

Rel: September 28, 2018

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# SUPREME COURT OF ALABAMA

SPECIAL TERM, 2018

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HealthSouth Rehabilitation Hospital of Gadsden, LLC

v.

Regina Honts, as personal representative of the Estate of  
Doris Green, deceased

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Regina Honts, as personal representative of the Estate of  
Doris Green, deceased

v.

HealthSouth Rehabilitation Hospital of Gadsden, LLC

**Appeals from Etowah Circuit Court  
(CV-13-900745)**

SELLERS, Justice.

HealthSouth Rehabilitation Hospital of Gadsden, LLC ("HealthSouth Gadsden"), the owner and operator of HealthSouth Rehabilitation Hospital of Gadsden ("HRHG"), is the defendant in a medical-malpractice case brought pursuant to Alabama's Wrongful Death Act, § 6-5-410, Ala. Code 1975 ("the WDA"), by the plaintiff, Regina Honts, as personal representative of the estate of Doris Green, deceased. A jury entered a verdict against HealthSouth Gadsden and awarded Honts damages of \$20,000,000. The trial court entered a judgment on that jury verdict. HealthSouth Gadsden then filed a postjudgment motion seeking a judgment as a matter of law ("a JML"), a new trial, or a remittitur of the damages award. After an evidentiary hearing as to the request for a remittitur, the trial court denied the postjudgment motion. HealthSouth Gadsden appeals; Honts cross-appeals, challenging rulings on discovery issues. As to case no. 1160045, we reverse the trial court's judgment and remand the case for a new trial. As to case no. 1160068, we affirm.

I. Facts and Procedural History

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Doris Green was Honts's mother. Green lived in Gadsden with Honts and Honts's husband. All three were retired. Although not in perfect health at age 79, Green was mentally alert, able to walk with a walker, and fairly active. In late June 2011, Green was suffering from a persistent urinary tract infection ("UTI"). Her physicians admitted her to Gadsden Regional Medical Center ("Gadsden Regional"), an acute-care facility, for treatment of the UTI, then transferred her to HRHG for two weeks of rehabilitation.

On July 4, 2011, at 6:20 p.m., Green's attending physician, Dr. Sunil Jaiswal, saw Green in her room at HRHG and determined that "everything look[ed] good." Green had been talking to people, was alert and rested quietly when appropriate, was easily aroused when needed, had stable heart and lung function, and did not need artificial oxygen. HRHG nurse Catherine Fuller was the nurse assigned to care for Green and her roommate on the evening of July 4. HealthSouth Gadsden records indicate that Fuller administered one Lortab tablet, a narcotic, to Green's roommate at 8:15 p.m. Fuller's shift ended at 1:00 a.m. Thereafter, Green was cared for by HRHG nurse Amy Gamble. Green's roommate was cared for by a

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nurse other than Gamble after Fuller's shift ended. Gamble testified that, when she assumed Green's care at 1:00 a.m. (some five hours after Fuller had administered a Lortab to Green's roommate), Green was in no distress; this is clearly marked on Green's chart. Gamble testified that she monitored Green each hour; however, the only notations on Green's chart were at 1:00 a.m. and then at 4:40 a.m.

In the early morning hours on July 5, 2011, something happened to Green, but no one knows how or by whom. At approximately 4:40 a.m. on July 5, Gamble found Green in her room in a nonresponsive state. Her oxygen saturation was at 70%, and her respirations were as low as six per minute. Dr. Jaiswal said "whatever happened, it happened on [July 5]," it was "a very sudden onset," and "her presentation was very acute." Green was transported to Gadsden Regional, where she arrived in a coma. A urinalysis screen conducted upon her arrival tested positive for opiates. A second urinalysis screen confirmed the presence of opiates in Green's system. Medical personnel at Gadsden Regional administered an intravenous ("IV") push of Narcan (a narcotic antidote) to Green, to which she responded. Gadsden Regional continued an

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IV drip of Narcan to Green until July 7, 2011, and monitored her in the intensive care unit until her condition stabilized, although she remained mostly nonresponsive.

Green had had adverse reactions to opiate medication years before her admission to HRHG; therefore, her chart duly noted that, and opiate medication was not prescribed for her.

After the incident, HealthSouth Gadsden determined that there was no indication in its records that Green had received an opiate and that no opiate medication was missing from its inventory. HRHG uses the medDISPENSE® system, a locked electronic machine that includes features that tightly control the storage and dispensing of medications to patients at HRHG. Before an HRHG nurse can administer any medication to a patient, the nurse must retrieve that medication from HRHG's medication-dispensing system. HRHG's medication-dispensing policy cautioned its nurses to ensure that medication retrieved from its medication-dispensing system was administered only to the patient for whom it was prescribed.

Neither HRHG's patient medical records nor its medication-administration records indicated that any opiate was missing or that any opiate not prescribed for Green had

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been administered to her. There also was no evidence indicating that an HRHG nurse or any other HRHG employee had given Green an unprescribed opiate. Furthermore, if Green's nonresponsive state was the result of an opiate, then the dosage was more than the typical dose.

Gadsden Regional discharged Green to Honts's home on July 12, 2011, to be cared for by a home-health provider. Even though Green's physical condition stabilized, her neurological and cognitive abilities regrettably remained impaired until her death on October 22, 2011, as the result of a cerebrovascular accident; her death certificate stated that she died as a result of a stroke.

On August 12, 2013, Honts sued HealthSouth Gadsden. The complaint stated one claim of negligence/medical malpractice against HealthSouth Gadsden concerning its treatment of Green, alleging that HealthSouth Gadsden's negligence caused Green's death. The parties engaged in extensive discovery. Honts's discovery efforts included a request that HealthSouth Gadsden produce Fuller's personnel file. HealthSouth Gadsden objected to producing that file, and Honts moved to compel production or, in the alternative, asked the trial court to examine

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Fuller's personnel file in camera. The trial court denied Honts's motion. This is one of the rulings Honts challenges in her cross-appeal.

The case proceeded to an eight-day jury trial beginning on May 9, 2016. During the trial, Honts requested that the trial court reconsider its order denying her motion to compel the production of Fuller's personnel file, but the trial court again denied her motion. At the conclusion of the case, the jury awarded Honts \$20,000,000 in punitive damages on her wrongful-death medical-malpractice claim as to the death of Green. The trial court entered a judgment on the verdict. HealthSouth Gadsden filed a motion seeking, alternatively, a JML, a new trial, or a remittitur of the damages award. Honts opposed HealthSouth Gadsden's motion and asked the trial court, in the event it granted HealthSouth Gadsden's motion in any respect, to reconsider certain decisions made before and during the trial, including the denial of her motion to compel production of Fuller's personnel file. The trial court conducted an evidentiary hearing and subsequently denied both HealthSouth Gadsden's and Honts's postjudgment motions. HealthSouth Gadsden appealed; Honts cross-appealed.

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II. HealthSouth Gadsden's Appeal (No. 1160045)

Although HealthSouth Gadsden raises numerous issues on appeal, we address only whether the trial court erred when it denied HealthSouth Gadsden's postjudgment motion for a JML or for a new trial.

A. Standard of Review

1. Motion for a JML

Our standard of review on a motion for a JML is well settled.

"When reviewing a ruling on a motion for a JML, this Court uses the same standard the trial court used initially in deciding whether to grant or deny the motion for a JML. Palm Harbor Homes, Inc. v. Crawford, 689 So. 2d 3 (Ala. 1997). Regarding questions of fact, the ultimate question is whether the nonmovant has presented sufficient evidence to allow the case to be submitted to the jury for a factual resolution. Carter v. Henderson, 598 So. 2d 1350 (Ala. 1992). The nonmovant must have presented substantial evidence in order to withstand a motion for a JML. See § 12-21-12, Ala. Code 1975; West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). A reviewing court must determine whether the party who bears the burden of proof has produced substantial evidence creating a factual dispute requiring resolution by the jury. Carter, 598 So. 2d at 1353. In reviewing a ruling on a motion for a JML, this Court views the evidence in the light most favorable to the nonmovant and entertains such reasonable inferences as the jury would have been free to draw. Id. Regarding a question of law, however, this Court indulges no presumption of correctness as to the trial court's

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ruling. Ricwil, Inc. v. S.L. Pappas & Co., 599 So. 2d 1126 (Ala. 1992)."

Waddell & Reed, Inc. v. United Investors Life Ins. Co., 875 So. 2d 1143, 1152 (Ala. 2003).

## 2. Motion for a New Trial

"In discussing the standard of review in an appeal from a judgment based on a jury verdict where the trial court has denied a motion for a new trial, this Court has stated:

" "Jury verdicts are presumed correct, and this presumption is strengthened by the trial court's denial of a motion for a new trial. Therefore, a judgment based on a jury verdict will not be reversed unless it is 'plainly and palpably' wrong."

Tanksley v. Alabama Gas Corp., 568 So. 2d 731, 734 (Ala. 1990) (quoting Davis v. Ulin, 545 So. 2d 14, 15 (Ala. 1989))."

Petty-Fitzmaurice v. Steen, 871 So. 2d 771, 773 (Ala. 2003).

### B. Analysis

The Alabama Medical Liability Act, § 6-5-480 et seq. and § 6-5-540 et seq., Ala. Code 1975 ("the AMLA"), contains, in pertinent part, the following provisions regarding medical-malpractice claims, including those brought pursuant to the WDA.

Section 6-5-548 of the AMLA provides:

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"(a) In any action for injury or damages or wrongful death, whether in contract or in tort, against a health care provider for breach of the standard of care, the plaintiff shall have the burden of proving by substantial evidence that the health care provider failed to exercise such reasonable care, skill, and diligence as other similarly situated health care providers in the same general line of practice ordinarily have and exercise in a like case.

"(b) Notwithstanding any provision of the Alabama Rules of Evidence to the contrary, if the health care provider whose breach of the standard of care is claimed to have created the cause of action is not certified by an appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself or herself out as a specialist, a 'similarly situated health care provider' is one who meets all of the following qualifications:

"(1) Is licensed by the appropriate regulatory board or agency of this or some other state.

"(2) Is trained and experienced in the same discipline or school of practice.

"(3) Has practiced in the same discipline or school of practice during the year preceding the date that the alleged breach of the standard of care occurred.

". . . .

"(e) The purpose of this section is to establish a relative standard of care for health care providers. A health care provider may testify as an expert witness in any action for injury or damages against another health care provider based on a breach of the standard of care only if he or she is

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a 'similarly situated health care provider' as defined above...."

Section 6-5-542(2) of the AMLA defines "standard of care" as follows:

"The standard of care is that level of such reasonable care, skill, and diligence as other similarly situated health care providers in the same general line of practice, ordinarily have and exercise in like cases. A breach of the standard of care is the failure by a health care provider to comply with the standard of care, which failure proximately causes personal injury or wrongful death. This definition applies to all actions for injuries or damages or wrongful death whether in contract or tort and whether based on intentional or unintentional conduct."

A plaintiff in a medical-malpractice case subject to the AMLA "must establish 1) the appropriate standard of care, 2) that the defendant health-care provider breached that standard of care, and 3) a proximate causal connection between the health-care provider's breach and the identified injury." Boyles v. Dougherty, 143 So. 3d 682, 688 (Ala. 2013).

1. Motion for a JML

HealthSouth Gadsden contends that the trial court erred in denying its motion for a JML because, it argues, Honts did not present sufficient evidence that HealthSouth Gadsden breached the applicable standard of care.

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At trial, Honts offered Naomi Seef as her expert witness on the standard of care. Seef is a registered nurse who works as the patient safety director for a 120-bed rehabilitation hospital and 2 acute-care hospitals in Chicago.

"Q [Honts's attorney]. Ms. Seef, are you familiar with the nursing standard of care for rehabilitation nurses as it existed in 2011?

"A. Yes.

"Q. Are you familiar specifically with the standard of care for rehab nurses when it comes to medication administration at rehab hospitals in 2011?

"A. Yes.

"Q. And have you told the jury what qualifies you and what your history is to familiarize yourself with that standard of care?

"A. I believe I have.

"Q. Judge, we offer Ms. Seef as an expert in rehab nursing standards care.

"THE COURT: Granted."

Seef testified that, at the time of the trial, she had been employed as a nurse at the rehabilitation hospital for 31 years and that before being promoted to her present position in 2014, she had been the director of nursing at the rehabilitation hospital since 2002. Seef testified as follows concerning the standard of care:

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"Q. If Dr. [Andy] Vann[, one of the physicians who treated Green at Gadsden Regional,] and Dr. Jaiswal are correct and those records are correct that diagnosed [Green] with opiate overdose and she got that at [HRHG], does that meet the standard of care?

"A. No, it does not.

"Q. Is there any situation under which it meets the standard of care?

"A. No.

"Q. [Honts's attorney asks that a taped deposition be played.] You read the deposition of [HealthSouth Gadsden's representative] Tammy Young, is that right?

"A. Yes.

"Q. You understood she was the corporate representative of HealthSouth [Gadsden]?

"A. I do.

"Q. Under the rules as the representative, we can play her deposition during your testimony, so I'm going to do that for you.

"A. Okay.

"(Tape played as follows:)

"Q. 'Would you agree--that you have mentioned earlier--you testified earlier that the administration of an unprescribed opiate to a patient, if it occurs, it's a breach of the standard of care. Is that correct? You have a standard of care not--the standard of care is do not prescribe--

do not administer opiates to patients who are not prescribed opiates, is that correct?'

"A. 'That is correct.'

"Q. 'So if you do--if HealthSouth [Gadsden] does give opiates to a patient who hasn't been prescribed it and in particular in this case where the chart states very clearly that she has an allergy to those medications, you would agree that if that happens it's a breach of the standard of care? We have been through this.'

"A. 'If that happened, yes.'

"Q. 'Okay. And would you agree it could only--you know, and there is--only--there's no other explanation. I mean, it could only happen but through the breach of the standard of care. You can't have a--the question is you can't. The question is can. Is there a scenario where a patient can receive an unprescribed opiate and it not be a breach of the standard of care?'

"A. 'Hypothetically, if the patient had their own inventory of medication that they brought with them or someone else brought to them.'

"Q. 'Sure.'

"A. 'Yes, there's a hypothetical.'

"Q. 'Let's assume. Let me rephrase the question. It comes from [HRHG]. You know, the question is if the opiate comes from [HRHG] and it is

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unprescribed, is there any scenario in which that would not be a breach of the standard of care?'

"A. 'Based on your question earlier, we've already established this. If we gave an opiate that was not prescribed, then that would not meet the standard of care.'

"(Tape stopped.)

"Q. Are you telling this jury anything different than what HealthSouth [Gadsden]'s own representative has already testified to?

"A. No."

HealthSouth Gadsden's corporate representative, Tammy Young, the chief nursing officer for HealthSouth Gadsden's central region, testified as follows:

"Q [HealthSouth Gadsden's attorney]. Okay. Let me just close with this, Ms. Young. And as you said in your video that they played and that we all admit, if one of our nurses, somebody at [HRHG], gave [Green] opiates and there was no prescription for it, then we would have violated the standard of care?

"A. That is correct.

"Q. And did you find any evidence in your review, going back and looking at all the documentation about what occurred, did you find any evidence that [Green] had been given an opiate?

"A. No. No evidence.

". . . . .

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"Q. And if she got opiates, if, in fact, the conclusion is that she did get opiates between the hours of midnight and 4:40 as all of these doctors have testified to, then it happened at [HRHG], didn't it?

"A. Theoretically it would have, but again there's no evidence.

"Q. You say theoretically. We know she was there?

"A. Yes.

"Q. We know she didn't leave?

"A. That's right.

"Q. We know that the doors were locked?

"A. That's right.

"Q. My question is just not theoretical. If she received opiates, if these symptoms were and are, in fact, the result of opiates, if the drug screens are right, then she received those opiates at [HRHG]; am I correct?

"A. If that occurred.

"Q. All right. Now--and if that occurred, that would be a breach of the standard of care?

"A. Yes."

Although there was no testimony or any affirmative proof at trial to the effect that an HRHG nurse administered an opiate to Green, which nurse did so, what opiate a nurse might have administered, the dosage of any such opiate, or when a

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nurse administered any such opiate, Honts imputes responsibility for the incident to HealthSouth Gadsden on the basis that whatever happened to Green happened at HRHG. It is undisputed that only HRHG employees and patients were in the facility during the 1:00 to 4:40 a.m. window in which Green became unresponsive. Although Honts specifically denies any reliance on the doctrine of *res ipsa loquitur*, she does imply that, notwithstanding the AMLA, a jury is free to consider circumstantial evidence that it was more probable than not that an HRHG nurse gave opiates to Green.

"Findings of facts cannot be based upon mere conjecture, of course, but it is also clear that direct evidence is not necessary to prove negligence on the part of a defendant and that proof of negligence may be established completely through circumstantial evidence. This Court has recognized that although the evidence may present no direct proof of negligence by the defendant, negligence does not require direct proof but may be inferred by a jury from the circumstances out of which the injury arose. A fact is established by circumstantial evidence if it can be reasonably inferred from the facts and circumstances adduced."

Bell v. Colony Apartments Co., 568 So. 2d 805, 810-11 (Ala. 1990) (citations and footnote omitted).

""A judgment as a matter of law is proper only where there is a complete absence of proof on a material issue

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...."" Liberty Nat'l Life Ins. Co. v. Daugherty, 840 So. 2d 152, 156 (Ala. 2002) (quoting Southern Energy Homes, Inc. v. Washington, 774 So. 2d 505, 510 (Ala. 2000), quoting in turn Locklear Dodge City, Inc. v. Kimbrell, 703 So. 2d 303, 304 (Ala. 1997)). Viewing the evidence in the light most favorable to Honts, the nonmovant, we conclude that the evidence presented to the jury constituted substantial circumstantial evidence from which the jury could have inferred that an HRHG nurse administered opiates to Green. See Target Media Partners Operating Co. v. Specialty Mktg. Corp., 177 So. 3d 843, 868 (Ala. 2013). Given the fact that Green was confined to HRHG and under the exclusive and constant care, custody, and control of its nurses, this inference is appropriate, even though there was no specific connection or testimony on which to find that a particular nurse had breached the standard of care by administering an opiate or had otherwise acted maliciously. Therefore, the trial court's order denying HealthSouth Gadsden's motion for a JML is due to be affirmed.

## 2. Motion for a New Trial

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HealthSouth Gadsden next contends that the trial court erred in denying its motion for a new trial because, it argues, the trial court charged the jury on the incorrect standard of care. All the testimony at trial regarding the standard of care was that the standard of care applicable to nurses was applicable in this case and that that was the standard that was breached. Despite that, the trial court inexplicably charged the jury on the standard of care applicable to hospitals.

During the trial court's charge conference, the trial court told the attorneys in this case that it planned to give Honts's requested jury charges as to the hospital standard of care. HealthSouth Gadsden objected to those charges on the basis that the trial court should charge the jury as to the nursing standard of care.

"[HealthSouth Gadsden's attorney]: To the extent that [HealthSouth Gadsden's] charges reflect the nursing standard of care versus the hospital standard of care, as [Honts's] versions of similar pattern charges reflect, I'm referring specifically to [HealthSouth Gadsden's] charges 21, 22, 24, 27 and 28.

"And we would say that the allegations of [Honts's] complaint and the evidence at trial clearly demonstrated that it is the nurse's conduct

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and no one else's that was being challenged here as a breach of the standard of care.

"Hill v. Fairfield Nursing Home [& Rehabilitation Center, LLC, 134 So. 3d 396 (Ala. 2013),] makes it clear that the implicated conduct is what controls, not the named institution of the defendant in a case like this, and to the extent [Honts's] charges request omission of the nursing standard of care, [HealthSouth Gadsden] objects to that and requests specifically that the Court reconsider its decision not to give charges 21, 22, 24, 27 and 28 as the proper statements of law for this case.

"THE COURT: Are you through with that particular motion?

"[HealthSouth Gadsden's attorney]: Yes, sir.

"THE COURT: That motion is denied. Timely made. Continuing exception."

The trial court then charged the jury as follows:

"The standard of care for a hospital is that level of reasonable care, skill, and diligence as other similarly situated hospitals usually follow in the same or similar circumstances.

"[Honts] must prove by expert testimony, the standard of care, that HealthSouth [Gadsden] did not follow the standard of care in providing medical care and treatment to [Green]. And that the death of [Green] was probably caused by HealthSouth [Gadsden]'s failure to follow the standard of care.

"You must decide whether HealthSouth [Gadsden]'s conduct caused [Green's] death. Its conduct caused the death if the conduct naturally and probably brought about the death and the death would not have happened without the conduct."

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HealthSouth Gadsden had requested that the trial court give the jury the following charges:

Charge No. 21:

"In performing professional services for a patient, a [nurse] must use such reasonable care, skill, and diligence as nurses in the same general neighborhood and in the same general line of practice ordinarily have an exercise in a like case."

Charge No. 22:

"[Honts] says [HRHG] is a rehabilitation hospital, and that Doris Green was a patient there on July 5, 2011. [Honts] also says that a nurse at [HRHG] caused Doris Green's death as a result of the failure of the nurse to follow the standard of care. HealthSouth [Gadsden] denies the claims of [Honts].

"To recover damages on this claim [Honts] must prove to your reasonable satisfaction by substantial evidence all of the following elements:

"1. The standard of care that should have been followed by the [HRHG] nurse during the time she was responsible for the medical care of Doris Green, and;

"2. That the nurse did not follow the standard of care in providing medical care and treatment of Doris Green, and;

"3. That the death of Doris Green was probably caused by the failure to follow the standard of care.

"If [Honts] proves to your reasonable satisfaction by substantial evidence each of these

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elements against [HealthSouth Gadsden], then you should find in favor of [Honts]. However, if [Honts] does not, then you should find in favor of HealthSouth [Gadsden].

Charge No. 24:

"[Honts] must prove by expert testimony the standard of care applicable to the ... nurses, that the ... nurses did not follow the applicable standard of care in providing medical care and treatment of Doris Green, and that the death of Doris Green was probably caused by their failure to follow the standard of care."

Charge No. 27:

"The standard of care for a nurse in this case is that level of reasonable care, skill, and diligence as other similarly situated nurse would exercise in the same general line of practice usually follow in the same or similar circumstances."

Charge No. 28:

"You must decide whether [an HRHG] nurse's conduct caused Doris Green's death. The conduct caused the harm if (1) the conduct naturally and probably brought about the harm and (2) the harm would not have happened without the conduct."

HealthSouth Gadsden argues that it was "'entitled to instructions that [a]re germane to the legal theories for which there was substantial evidence.'" Holly v. Huntsville Hosp., 865 So. 2d 1177, 1188 (Ala. 2003) (quoting George H. Lanier Mem'l Hosp. v. Andrews, 809 So. 2d 802, 806-07 (Ala.

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2001)). HealthSouth Gadsden further argues that this Court has held that, in a medical-malpractice case, the standard-of-care instruction must match the alleged breach and the evidence at trial. Discussing Holly, HealthSouth Gadsden contends that this Court reversed the judgment in that case and remanded the case for a new trial because the trial court instructed the jury on the wrong standard of care. 865 So. 2d at 1186. Here, HealthSouth Gadsden states, Honts "alleged that HRHG violated the nursing standard of care, and presented expert testimony concerning only that nursing standard of care." HealthSouth Gadsden's brief, at 39. Because "[a]ny liability on the part of [HealthSouth Gadsden] is derived from the actions of its nurses," HealthSouth Gadsden explains, Honts "had 'the burden of proving by substantial evidence that the health care provider,'" i.e., an HRHG nurse, breached the standard of care. Mobile Infirmary Ass'n v. Tyler, 981 So. 2d 1077, 1084 (Ala. 2007) (quoting § 6-5-548(a), Ala. Code 1975). Instead, HealthSouth Gadsden states, the trial court instructed the jury on the hospital standard of care, even though Honts did not introduce any expert testimony regarding any supposed standard of care applicable to hospitals or any

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breach of such a standard, nor was her theory of the case that HealthSouth Gadsden breached a hospital standard of care. HealthSouth Gadsden insists that the trial court's instruction to the jury on the hospital standard of care was error; therefore, it argues, this Court should reverse the judgment and remand the case for a new trial. We agree.

Honts argues that because HealthSouth Gadsden was the only defendant, the trial court properly instructed the jury using Alabama Pattern Jury Instructions--Civil, Instruction 25.02, entitled "Standard of Care for Hospital," which states:

"The standard of care for a hospital is that level of reasonable care, skill and diligence as other similarly situated hospitals usually follow in same or similar circumstances."

Honts states that, although she alleged that HealthSouth Gadsden breached the standard of care, the wrongdoer was never alleged or identified. Therefore, she argues, the trial court acted within its discretion by narrowly focusing the jury on whether the standard of care applicable to HealthSouth Gadsden was violated. Citing Clayton v. LLB Timber Co., 70 So. 3d 283, 284-85 (Ala. 2011), Honts maintains that a trial court "has broad discretion in formulating its jury instructions, provided those instructions accurately reflect the law and the

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facts of the case." Moreover, Honts argues, under Rule 45, Ala. R. App. P., the failure to give a certain charge does not constitute reversible error unless it "appear[s] that the error complained of has probably injuriously affected substantial rights of the parties." Honts insists that HealthSouth Gadsden was not prejudiced by the trial court's charge. Honts also relies on Rule 51, Ala. R. Civ. P., which states: "The refusal of a requested [charge], although a correct statement of the law, shall not be cause for reversal on appeal if it appears that the same rule of law was substantially and fairly given to the jury in the court's oral charge...."

In Holcomb v. Carraway, 945 So. 2d 1009, 1012 (Ala. 2006), this Court said:

"The plaintiff in a medical-malpractice action must prove by substantial evidence that the defendant health-care provider 'failed to exercise such reasonable care, skill, and diligence as other similarly situated health care providers in the same general line of practice ordinarily have and exercise in a like case.' § 6-5-548(a), Ala. Code 1975. To meet this burden, a plaintiff ordinarily must present expert medical testimony; however, such expert testimony is allowed only from a 'similarly situated health care provider.' See § 6-5-548(e), Ala. Code 1975; Leonard v. Providence Hosp., 590 So. 2d 906 (Ala. 1991)."

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As previously stated above, the AMLA provides two definitions for a "similarly situated health care provider," i.e., one for a specialist and one for a nonspecialist. In this case, the health-care provider is clearly a nonspecialist; therefore, § 6-5-548(b) defines a "similarly situated health care provider" as one who meets all of the following qualifications:

"(1) Is licensed by the appropriate regulatory board or agency of this or some other state.

"(2) Is trained and experienced in the same discipline or school of practice.

"(3) Has practiced in the same discipline or school of practice during the year preceding the date that the alleged breach of the standard of care occurred."

In Hill v. Fairfield Nursing & Rehabilitation Center, LLC, 134 So. 3d 396 (Ala. 2013), the plaintiff argued that the standard of care alleged to have been breached was the standard of care applicable to nurses. The health-care facility argued that the standard of care applicable to physical therapists was the standard of care that had been breached. This Court stated:

"[I]n applying subsections (b) and (c) [of § 6-5-548, Ala. Code 1975,] to those instances where the defendant is a non-individual, such as a professional corporation or a medical institution, which

has acted through another individual health care provider, the focus should be on the individual practitioner whose specific action allegedly fell below the required standard of care.'

"Barton v. American Red Cross, 829 F. Supp. 1290, 1301 (M.D. Ala. 1993), cited with approval in Husby v. South Alabama Nursing Home, Inc., 712 So. 2d 750 (Ala. 1998). Smith, a certified nursing assistant, was providing nursing services to Hill at the time Hill suffered her injury. Smith was not acting as a physical therapist or providing physical-therapy services to Hill (a circumstance that arguably would disqualify, not qualify, a physical therapist from testifying as to the standard of care applicable to a provider of nursing care to a patient). Furthermore, one of the ways Fairfield allegedly breached its duty in this case was through the preparation of an allegedly inadequate care plan and daily care guides that were being followed by Smith when she dropped Hill. These plans and guides were prepared by the attending nurses responsible for Hill's care.

". . . .

"In a case with both factual and legal similarities to the present case, Husby v. South Alabama Nursing Home, Inc., supra, this Court addressed the sufficiency of evidence relating to claims against a nursing home and two of its administrators by a resident who was injured in a fall from her bed allegedly resulting from the failure of nurses to use proper physical restraints. This Court held that a plaintiff seeking to hold those parties liable based upon the alleged negligence of the nurses could not use a hospital administrator or an anesthesiologist as a proper expert witness relating to the standard for 'hands on' nursing care:

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"'The defendants cite Barton v. American Red Cross, 829 F. Supp. 1290 (M.D. Ala. 1993), aff'd, 43 F.3d 678 (11th Cir. 1994), for the proposition that the focus should be on the individual practitioner whose specific action is alleged to have fallen below the standard of care. We accept that proposition, and we conclude that the focus in this case should be on the standard of care owed by the nurses who rendered direct care to Husby. Also, when a defendant is not an individual, it is logical to limit the admissible expert testimony to that coming from witnesses who are, as to the specific individual whose actions formed the basis for the litigation, similarly situated. Thus, we will apply the same standard of care, that governing a nurse administering direct care, to all three defendants.'

"712 So. 2d at 753."

134 So. 3d at 403-04.

Based on the foregoing, this Court concluded that the expert witness who testified as to the nursing standard of care was a proper expert witness to testify as to the standard of care applicable to Smith as a certified nursing assistant in effecting a transfer of a patient such as Hill and as to whether Smith met that standard in the case. In this case, Seef, the expert witness Honts offered as to the standard of care, is licensed by the appropriate regulatory board of Illinois, is trained and experienced in the discipline or

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school of practice of providing nursing care in a rehabilitation hospital, and practiced in that discipline or school of practice for the year preceding the date on which the alleged breach of the standard of care occurred in this case. Without a doubt, Seef met the criteria needed to testify as to the standard of care applicable to nurses and was properly allowed to testify as a similarly situated health-care provider. However, Seef was not offered as an expert on the standard of care applicable to hospitals; indeed, she was not able to satisfy the criteria necessary to be considered a similarly situated health-care provider as to that standard of care. Because Seef was qualified and testified exclusively as to the nursing standard of care, she never discussed the hospital standard of care. This voluminous record has absolutely no testimony whatsoever about the standard of care for hospitals, much less any testimony by an expert qualified to testify about the hospital standard of care. "[E]xpert testimony in a medical-negligence case must show in what respect the defendant's conduct deviated from the appropriate standard." Brookwood Med. Ctr. v. Lindstrom, 763 So. 2d 951, 953 (Ala. 2000). Seef's expert testimony was

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sufficient to show how the conduct of the nurses at HRHG deviated from the nursing standard of care, but her testimony did not attempt to show how HealthSouth Gadsden's conduct deviated from the hospital standard of care.

In Holly, this Court reviewed a jury charge that was the basis for the plaintiff's motion for a new trial.

"Under Alabama law, "[a] party is entitled to proper jury instructions regarding the issues presented, and an incorrect or misleading charge may be the basis for the granting of a new trial." King v. W.A. Brown & Sons, Inc., 585 So. 2d 10, 12 (Ala. 1991) (citation omitted). When an objection to a jury charge has been properly preserved for review on appeal, as this one was, we "look to the entirety of the [jury] charge to see if there was reversible error," and reversal is warranted only if the error is prejudicial. King, 585 So. 2d at 12.

"....

"... The defendants were entitled to instructions that were germane to the legal theories for which there was substantial evidence. Therefore, the trial court's charge was prejudicial and constituted reversible error.'

"George H. Lanier Mem'l Hosp. v. Andrews, 809 So. 2d 802, 806-07 (Ala. 2001)."

865 So. 2d at 1187-88. This Court noted that the evidence the plaintiffs were allowed to introduce regarding the applicable

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standard of care and the defendant's alleged breach of that standard was severely limited, while the defendant was allowed to testify that he did not breach the standard of care. The Holly Court held that the exclusion of competent expert testimony offered by the plaintiffs had probably injuriously affected their substantial rights, citing Rule 45, Ala. R. App. P. Therefore, the Court concluded, the plaintiffs were entitled to a new trial. Holly, 865 So. 2d at 1188.

In another medical-malpractice action, Houserman v. Garrett, 902 So. 2d 670, 676 (Ala. 2004), this Court concluded that the defendants were entitled to a new trial on the basis of an erroneous jury charge.

"Our Court has repeatedly held that an incorrect or misleading charge may be the basis for a new trial. Holly v. Huntsville Hosp., 865 So. 2d 1177, 1187-88 (Ala. 2003). We recognize that in reviewing an allegedly defective jury instruction we are to review the entire charge to determine whether reversible error occurred, and we have done so. Sewell v. Internal Medicine & Endocrine Assocs., P.C., 600 So. 2d 242 (Ala. 1992). As we have noted, Dr. Houserman and Honea & Houserman, P.C., through objection and requested jury instructions, properly raised this issue below.

"We find the jury charge, viewed in its entirety, to be 'misleading and erroneous,' and we further find that error to have 'probably injuriously affected substantial rights of' Dr. Houserman and Honea & Houserman, P.C., and therefore

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prejudiced them. Rule 45, Ala. R. App. P.; Holly v. Huntsville Hosp., 865 So. 2d at 1188."

Because HealthSouth Gadsden objected to the trial court's jury charge on the hospital standard of care and requested a jury charge on the nursing standard of care, it properly preserved this issue for appeal. We have reviewed the trial court's charge to the jury in its entirety, and we conclude that charging the jury as to the hospital standard of care after the only testimony concerning the applicable standard of care was regarding the standard of care for nurses was misleading and erroneous.

Moreover, we conclude that the trial court's charge "probably injuriously affected substantial rights" of HealthSouth Gadsden. See Rule 45, Ala. R. App. P. Honts offered her expert-witness testimony as to the nursing standard of care, then requested a jury instruction as to the hospital standard of care. The trial court gave that instruction over the objection of HealthSouth Gadsden, which was clear error. Therefore, the trial court's order denying HealthSouth Gadsden's motion for a new trial on the basis of an erroneous jury instruction is due to be reversed. Because we hold that HealthSouth Gadsden is entitled to a new trial on

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that basis, we pretermitt consideration of the other grounds for a new trial that HealthSouth Gadsden argues on appeal.

III. Honts's Cross-Appeal (No. 1160068)

Because we are reversing the trial court's order and remanding this case for a new trial, we address Honts's argument in her cross-appeal that the trial court erred when it denied her motion to compel HealthSouth Gadsden to produce Fuller's personnel file. We conclude that the trial court properly denied Honts's motion.

A. Standard of Review

Where a trial court has denied requested discovery, "[t]he first step in determining whether the court has [exceeded] its discretion is to determine the particularized need for discovery, in light of the nature of the claim." Ex parte Weaver, 781 So. 2d 944, 948 (Ala. 2000) (quoting Ex parte Rowland, 669 So. 2d 125, 127 (Ala. 1995)). This requirement is heightened when a party seeks to discover personnel files, which are afforded special protection under Alabama law. "There exists a strong public policy against disclosure of personnel files." Ex parte Liberty Mut. Ins. Co., 92 So. 3d 90, 102 (Ala. Civ. App. 2012) (quoting In re

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One Bancorp Sec. Litig., 134 F.R.D. 4, 12 (D. Me. 1991)). For that reason, "[d]iscovery of such files is permissible" only if (1) ""the material sought is 'clearly relevant,'" and (2) ""the need for discovery is compelling because the information sought is not otherwise readily obtainable."" Id. A plaintiff "must first make an initial fact-specific showing," and "[g]eneral allegations ... do not suffice to render [personnel] records discoverable." Id.

#### B. Analysis

Honts contends that the trial court exceeded its discretion when it denied her motion to compel the production of Fuller's personnel file, arguing that the personnel file had information relevant to indicate who administered the opiates to Green. Honts alleges on appeal that "Fuller was heavily involved in the events surrounding [Green's] overdose ... and may have well been the culprit." Honts's brief, at 86. Honts does not, however, substantiate that allegation with any citation to the record. It is mere speculation to attempt to connect Fuller with an alleged incident that was discovered almost four hours after her shift ended and almost eight hours after she administered the only opiate of record

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in this case. Honts's speculation is not evidence that could have linked Fuller to a breach of the nursing standard of care.

Honts further speculates that because Fuller committed suicide approximately two years after she cared for Green while employed at HRHG, Honts should be entitled to the production of Fuller's personnel file. However, Fuller was no longer employed by HRHG at the time of her suicide. More critically, it is clear from the record that Fuller's suicide was the result of personal issues and had no connection to Green's death. This Court declines to publish the specific details of the allegations Honts makes in attempting to establish that Fuller was involved in the alleged incident that resulted in Green's emergency hospitalization because there is no evidence of record to connect those allegations to a breach of the standard of care. Honts failed to make the necessary showing to the trial court, and she does not advance any such argument on appeal. Honts's motion to compel was based on her speculation that Fuller might have been the nurse who might have administered an opiate to Green. In commenting on the personnel file at trial, Honts's counsel conceded: "I

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don't know what's in there; I just don't know." To prevail, Honts needed to provide evidence of the potential contents of Fuller's personnel file, why that information could not be located elsewhere, and how the information could be relevant to show a potential breach by Fuller of the nursing standard of care. Honts failed to make a proffer regarding what the excluded evidence would have shown, as was required to preserve that issue for appeal. See SSC Selma Operating Co. v. Gordon, 112 So. 3d 36, 40 (Ala. 2012). Thus, the trial court could not have exceeded its discretion in denying Honts's request to compel discovery of Fuller's personnel file.

Finally, Honts failed to make a fact-specific showing at trial as to what that personnel file contained that could establish a breach of the standard of care. Moreover, on appeal, Honts merely asserts that she "should have been able to discover Fuller's employment file and present all evidence that was material and relevant." Honts's brief, at 87. Given the fact that the file sought was a personnel record, Honts had to specifically demonstrate not only the relevancy of the information, but also that the information was not obtainable

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from another source. Having failed to make any such proffer and during trial having further failed preserve the issue, Honts cannot now argue that the trial court erred in denying her motion to compel production of Fuller's personnel file. Even if such an argument were proper, we conclude that the trial court did not exceed its discretion in denying Honts's motion to compel. The tragic circumstances surrounding Fuller's suicide simply are not relevant to the incident that allegedly led to Green's death; we cannot conceive of any information that might be in Fuller's personnel file that could have any bearing on that incident.

#### IV. Conclusion

In case no. 1160045, we reverse the judgment of the trial court and remand the case for a new trial. We affirm the trial court's denial of Honts's motion to compel production of Fuller's personnel file in case no. 1160068. In view of our decision, we pretermit consideration of the remaining issues raised in the appeal and the cross-appeal.

1160045--REVERSED AND REMANDED.

Stuart, C.J., concurs.

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Bolin, Parker, Shaw, Main, Wise, and Bryan, JJ., concur  
in the result.

1160068--AFFIRMED.

Stuart, C.J., concurs.

Bolin, Parker, Shaw, Main, Wise, and Bryan, JJ., concur  
in the result.