsel for Ms. Shipley objected and the following dialogue ensued:

Mr. Bednarz, Sr. [Ms. Shipley's counsel]: Your Honor, may we approach?

The Court: Yes.

Mr. Bednarz, Sr.: Your Honor, I think that was blatant - - I object. I think that was blatant blame-shifting to [Dr. Walker, the emergency room physician] that he wouldn't send anybody home, you know, under those conditions, and so we're right back - - she discusses Sunday and then I'm prevented from cross-examining on Sunday, but he's laying everything on Walker.

Ms. Longmire [Dr. Williams' counsel]: And I will ask him. We are not criticizing Dr. Walker and he is just talking about why he thought the patient was not going to be seen the next day. That's where I'm trying to go. And he was a little nonresponsive to me, but I'm going to get him there.

The Court: Well, what you need to do and if you don't do it, I will because he's not responding --

Ms. Longmire: I will.

The Court: -- is get him back on track.

Dr. Williams' counsel proceeded to question Dr. Woodman, without objection, relative to Dr. Williams' follow-up and the standard of care. We fail to see that this testimony constituted evidence or an inference of comparative fault, and it therefore did not violate the order of the court.

Ms. Shipley also references the following testimony of Dr. Woodman which occurred during questioning regarding the ability of Ms. Shipley, an enrollee in the TennCare program, to be seen and treated without a referral:

Q. And in TennCare guidelines going back to 2001 - - go ahead.

A. I didn't answer your question. You asked about, you know, was there a problem with her needing a referral to get paid.

Q. All right. Yes.
A. I think that was your question. And this has very little to do with getting paid to see a patient. We don't get paid very well to see Medicaid patients. That's not something that concerns us that much. And the reason I see Medicaid patients and most of us is because –

Mr. Bednarz, Sr.: Your Honor, I object to being nonresponsive.
The Court: I agree.
By Ms. Longmire:
Q. All right. Just confine – confine the question to could you see a patient of TennCare without a referral and either not get paid or get paid directly by the patient?
A. Absolutely not. And I can explain that briefly if you would like. I'll try to keep it brief.
The Court: Yes.

As is apparent, this objection was not to the question but, rather, that the answer was not responsive. Ms. Shipley's argument that this line of inquiry was impermissible blame shifting is without merit.

The instance of alleged blame shifting relative to the testimony of Dr. Williams' medical assistant, Grace Hooper, was as follows:

Q. And would you send them to the emergency room?
A. Sure. That was standard procedure.
Q. So if a patient called in and said they were worse and they couldn't get to Dr. Williams, you would send them to the emergency room?
A. Yes, I would.
Q. And you wouldn't hesitate to do that?
A. No.
Q. And you had orders to do that?
A. Yes. I mean, the emergency [room] is fine.
Q. All right. And this indicates on 5/30 that, in fact, Dr. Williams did call in a prescription for pain medication; is that right?
A. That's right.
Q. All right. And at 6/15/01, that's June, Mr. Shipley is calling you again, and you're noting that in the file, documenting that request for something for nausea; is that right?
A. That's right.

(Proceedings held at the bench.)

Mr. Bednarz: I can't see the possible relevancy of this, and it's blame shifting again. This has elements of the blame shifting in it.
The Court: In what way?
Mr. Bednarz: Inferring that she could go to the emergency room and she could tell her go to the emergency room. Just the chronology that is being laid out here, it's just totally irrelevant.
The Court: Well, I think - - well, I want you to speak.
Ms. Longmire: I think there is a historical reference she's documenting that she would troubleshoot the problem…And I think it's important with respect to these three days in question.
The Court: I do too. And – but just be careful about the potential blame shifting issue.
***
Objection overruled. You may proceed.

In this dialogue the court agreed with Dr. Williams' counsel that the testimony was relevant to the issues in the case and overruled Ms. Shipley's relevance objection; she does not assign error in that regard. We fail to see how the questions or answers constituted blame shifting. In any event, the record shows that Dr. Williams' counsel proceeded to elicit another line of testimony.

Ms. Shipley asserts that the court recognized that instances of blame shifting occurred when the court made the following ruling *sua sponte,* excluding evidence of the location of the emergency department and evidence that Ms. Shipley failed to fully inform Dr. Williams of her prior medical history:

Having listened to the testimony, and particularly Dr. Williams' testimony yesterday, it's my feeling that there is blame-shifting going on by the defendant to the plaintiff on failure to tell Dr. Williams about the plaintiff's hospitalizations at the hospital in Springfield - - I'll come up with it in a minute - - and/or the hospital in Sumner County.

And Dr. Williams testified yesterday – and this is a truthful statement by her. There is nothing nefarious about this at all by Dr. Williams. It's just the way it is. Rather than stating the facts, there are inferences of blame on the plaintiff, the plaintiff should have told me about these hospitalizations, and probably she should have, but in the context of this trial - - and when I say probably she should have, for good continuity of medical treatment, but in the context of

this trial, that to me is precisely what blame-shifting is all about, that it's your fault, plaintiff, you didn't tell me about all this or I would have been more vigilant in your care. So it's just like a comparative fault statement.

The same thing with the fact that the plaintiff knew where the emergency room was, could have gone into the emergency room on November 19th or November 20th, and it's like saying to the plaintiff you knew where to go and you didn't go, so it's your fault that you got worse and didn't get medical care. And that's blame-shifting.

But it's all out there and I let it get out there because I believe that those were just facts, but the way the facts have been presented, it has created an inference, if not an exact direct statement, that the plaintiff is at fault, if not totally, partially at fault for the condition she found herself in on November 21st of 2001.

So, I'm going to do a curative instruction. I don't know what it's going to be yet, but I need to make it thorough and I need to make it understandable to these jurors because they have already heard all these facts and they have heard all these statements that have created these inferences that the plaintiff is at fault.

And so I'm going to have to work on that, but we're not going to have any more testimony about the hospitalizations and the medical treatment in Springfield or in Robertson County or Sumner County. And we're going to withdraw from evidence that drawing that was put in for the same reason of the Summit Medical Center that shows where the emergency room entrance is, where Dr. Williams' office – how you get to Dr. Williams' office and just the layout of the Summit Medical Center.

Counsel for the parties proceeded to discuss the court's ruling. Dr. Williams' counsel, in particular, expressed disagreement with the court's concern that the evidence which the court cited as containing inferences of comparative fault was not relevant evidence in support of Dr. Williams' theory of the case.[10] Ms. Shipley's counsel did not specifically address the ruling but discussed the effect of the ruling on his cross-examination of Dr. Williams.

[10] The following colloquy between the court and counsel is illustrative:

Ms. Longmire: With respect to your ruling on your announcement, I guess, with respect to that on blame-shifting, we would respectfully disagree. We understand that's the court's ruling. And we believe that that evidence is relevant to show what the doctor knew or should

Ms. Shipley did not move for a mistrial and does not assign error to the court's failure to declare a mistrial, the decision to give a curative instruction, or to the adequacy of the instruction. Since this ruling has been cited as an instance of blame shifting, however, we will review the adequacy of the instruction to address the concern.

Immediately prior to giving the standard charge, the court gave the following instruction:

> The first thing I'm going to do before I read the jury charge, which is the law in this case, I'm going to give you an instruction about some testimony that you have heard. And what I'm basically going to tell you to do is to ignore this testimony and not to consider this testimony for any purpose during your deliberations.
>
> And this - - I'm just going to give this preliminary statement before I give you the statements that I want you to ignore. This is the preliminary statement.
>
> As you-all know, the plaintiff, Mrs. Shipley, alleges that the defendant, Dr. Williams, violated the applicable standard of acceptable professional practice in her care and treatment of Mrs. Shipley on November 19th, 20th and/or the 21st of 2001. That's Monday, Tuesday and Wednesday. And Dr. Williams, of course, denies this allegation. That's the preliminary statement.

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have known and what they could rely upon.
The Court: And since the doctor didn't know, then what's the inference of that? You should have told the doctor?
Ms. Longmire: No, sir. The inference is that if the patient or the plaintiff was worse, then she would have called the doctor. And so because she didn't, the inference is that the doctor can rely on the lack of communication as a positive sign that she's the same, not that she should have called. There has been no proof whatsoever in the record that she was worse on Monday or Tuesday, so the inference and the reason for our efforts - -
The Court: That's your best argument.
Ms. Longmire: Well, that's truly honestly, that's our point with this information. And I never asked the question are you blaming Mrs. Shipley and we have never tried to get that inference. I swear to the court we never have.
The Court: I know you haven't, but that's how - - that's how it's come out.
Ms. Longmire: But I will say this. That is why we believe the evidence to be so important, because when Ms. Shipley was worse, either she or her husband called. We released the patient as stable on Sunday. We didn't hear from her. She's in the medical world realm. She could easily have communicated, and so we - - we rely on that lack of communication that she is stable, that it's - - that everything is okay, that everything is status quo. And so that's the purpose.

> Now, listen carefully. As part of her defense, Dr. Williams has not attributed blame or fault of any kind to Mrs. Shipley or to any other person in this case. You are not to consider testimony regarding Mrs. Shipley's care and treatment at NorthCrest Medical Center in Springfield, Tennessee, and at Sumner Regional Medical Center in Gallatin, Tennessee, for the purpose of attributing any fault to Mrs. Shipley.
>
> As I said earlier, Dr. Williams has not attributed blame or fault of any kind to Mrs. Shipley or to any other person in this case, so you are to disregard this testimony because it is not evidence and you must not consider it for any purpose.
>
> Also, you're not to consider testimony regarding the proximity of the emergency room to Dr. Williams' office for the purpose of attributing any fault to Mrs. Shipley. You are to disregard this testimony because it is not evidence and you must not consider it for any purpose.
>
> So that's an instruction I'm giving you-all and the reason I'm giving it to you is because you have already heard that testimony, and I'm telling you as a result of a ruling that I made in this trial after the testimony was put before you, as a result of my ruling, I am telling you not to consider that testimony. It is not evidence. And, of course, I have told you earlier you're only to consider the evidence in this case and I'm instructing you that is not evidence.

In composing the instruction, the court was called upon to balance the fact that comparative fault was not a defense raised by Dr. Williams with her theory — supported by testimony — that the absence of a complaint from Ms. Shipley was evidence that she was not in immediate distress. By its nature, this theory was advanced through inferences from the evidence.[11] The court had previously cautioned counsel to avoid questions which might lead to evidence from which the jury could infer that Dr. Williams was shifting the blame.[12]

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[11] "Inferences are deductions or conclusions which with reason and common sense lead the jury to draw from facts which have been established by the evidence in the case." INFERENCE, *Black's Law Dictionary* (6th ed. 1990).

[12] After making the *sua sponte* ruling discussed *supra*, the court cautioned counsel:

> [B]e careful about our cross-examination on those issues. Stay away from those issues because I'm not going to give the curative instruction yet because I want to think about it before I give it, but watch your cross-examination. Don't go into those areas that I say I'm going to tell the jury not to consider.

From our review, the instruction sets an appropriate balance between the procedural posture of the case, the theories advanced by the parties, and the evidence. The Court waited until all the evidence was in before giving the instruction; the instruction was narrowly tailored to address specific evidence, and properly instructed the jury not to infer any liability on the part of Ms. Shipley.[13]

We discern no error or abuse of discretion in the court's handling of asserted blame shifting.

2. Scope of Dr. Williams Testimony on Cross-Examination

Ms. Shipley argues that the court erred in not allowing her the opportunity to cross examine Dr. Williams on testimony that inferred others were to blame for Ms. Shipley's injuries. Contrary to the requirement at Tenn. R. App. P. 27(a)(7) that the appellant include appropriate citations to the record, Ms. Shipley does not cite specific instances in which she attempted, without success, to question a witness, nor does she cite specific testimony that she was prevented from discussing. She only cites testimony from Dr. Williams' deposition and asserts that cross-examination using the deposition testimony "was critical because it contradicted much of the trial testimony she gave." The failure to make appropriate citations is constitutes a waiver of this issue. *See Clayton v. Herron*, No. M2014-01497-COA-R3-CV, 2015 WL 757240, at *3 (Tenn. Ct. App. Feb. 20, 2015).

She has likewise waived any issue regarding the exclusion of evidence arising from a limitation on her examination of Dr. Williams. She failed to object to any such limitation following the ruling of the court discussed in the immediately preceding section of this opinion, and failed to either object to the limitation of her ability to ask a specific question or make an offer of proof relative thereto during the course of trial, as required by Tenn. R. Evid. 103.

3. Respondeat Superior[14]

Prior to trial, Dr. Williams filed a motion *in limine* to preclude evidence of vicarious liability, stating:

[13] We have reviewed the other instances of asserted blame shifting which were not objected to or otherwise preserved for appeal, and conclude that the portion of the instruction stating "Dr. Williams has not attributed blame or fault of any kind to Mrs. Shipley or to any other person in this case, so you are to disregard this testimony because it is not evidence and you must not consider it for any purpose" sufficiently addresses those instances, as well.

[14] The parties use the terms "respondeat superior" and "vicarious liability" interchangeably. For the purpose of clarity, we will use the term "vicarious liability."

> The proof in this case will elicit testimony from an employee of Signature Surgical Group, PLLC, i.e., Grace Hooper, and her actions and involvement in the follow-up care of Ms. Shipley after November 18, 2001. Grace Hooper is not a party. The Defendant has no problems with Ms. Hooper testifying. However, it is obvious that no argument or inference or evidence with respect to vicarious liability should be presented to this jury as it is not part of the case.

Following a pretrial hearing on the motion, the court granted Dr. Williams' motion. Ms. Shipley argues that the decision to exclude such evidence was error.

In her brief on appeal, Ms. Shipley has failed to cite to a specific instance where she was prevented from introducing evidence of vicarious liability or at which she made an offer of proof as required by Tenn. R. Evid. 103. For the reasons set forth in the immediately preceding section of this opinion, this issue is waived.

C. The Award of Sanctions

The case was set for trial on September 9, 2013 and when the case was called for trial, Ms. Shipley's counsel moved for a continuance on the ground that, at a deposition less than a week before trial Dr. John Williams, Ms. Shipley's primary care physician who was to testify as to her life care plan, changed his testimony from his first deposition taken in 2006. The court granted the motion and assessed a total of $13,500 against Ms. Shipley's counsel for the expert witness cancellation fees incurred and Dr. Williams' income lost as a result of the continuance. Ms. Shipley argues that the court abused its discretion because her counsel "did not engage in any sanctionable conduct" and that sanctions are not appropriate because "the continuance was the direct result of changed and surprising testimony given right after the entity responsible for paying any judgment in this case provided a treating physician that had no possible exposure in the case."[15]

[15] This statement in Ms. Shipley's brief reflects a "supposedly unsupported conspiracy theory" argument her counsel advanced at the hearing in which the court awarded the sanctions. Ms. Shipley's counsel contended that Dr. John Williams had approved a life care plan in 2006 which was prepared by Rebecca Williams; that Ms. Williams became ill while the case was on appeal and a new life care plan was prepared by a new life planner, Cynthia Wilhelm, in 2012; that when he was served with a subpoena for trial, Dr. John Williams, though counsel, claimed his exemption from personal appearance, as a result of which his deposition had to be taken; and that, when he gave the deposition on September 4, 2013, he would not approve Ms. Wilhelm's plan. Ms. Shipley asserts that "the attorney [for Dr. John Williams] had been provided by State Volunteer Mutual Insurance Company. It appears that this is the same insurance company that insures Dr. Robin Williams and that would be responsible for paying any judgment in this case."

"Appellate courts review a trial court's decision to impose sanctions and its determination of the appropriate sanction under an abuse of discretion standard." *Pegues v. Illinois Cent. R. Co.*, 288 S.W.3d 350, 353 (Tenn. Ct. App. 2008) (citing *Alexander v. Jackson Radiology Assoc., P.A.*, 156 S.W.3d 11, 14 (Tenn. Ct. App. 2004)). A court abuses its discretion when it applies an incorrect legal standard, reaches a decision that is illogical or unreasoned, or causes an injustice to the complaining party. *Id*. (citing *Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 131 (Tenn.2004)). The trial court's determination of the appropriate sanction will be set aside on appeal only where the court misapplied or misconstrued the controlling legal principles or acted inconsistently with the substantial weight of the evidence. *Id*. at 353-54 (citing *Alexander,* 156 S.W.3d at 15).

At the hearing on the Dr. Williams' motion for expenses and attorneys' fees, the court ruled:

> I'm not granting attorney's fees, but I am going to grant the – Dr. Drummond's cancellation fee of $3,000, Dr. Guy Voeller's cancellation fee of $2500, Dr. George Woodman's cancellation fee of $5,000, and Dr. Robin Williams' $3,000 missed from work. And that's $13,500 as sanctions because I truly believe we could have avoided maybe all of those cancellation fees if we would have addressed these issues right after the taking of Dr. John Williams' discovery deposition and evidentiary deposition when Dr. John Williams made it very clear he was not going to cooperate with the plaintiff's counsel and…left you all without the proof you needed to go forward.

Rule 27.05(e) of the Rules of Practice of the Twentieth Judicial District states, "[i]f a continuance is granted, the court may award expenses and attorney's fees, including compensation to witnesses for lost income and/or travel expenses and tax the same as court costs." This was the legal basis for the court's award; as such, the court applied the correct legal standard. Similarly, the court's reasoning that the matter which led to the continuance could have been addressed earlier, thereby avoiding the expenses which were incurred, provides a logical and factual basis for its decision. The fact that Ms. Shipley's counsel did not engage in sanctionable conduct is not dispositive of the issue. Local Rule 27.05(e) is not a rule which sanctions conduct in the manner of Tenn. R. Civ. P. 11; rather, it allows for the recoupment of expenses incurred by those persons who are detrimentally impacted by a continuance. We find no abuse of discretion in the award.

III. CONCLUSION

For the foregoing reasons the judgment of the trial court is affirmed in all respects.

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RICHARD H. DINKINS, JUDGE