IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 11, 2013 Session

CYNTHIA BEARDEN v. GREGORY LANFORD, M. D. AND NEUROLOGICAL SURGEONS, P. C.

Appeal from the Circuit Court for Davidson County
No. 09C2281 Thomas W. Brothers, Judge

No. M2012-02073-COA-R3-CV - Filed December 30, 2013

In this medical malpractice action, the plaintiff alleged that the defendant, a neurosurgeon, negligently penetrated her spinal cord with a surgical instrument while performing a cervical fusion at two levels of her neck leading to partial paralysis and other neurological problems. She was ultimately diagnosed with a condition called Brown Sequard Syndrome. The issues were tried before a jury; however, several of the claims were dismissed on directed verdict. The remaining claims went to the jury which rendered a verdict on behalf of the defendant-neurosurgeon. The plaintiff raises numerous issues on appeal, the substance of which may be divided into three categories. First, she contends error associated with the directed verdict, the verdict form, and the jury instructions. In this regard she contends, inter alia, that the trial court erred in directing a verdict as to res ipsa loquitur because she presented the testimony of three expert witnesses of the defendant's specific acts of negligence. The plaintiff also contends the court erred by dismissing all but three of her claims upon a directed verdict. Second, the plaintiff argues she was denied a fair trial due to inappropriate argument and misconduct. Third, she argues a host of errors secondary to evidentiary rulings. Finding no reversible error, we affirm.

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

Frank G. Clement, Jr., J., delivered the opinion of the Court, in which Patricia J. Cottrell, P.J., M.S., and Richard H. Dinkins, J., joined.

Joe Bednarz, Sr., Joe Bednarz, Jr., Nashville, Tennessee, and Steven R. Walker, Oakland, Tennessee, for the appellant, Cynthia Bearden.

C.J. Gideon, Jr., Heather Piper, Nashville, Tennessee, for the appellees, Gregory Lanford,

M.D. and Neurological Surgeons, P.C.

OPINION

The crux of this case arises out of allegations of medical negligence, secondary to what was anticipated to be a fairly routine two-level anterior cervical discectomy with fusion ("ACDF") performed on Cynthia Bearden ("Mrs. Bearden"), at Baptist North Tower Surgical Hospital on July 7, 2006.

The relevant history begins with an MRI, ordered by Mrs. Bearden's primary care physician, that revealed disc herniation and compression at two levels of her cervical spine, C5-C6 and C6-C7. Based upon the MRI, Mrs. Bearden was referred to Gregory Lanford, M.D. ("Dr. Lanford"), a board-certified neurosurgeon, for further evaluation.

On initial presentation to Dr. Lanford, Mrs. Bearden complained of persistent right arm pain, numbness and weakness, occasional left arm symptoms, and ongoing neck pain. Per Dr. Lanford's recommendations, conservative therapies were initially attempted, but proved unsuccessful in managing her symptoms. Dr. Lanford and Mrs. Bearden then discussed her interest in surgical intervention to attempt to relieve her symptoms during subsequent office visits in both April and June 2006; Mrs. Bearden ultimately elected to proceed with the operation.

Prior to surgery, Dr. Lanford discussed the inherent risks of the ACDF with Mrs. Bearden, including hemorrhage, infection, cerebrospinal fluid leak, and the potential for increased neurological deficit. He further explained her symptoms could persist or recur. The only disputed care, in the matter at hand, was the surgical care rendered by Dr. Lanford while in the operating suite.

In performing the procedure, Dr. Lanford inserted a spinal marker needle into the disc space and obtained an intra-operative x-ray of the spine to confirm that he was performing the ACDF at C5-C6 as desired. This x-ray indeed showed the needle was in the C5-C6 disc space. Consequently, Dr. Lanford initiated the procedure by accessing the anterior spine, making an incision and opening the disc space with an eleven-blade scalpel, and then removing disc material at C5-C6 and C6-C7 with a curette. During the procedure, Dr. Lanford encountered a cerebrospinal fluid leak, which was indicative of a hole in the dura, the protective outer lining encasing the spinal cord. Dr. Lanford closed this hole with a sealant called Tisseel, and then completed the procedure. While in recovery, Mrs. Bearden began exhibiting partial paralysis and other neurologic abnormalities. She was ultimately diagnosed with a condition called Brown Sequard Syndrome.

One year later, on July 5, 2007, Mrs. Bearden filed this malpractice action against Dr.

Lanford and Baptist Hospital, with a derivative vicarious liability claim against Dr. Lanford's practice group, Neurological Surgeons, P.C. The case went to trial in 2009, however, following a mistrial due to a hung jury, Mrs. Bearden voluntarily dismissed the suit.

Suit was re-filed on July 2, 2009. In the Complaint, Mrs. Bearden asserted both general and specific factual allegations of medical negligence against Dr. Lanford in performing her cervical fusion including allegations that he improperly opened the dura during the procedure, injured the spinal cord with a surgical instrument, and injured her cervical spine and "neurological system" during the procedure.[1] She also alleged, in relevant part, that Dr. Lanford breached the applicable standard of care for a neurosurgeon practicing in Nashville, Tennessee or a similar community in the care he rendered to her.

As the trial date of April 24, 2012 approached, both sides filed numerous motions in limine, which included similar motions in limine directed at the exclusion of medical literature as substantive evidence, or for any purpose other than impeachment in accordance with Tennessee Rule of Evidence 618. The trial court granted these respective motions, but allowed the parties to question whether a witness's opinion was supported by the medical literature; moreover, in impeaching a witness, the trial court allowed the parties to electronically display the literature to the witness and jury. Mrs. Bearden also filed additional motions in limine to exclude the testimony of defense expert neurologist Alfred Callahan, M.D., as speculative, unreliable, and not based on scientific reasoning as well as to exclude evidence of informed consent and evidence of risks of the procedure, both of which were denied.

When the case went to trial, the cause of Mrs. Bearden's paralysis was hotly debated. In her case-in-chief, Mrs. Bearden introduced three medical expert witnesses who opined that Dr. Lanford negligently performed the surgery by penetrating her spinal cord with one of three surgical instruments-the spinal marker needle, the eleven-blade scalpel, or the curette, and, as a direct result, she acquired Brown Sequard Syndrome.

Following the close of Mrs. Bearden's proof, Dr. Lanford made a broad reaching motion for a directed verdict which challenged all elements of Mrs. Bearden's claims including, without limitation, the issue of res ipsa loquitur. The trial court ruled that Mrs. Bearden was precluded from proceeding under the doctrine of res ipsa loquitur; as for the other issues, the court took the motion for directed verdict under advisement and the trial continued.

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[1] Baptist Hospital was later non-suited. The derivative vicarious liability claims against Neurological Surgeons, P.C., remain and it is an appellee on appeal.

Following the close of all of the proof, Dr. Lanford renewed his motion for a directed verdict, as to:

> [A]ll claims of liability, and all elements of damages. And, specifically, we move for a directed verdict on any claim of liability regarding postop care, especially on July 7, 2006 . . . as a result of what the proof was and wasn't and the directed verdict claims, ask the Court to direct a verdict on any claims of liability beyond the needle and knife issue. If I'm not articulating some specific issue that should be excluded; I'll do it in the inverse. The proof the Plaintiffs presented at trial, or that could have come up in the Defense proof that's now closed, only supports claims of liability on needle or knife going to the Jury. So, those two more specific respects.

A discourse on the motion followed during which the trial court noted that, in addition to the needle and eleven-blade scalpel, evidence had been presented that Dr. Lanford had mishandled the curette, thereby penetrating the spinal cord. The court further stated that while there had been references during the trial to other operative devices used during the ACDF, such as drills and retractors, there was no claim that these devices could have caused injury.

Following the discussion, the trial court partially granted the motion for directed verdict, dismissing all claims pertaining to the care and treatment rendered by Dr. Lanford post-surgery and all other claims except for those premised on Dr. Lanford's negligent use of the spinal needle, the eleven-blade scalpel, or the curette during Mrs. Bearden's procedure. The court explained its ruling stating that Mrs. Bearden's entire case was based on the theory that she suffered a devastating injury to her spinal cord as a result of "penetration by one of three sharp surgical instruments in the hands of Dr. Lanford." The ruling from the bench reads as follows:

> I'm going to deny the motion for directed verdict as to any claim based upon the utilization of the surgical needle, the knife or the number-actually, the No. 11 blade, or knife, and the curette . . . I think there was enough evidence for the curette to be considered. I will grant it as to all others.

The written order that followed stated:

> The Motion for Directed verdict with regard to the Plaintiff's claim/theory regarding care and treatment by Dr. Lanford for anything other than his use of the spinal needle, #11 blade, and the curette used to remove disc material at C5-C6 is GRANTED.

In addition to the above ruling, the trial court also made the finding that other evidence, which was not consistent with Mrs. Bearden's allegations or the rules of evidence, had permeated the case and were a potential distraction from the ultimate issues. Further, the court stated, any negligence associated with the small hole in the dura was not in and of itself malpractice related to any injury suffered by Mrs. Bearden; instead, the hole in the dura was subsumed by the alleged injury to the spinal cord leading to Brown Sequard Syndrome. As a consequence, the court determined, over the objection of Mrs. Bearden, that it was necessary to employ a special verdict form to keep the jury focused, asking:

> Was Defendant negligent by failing to comply with the recognized standard of acceptable professional practice for the medical profession and specialty in this community or a similar community by causing a surgical instrument to penetrate the spinal cord of the Plaintiff? (The plaintiff has the burden of proof).

Following closing arguments, the case was submitted to the jury. Thereafter, the jury unanimously found Dr. Lanford was not negligent, and thus never had to address whether Dr. Lanford's negligence was the legal cause of injury or damage to Mrs. Bearden, or any damages issues. Mrs. Bearden timely filed a Motion for New Trial, which was denied. This appeal followed.

Mrs. Bearden raises numerous issues on appeal. She contends that the special verdict form was in error, that prejudicial misconduct by counsel for Dr. Lanford during the trial, and that the presentation of inappropriate character evidence and medical literature before the jury deprived her of a fair trial. She contends that the trial court erred in directing a verdict on the issues of res ipsa loquitur and all negligence except for those pertaining to the penetration of the spinal cord by one or more of the three sharp surgical instruments. She contends it was error to allow the introduction of speculative and unreliable opinions of Dr. Callahan, the improper use of character evidence, the admission of prejudicial testimony from a police officer regarding a physical confrontation with Mrs. Bearden which Dr. Lanford argued refuted the extent of her neurological injury and impairment. Further, she contends it was error to allow evidence of informed consent to the procedure by Mrs. Bearden, evidence of a worker's compensation settlement, refusing her the opportunity to rebut this evidence, and limiting her cross-examination of certain witnesses.

ANALYSIS

We focus our attention on the issues wholly dispositive to this appeal and consequently, we begin our analysis as to the granting of the directed verdicts and the jury charge.

I. DIRECTED VERDICTS

A motion for a directed verdict pursuant to Tennessee Rule of Civil Procedure 50.01 requires the trial court to determine as a matter of law whether the evidence is sufficient to create an issue for the jury to decide. *See Underwood v. Waterslides of Mid-America, Inc.*, 823 S.W.2d 171, 176 (Tenn. Ct. App. 1991). Thus, whether to grant a directed verdict is a question of law. *Stanfield v. Neblett*, 339 S.W.3d 22, 29 (Tenn. Ct. App. 2010).

When considering a motion for directed verdict, the trial court must take the strongest legitimate view of the evidence and allow all reasonable inferences in favor of the non-moving party, while discarding all evidence to the contrary. *Underwood*, 823 S.W.2d at 176. Courts reviewing a motion for directed verdict may not weigh the evidence or evaluate the credibility of the witnesses. *Id*. Instead, they must review the evidence most favorably to the party against whom the motion is made; they must give that party the benefit of all reasonable inferences from the evidence; and they must also disregard all evidence contrary to that party's position. *Id*.

A directed verdict is proper only when reasonable minds could reach but one conclusion. *Id*. (citing *Williams v. Brown*, 860 S.W.2d 854, 857 (Tenn. 1993)). A case should go to the jury, even if the facts are undisputed, if reasonable persons could draw conflicting inferences from the facts. *Id*.

The range of reasonable inferences to be drawn from the evidence depends upon the unique facts of each case. An inference is reasonable and legitimate only when the evidence makes the existence of the fact to be inferred more probable than the nonexistence of the fact. *Id.* (citing *Hollingsworth v. Queen Carpet, Inc*., 827 S.W.2d 306, 309 (Tenn. Ct. App. 1991)). Any lesser test would permit the jury to rest its verdict on impermissible speculation and conjecture. *Id*. (citing 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2528, at 565 (1971); *Daniels v. White Consol. Indus., Inc*., 692 S.W.2d 422, 425 (Tenn. Ct. App. 1985)).

A. RES IPSA LOQUITUR

In her complaint, Mrs. Bearden asserted specific issues of liability and the alternative theory of res ipsa loquitur. In pre trial proceedings, the trial court informed her counsel that her ability to use res ipsa as an evidentiary tool for circumstantial proof may be precluded if she presents expert testimony of specific acts of negligence. During her case-in-chief, Mrs. Bearden presented the testimony of three expert witnesses, each of whom offered testimony of the standard of care, Dr. Lanford's breach of the standard of care, and that his breaches proximately caused her injuries. At the close of her case-in-chief, Dr. Bearden moved for a

directed verdict based on the evidence of specific acts of negligence presented by her medical experts. In its ruling on the motion, the trial court stated from the bench:

> I think that the motion is, first of all well taken, as I have indicated earlier, I believe the case law in Tennessee is clear that while a Plaintiff may make alternative claims of res ipsa and specific acts of negligence, if there is proof of specific acts of negligence, the courts have consistently held that excludes the ability to rely upon the circumstantial proof of res ipsa as an evidentiary tool to get the matter to the Jury.
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> Here, they are clearly - the record is replete with assertions of specific acts of negligence whereas the Plaintiffs' experts have criticized Dr. Lanford and, therefore, the claims based via - not the claims based on - but the ability to utilize res ipsa loquitur as an evidentiary tool in this matter is prohibited. And motion for directed verdict is well taken and granted. So the Jury will not be instructed on res ipsa.

On appeal, Mrs. Bearden insists she successfully invoked res ipsa loquitur; hence, she insists she was entitled to a jury instruction on this issue. She also maintains that she met her burden under Tennessee Code Annotated § 29-26-115(c) and that contrary to the trial court's findings, the record is not rife with expert testimony of specific acts. She insists that her proof at trial was indeed compatible with the application of res ipsa loquitur.

The typical medical malpractice claim is governed by Tennessee Code Annotated § 29-26-115(a), which states that the claimant shall have the burden of proving by evidence as provided in subsection (b):

> (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;
> (2) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;
> (3) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and
> (4) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

Subsection (c) of the above statute, which pertains to res ipsa loquitur claims in a medical negligence suit, states:

> In a malpractice action as described in subsection (a), there shall be no presumption of negligence on the part of the defendant; provided there shall be a rebuttable presumption that the defendant was negligent where it is shown by the proof that the instrumentality causing injury was in the defendant's (or defendants') exclusive control and that the accident or injury was one which ordinarily doesn't occur in the absence of negligence.

Tenn. Code Ann. § 29-26-115(c).

This section essentially codifies the long-standing doctrine of res ipsa loquitur in the context of medical malpractice. *Callins v. Baptist Memorial Hosp.-Union City*, No. 02A01-9403- CV-00051, 1995 WL 48499 (Tenn. Ct. App. Feb. 7, 1995). The objective of a plaintiff relying on res ipsa loquitur is to show a breach of duty or "proximate negligence." *Sullivan v. Crabtree*, 258 S.W.2d 782, 783 (Tenn. Ct. App. 1953).

In Tennessee, it is well-settled that "res ipsa loquitur is a form of circumstantial evidence that permits, but does not compel, a jury to infer negligence, from the circumstances of an injury."[2] *Seavers v. Methodist Med. Ctr. of Oak Ridge*, 9 S.W. 3d 86, 91 (Tenn. 1999); *see also Lewis v. Casenburg*, 7 S.W.2d 808, 811 (Tenn. 1928). "[A] case of res ipsa loquitur does not differ from an ordinary case of circumstantial evidence. Res ipsa loquitur is not an arbitrary rule but rather 'a common sense appraisal of the probative value of circumstantial evidence.'" *Sullivan v. Crabtree*, 258 S.W.2d at 784 (quoting *Boykin v. Chase Bottling Works*, 222 S.W.2d 889, 896 (Tenn. Ct. App. 1949).

Prior to the 1999 holding in *Seavers*, it was well-established that the doctrine of res ipsa loquitur did not apply where specific acts of negligence are alleged and the plaintiff submits proof of these specific acts of negligence. *See, e.g., Schindler v. Southern Coach Lines*, 217 S.W.2d 775, 777 (Tenn. 1949); *Ross v. Griggs*, 296 S.W.2d 641, 646 (Tenn. Ct. App. 1955); *Wooten v. Curry*, 362 S.W.2d 820 (Tenn. Ct. App. 1961); *Jones v. Metro Elevator Co.*, No. W2000-02002-COA-R3-CV, 2001 WL 1683782 (Tenn. Ct. App. Dec. 31, 2001). However, as Mrs. Bearden correctly states, an exception to this general rule was adopted in *Seavers*.

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[2]While the formulation of this rule had its roots in motor carrier and transportation liability, this tenet has had equal applicability in the context of medical negligence suits. *Seavers,* 9 S.W.3d at 97.

In *Seavers*, after reviewing the majority of states, which permit medical malpractice claimants to come forward with expert testimony to support a res ipsa inference, and the minority of states, like Tennessee, which did not permit negligence to be inferred in medical malpractice cases where expert testimony is required, our Supreme Court concluded that:

> [T]he better rule is to allow expert testimony in medical malpractice cases, where otherwise admissible, to assist the parties both in establishing or rebutting the inference of negligence under a theory of res ipsa loquitur. While we agree that res ipsa loquitur is best suited for cases where the nature of the injury lies within the common knowledge of lay persons, we see no reason to continue to preclude the use of the res ipsa doctrine simply because a claimant's injury is more subtle or complex than the leaving of a sponge or a needle in the patient's body. As recognized by the Restatement and a majority of other jurisdictions, the likelihood of negligence necessary to support a charge under res ipsa loquitur may exist even when there is no fund of common knowledge concerning the nature and circumstances of an injury. *See Connors v. University Assoc. in Obstetrics & Gynecology, Inc*., 4 F.3d 123, 128 (2d Cir. 1993) (applying Vermont law); Restatement (Second) of Torts § 328D cmt. d.
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> This is especially true in medical malpractice cases where, as here, a claimant suffers a subtle nerve injury while heavily sedated and under the exclusive care of a hospital nursing staff. Claimants often have no knowledge of what happened during the course of medical treatment, aside from the fact that an injury occurred during that time. In cases where the standard of care or the nature of the injury requires the exposition of expert testimony, such testimony may be as probative of the existence of negligence as the common knowledge of lay persons. The use of expert testimony in that regard serves to bridge the gap between the jury's common knowledge and the complex subject matter that is "common" only to experts in a designated field. With the assistance of expert testimony, jurors can be made to understand the higher level of common knowledge and, after assessing the credibility of both the plaintiff's and defendant's experts, can decide whether to infer negligence from the evidence. *See Connors*, 4 F.3d at 128-29.

Seavers, 9 S.W.3d. at 94-95.

The Court went on to state:

> In response to the shortcomings of the restrictive view and in keeping with the modern trend in medical malpractice cases, we conclude that expert testimony may be used to establish a prima facie case of negligence under res ipsa loquitur. While this decision requires us to overrule prior case law, we find that it is supported by Tennessee's medical malpractice statute. As previously stated, Tennessee Code Annotated section 29-26-115(b) sets forth the qualifications for experts in medical malpractice cases, requiring experts to be "licensed to practice in the state or a contiguous bordering state a profession or specialty which would make his expert testimony relevant to the issues in the case and [has] practiced this profession or specialty in one of these states during the year preceding the date that the alleged injury or wrongful act occurred." Section 29-26-115(c) next permits the res ipsa inference of negligence "where it is shown by the proof that the instrumentality causing injury was in the defendant's exclusive control and that *the accident or injury was one which ordinarily doesn't occur in the absence of negligence*."

Id. at 95 (emphasis added).

Based upon the foregoing determination that Tennessee Code Annotated § 29-26-115(c) does not prohibit use of the res ipsa inference of negligence "where it is shown by the proof that the instrumentality causing injury was in the defendant's exclusive control and that the accident or injury was one which ordinarily doesn't occur in the absence of negligence," the Court stated that "the remaining question was whether the res ipsa doctrine should be applied" in that case. *Id*. At 96. In that regard, the Court further stated that it was for the trial court to determine if Mrs. Seavers had "made out a prima facie case to support a charge of res ipsa loquitur" regardless of whether she relied "on lay testimony or the testimony of experts." *Id*. at n.16.

The *Seavers* court then determined that the res ipsa doctrine applied, based on the facts in that case, *id*. at 96; thus, we must consider the relevant facts in *Seavers* before we proceed.

Mrs. Seavers was admitted to the medical center for treatment of bilateral viral pneumonia. *Id*. at 88. She was able to use her right arm and hand normally and there were no signs of injury to her right ulnar nerve when she was admitted. *Id*. Three days later, she was transferred to ICU for treatment of the pneumonia, which included intubation, heavy sedation, intravenous injections, and placement on a respirator. *Id*. The nurses' notes reflect that the patient had "full use of her left and right extremities at that time, and again, there was

no indication that she had any problems or dysfunctions with her right ulnar nerve." *Id*. She stayed in ICU for one month, during which time, she was heavily sedated and unable to care for herself and she was unable to talk during most of her stay due to an endotracheal tube positioned through her mouth and into her trachea. *Id*. More important to the issue at hand, during the month she remained in ICU "both of her hands had been placed in wrist restraints, fastened to the hospital bed rails, to prevent her from pulling or removing the endotracheal tube." *Id*. at 89.

While in the ICU, the nursing staff noted for the first time that the grip in the patient's right hand was weaker than in her left hand. *Id*. When the endotracheal tube was removed and the patient could talk, she complained that her right arm was numb and that she had difficulty using her right hand. *Id*. She was moved to a private room at the medical center for further recovery after which Dr. James Lynch, a neurologist, administered an electromyelogram ("EMG") approximately one week later. The EMG revealed that she had suffered severe damage to her right ulnar nerve. *Id*. Subsequently, due to the nerve injury, the patient and her husband filed suit against the medical center for malpractice alleging that the medical center's nurses negligently restrained or positioned her arm while she was under their care, resulting in the damage to her right ulnar nerve. She later amended her complaint to include the theory of res ipsa loquitur under Tennessee Code Annotated § 29-26-115(c). *Id*.

Mrs. Seavers' principal expert witness at trial was Dr. Stephen Natelson, who had served as the plaintiff's neurologist since 1978; he treated her right arm after she left the medical center.[3] Dr. Natelson testified that Mrs. Seavers' injury occurred as a result of prolonged pressure on the ulnar nerve in her right elbow. Although he could not offer conclusive proof of causation, he stated that the nerve injury could have occurred if a member of the ICU nursing staff failed to pad her elbow or failed to prevent her arm from becoming pressed against a hard object such as a bed rail. Dr. Natelson's testimony was corroborated by Mrs. Seavers' husband, who testified that:

> [H]e noticed abrasions forming under [his wife's] arms while she was confined to the bed in the ICU. He testified that he placed wash cloths between her arms and the bed rails to prevent further soars [sic] from developing under her arms.

[3]Dr. Natelson had treated her for various ailments, including multiple sclerosis which she was diagnosed with in 1979, and he testified that her ulnar nerve injury was not caused or related in any way to the multiple sclerosis and there was nothing in the record to suggest otherwise. *Seavers*, 9 S.W.3d at 89.

> He had no knowledge of [Mrs. Seavers'] arm pain until later when the endotracheal tube was removed from her mouth.

Id. at 89 n.5.

Further, Dr. Natelson and another expert witness, Sharon Woodworth, a registered nurse who worked in the ICU at another medical center, opined that Mrs. Seavers was "under the exclusive control and care of the medical center's nursing staff when the nerve injury occurred" and that "the ICU care included not only direct medical treatment for the [Mrs. Seavers'] pneumonia, but also the positioning and turning of [her] body while she was sedated and confined to the hospital bed." *Id*. at 89-90. Dr. Natelson and Ms. Woodworth further stated that "when treating ICU patients who are unconscious or under heavy sedation or restraint, the standard of professional care requires the protection of the patients' extremities so that injuries to the ulnar nerves do not occur" and that based upon their independent review of Mrs. Seavers' medical records and the EMG results, it was their respective opinions that "the injury was the type which would not have occurred if the nursing staff had upheld the standard of care." *Id*. at 90.

As the foregoing reveals, the straps that bound Mrs. Seavers' arms to a bed rail for a month while she was heavily sedated and unable to speak or write were the *instrumentality* that was in the control of the health care providers in *Seavers*. The instrumentalities used and the type of injury Mrs. Seavers sustained both differ from the instrumentalities used by Dr. Lanford and the type of injury at issue here, Brown Sequard Syndrome; a syndrome that has many possible causes and some of which may result in the absence of negligence or a deviation from the standard of care.

Similar to *Seavers,* the "remaining question" of whether the res ipsa doctrine applied was at issue in the 2011 decision in *Smith v. Mills*, No. E2010-01506-COA-R3-CV, 2011 WL 4553144 (Tenn. Ct. App. Oct. 4, 2011), and in a recent decision by this court, *Burchfield v. Renfree*, No. E2012-01582-COA-R3-CV, 2013 WL 5676268 (Tenn. Ct. App. Oct. 18, 2013), both of which were decided based upon *Seavers*.

In *Smith v. Mills* the patient brought a medical malpractice claim alleging the negligent performance of a tubal ligation by an obstetrician wherein he stitched a portion of the patient's bowel to her abdominal wall while closing the incision. *Id*. at *1. Dr. Wolk, the patient's expert witness and a general obstetrician and gynecologist, testified that he viewed the stitching of the bowel to the fascia "as a breach of the standard of care." *Id*. at *1-2. He further testified that stitching the bowel during the closure of the fascia would not occur in the absence of negligence, but nevertheless is a "statistical complication." *Id*. at *2. At the close of the patient's case, the defendants moved for a directed verdict, which was denied as

to liability; however, the trial court took the motion related to a res ipsa loquitur jury instruction under advisement, and subsequently granted it. *Id*. at *1-2. The patient appealed arguing that her expert witness testified that the injury was one that ordinarily does not occur in the absence of negligence and relied heavily on *Seavers*.

We noted in *Smith* that res ipsa loquitur was historically reserved "for cases where the act was so obviously negligent that a layperson's common knowledge allowed an inference of negligence"; however, in *Seavers*, our Supreme Court expanded the reach of res ipsa "to include cases that concern complex medical issues that are beyond the layperson's general understanding and that require expert testimony to prove causation, the standard of care, and/or that the injury does not ordinarily occur in the absence of negligence." *Id*. (Citing *Seavers*, 9 S.W.3d. at 97). And like here, because the patient in *Smith* relied heavily on *Seavers*, we examined that case and determined that the patient's interpretation of *Seavers* was mistaken. *Id*. We further noted that *Seavers* overruled prior decisions that deemed res ipsa as only applicable in cases "where the proof is such that the jury can reasonably infer from common knowledge and experience that the defendant was negligent." *Id*. at *9 (quoting *Seavers*, 9 S.W.3d at 92). Therefore, we reasoned in *Smith* that any pre-*Seavers* opinions concerning the applicability of res ipsa that do not offend the very specific holding of *Seavers* remain good law and, to that end, we looked to *Hughes v. Hastings*, 469 S.W.2d 378 (Tenn. 1971).

Applying *Hughes* to the facts in *Smith*, we noted that Dr. Wolk testified that stitching the bowel while closing the fascia does not ordinarily occur in the absence of negligence, and as he repeatedly stated, Dr. Mills acted negligently when he stitched the patient's bowel to her fascia. Then, we went on to explain:

> Indeed, the thrust of Patient's case at trial was that Dr. Mills provided services that fell beneath the recognized standard of professional care when he stitched Ms. Smith's bowel to her fascia. Dr. Wolk testified on direct that "[i]t is my opinion that encompassing the bowel or grabbing the bowel with the stitch during the closure of an incision like this would not meet the standard of care." However, applying *Hughes*, we agree with the trial court that the facts of this case do not lend themselves to proving negligence circumstantially through res ipsa loquitur because Patient has presented evidence at trial of specific acts of negligence. The doctrine of res ipsa permits the jury to infer negligence when there is a lack of evidence about what occurred - it is not a mechanism for having the jury ignore the evidence. In this case, the parties do not dispute what actually caused Patient's injury - i.e. the inserting of a stitch into the bowel during the closing of the fascia. However, there was ample evidence in the record upon which the jury could find that this injury can occur even when

> the physician uses due care. Further, we cannot find that Patient established that this is the type of injury which ordinarily would not occur but for negligence. Thus, we affirm the judgment of the trial court that Patient failed to carry her burden of demonstrating that res ipsa loquitur applied in this case.

Smith, 2011 WL 4553144 at *8-9.

In *Burchfield v. Renfree*, the defendant, Dr. Renfree, performed carpal tunnel release surgery on Mr. Burchfield's right arm. *Burchfield*, 2013 WL 5676268, at *1. Subsequently, the Burchfields filed suit against Dr. Renfree alleging that he negligently performed the surgery and caused nerve damage. *Id*. The Burchfields claimed that during the surgery Dr. Renfree negligently severed the median nerve, causing permanent injury. *Id*. During trial, the Burchfields argued that Tennessee Code Annotated § 29-26-115(c) embodies medical res ipsa loquitur and the jury should have been instructed regarding res ipsa. *Id*. at *13. The court found there was no basis for the Burchfields to rely on res ipsa loquitur, as direct evidence was presented of Dr. Renfree's alleged negligence. *Id*.

In explaining our ruling, we stated "there was no basis for the Burchfields to rely on res ipsa loquitur as there was direct evidence presented of Dr. Renfree's alleged negligence." *Id*. at *14 (citing *Smith*, 2011 WL 4553144, at *10). This was based on the fact the Burchfields' expert, Dr. Natelson, "testified at length regarding multiple alleged deviations from the standard of care by Dr. Renfree during surgery, which Dr. Natelson opined were the cause of Mr. Burchfield's injury. Dr. Natelson also opined that Dr. Renfree had cut Mr. Burchfield's median nerve as the result of negligence because Dr. Renfree, inter alia, (1) failed to take measurements, (2) failed to cut distal to proximal, (3) failed to visualize the nerve and ligament, and/or (4) performed the operation too quickly." *Id.* Dr. Renfree, as well as his expert witnesses, agreed that the nerve was lacerated during the procedure, but insisted "the laceration was not the result of negligence and that Dr. Renfree did not deviate from the standard of care." *Id.* Thus, the court reasoned, "Dr. Renfree presented proof that *the injury could have occurred in the absence of negligence*, as Dr. Renfree and his experts testified that there was no negligence in this case." *Id*. (emphasis added). We further stated:

> [T]he facts of this case do not lend themselves to proving negligence circumstantially through res ipsa loquitur because Patient has presented evidence at trial of specific acts of negligence. The doctrine of res ipsa permits the jury to infer negligence when there is a lack of evidence about what occurred - *it is not a mechanism for having the jury ignore the evidence*.

Id. (quoting *Smith*, 2011 WL 4553144, at *10) (emphasis added).

As the court further explained in *Burchfield*:

> In this case, the parties do not dispute what actually caused Patient's injury - i.e. the inserting of a stitch into the bowel during the closing of the fascia. *However, there was ample evidence in the record upon which the jury could find that this injury can occur even when the physician uses due care. Further, we cannot find that Patient established that this is the type of injury which ordinarily would not occur but for negligence. Thus, we affirm the judgment of the trial court that Patient failed to carry her burden of demonstrating that res ipsa loquitur applied in this case*.

Id. at *15 (emphasis added).

In the case at bar, the trial court ruled that Mrs. Bearden was precluded from using res ipsa loquitur as an evidentiary tool because she presented expert testimony of *specific* acts of negligence; however, Mrs. Bearden maintains that contrary to the trial court's findings, the record is not rife with expert testimony of *specific* acts of negligence. She insists that her proof at trial was indeed compatible with the application of res ipsa loquitur and she relies heavily on *Seavers*. Specifically, she contends the evidence of specific acts of negligence in *Seavers* was much more specific than those presented by her three experts; thus, she concludes we are required to find that a res ipsa loquitur instruction was not contravened here. We respectfully disagree and find that she misconstrues the holding of *Seavers*.

Mrs. Bearden presented the testimony of three expert witnesses: Scott Gibbs, M.D. and George Gruner, M.D., both neurosurgeons; and James Malcolm, M.D., an orthopaedic surgeon. All three physicians testified that after reviewing the medical records, imaging, and deposition testimony, each had reached the opinion to a reasonable degree of medical certainty that Dr. Lanford violated the standard of care required of neurosurgeons treating a patient like Mrs. Bearden in 2006. Additional relevant excerpts of their testimony follow.

On direct examination, Dr. Gibbs testified:

> Q. [A]nd after reviewing those records, [i.e. medical records, diagnostic imaging studies, deposition testimony] did you form an opinion as to whether or not Dr. Lanford violate--violated the standard of care?
> A. Yes, he did.
> Q. And what was that opinion?
> A. My opinion was that he did violate the standard of care. We as surgeons use instruments, and our hands control those instruments. We cannot do all operations with our bare hands, so surgeons must control their instruments.

> And what I determined was that a sharp injury had occurred to Mrs. Bearden's spinal cord, which left her weak on one side of her body and with loss of pain and temperature sensation on the other side of her body.
>
> ***
>
> Q. Dr. Gibbs, to a reasonable degree of medical certainty, did Dr. Lanford violate the standard of care by injuring the spinal cord with an instrument during this procedure?
> A. Yes, he did.

Moreover, on cross-examination, Dr. Gibbs acknowledged the general proposition that injury to the dura could occur in the absence of negligence, but pointedly qualified his testimony, stating that:

> [W]hen someone perforates the dura in the anterior third of the disc space, that is a breach of standard of care . . . I'm trying to make clear to you what is a breach of standard of care and what is not. If you're down at the posterior longitudinal ligament and you happen to snag the dura with a Kerrison instrument, which is a little biting instrument, or the curette and you tear it, that's not a violation of the standard of care. But when you're going through the anterior third of the disc and you violate the dura in some way, that is a breach of the standard of care.

Dr. Malcolm also testified as an expert witness on behalf of Plaintiff.

> Q. [I]s there anyway that the - that the [cerebrospinal] fluid could have traveled through the PLL [posterior longitudinal ligament], through the disc space, and out through the disc unless an instrument had been put in there?
> A. Not that I know of, sir.
> Q. Doctor, do you have an opinion to a reasonable degree of certainty as to how CSF leakage could have appeared while [Dr. Lanford] was just superficially removing discs?
> A. Yes, sir. At this point, he's put two sharp objects into that disc space, so probably one of those has done the damage.
> Q. To a reasonable degree of medical certainty, did -- in your opinion, did Dr. Lanford cause that CSF leakage that he has documented there?
> A. Yes, sir. I think it was probably the 11-blade[.]
>
> ***

Q. Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether or not this injury was preventable?
A. Yes, sir.
Q. And would you tell the ladies and gentlemen of the jury why and how this could have been prevented.
A. Whenever we operate on the cervical spine, we are very careful in wherever we're using the instruments to try to protect all of the soft tissues from the start of the surgery, because in approaching the neck, it's full of a whole bunch of problem issues, blood vessels and other nerves on our dissection down to the spinal column. And then once we get into the spinal column, we put in devices to protect the soft tissues we've just passed through in the neck, the anterior neck. And he did that. In his description, he talks about putting in retractors to protect the soft tissues. We try and move in an expeditious manner through our surgery so those retractors don't put pressure on soft tissues for too long. We then use a radiographic imaging to establish that we're at the level we think. You can palpate certain bony landmarks, et cetera, and know roughly where you are. But you have to be exactly on the right disc because you don't want to operate on the wrong level. And then once we have the correct level, we use the knife to start the dissection of the disc. The reason for the knife, it's sharp[.]

***

Q. Dr. Malcolm, is it your opinion that the injury sustained by Mrs. Bearden was caused by a sharp instrument?
A. Yes, sir.

***

Q. In your opinion, was it a violation--assuming it was the sharp instrument as you have opined, is it more probable than not that the injury to the dura in this case was below the standard of care?
A. Yes, sir.

Finally, Dr. Gruner testified:

Q. And after reviewing Dr. Lanford's deposition and the images, did you form an opinion as to whether or not Dr. Lanford violated the standard of care?
A. Yes, sir, I did.

Q. And what was that opinion?
A. It was my opinion that the standard of care - that what happened was below the standard of care . . . . Something - sharp instrumentation had disrupted the normal boundaries of the posterior longitudinal ligament and the dura.

***

Q. Doctor, to a reasonable degree of medical certainty, what is your opinion as to the most probable cause of the spinal fluid that [Dr. Lanford] was describing at that time [in his operative note]?
A. If one takes his description at the time of the operation, it was either the spinal needle; if one goes further along in the operation, then it would have been the knife, the No. 11 blade.
Q. And, Doctor, do you have an opinion as to whether or not that was a violation of the standard of care?
A. It's a violation of the standard of care in this patient to have injured the spinal cord with a sharp instrumentation.

***

Q. Would the earlier time of 9:02, the x-ray being taken, in any way change your opinion that this injury was caused by a sharp instrument?
A. No, sir.
Q. Would it in any way affect your opinion as to whether or not Dr. Lanford was negligent in the use of his instruments?
A. No, sir.
Q. Doctor, in your opinion, is a sharp injury to the cord one of the risks of the procedure that she consented to?
A. No, sir.
Q. Tell me why not.
A. Well, No. 1, that's usually not something that we put into description when we talk to patients about the potential risks that could be involved in the operation. It's distinctly below the standard of care to put a knife or other sharp instrument into the spinal cord if that's not what you need to do for the operation.
Q. [D]o you have an opinion as to whether or not the injury to the dura itself fell below the standard of care?
A. Yes, it did, based on the - based on the criteria and condition of the patient.
Q. Doctor, was this - in your opinion, was this injury preventable?
A. Yes, sir. it was.

> Q. Would you tell the ladies and gentlemen of the jury how this injury could have been prevented?
> A. [I]n this patient, there was plenty of room at the C5-6 level so that there's no evidence that there were any unusual conditions that would have indicated that the spine - that the dura or the - should have been violated or that the injury to the spinal cord should have happened . . . . A competent neurosurgeon - the average neurosurgeon should have been able to do this operation without any injury to the spinal cord.[4]

On cross-examination, Dr. Gruner opined that Dr. Lanford breached the standard of care by slicing through the cervical disc, posterior longitudinal ligament, dura, and then into the spinal cord with a surgical instrument - either the localizing needle or the Number 11 blade - thereby causing Mrs. Bearden to suffer Brown Sequard Syndrome.

> Q. [T]hat means . . . everything that this man has done in connection with this patient met the standard of care with the single exception of one or two potential things. One, you say that he might have put this localizing needle through the disc, through the posterior longitudinal ligament, through the dura, and into the cord; or might have done it with the No. 11 blade? Those are the two exceptions?
> A. That's correct.

Mrs. Bearden's three medical experts consistently testified that one of three surgical instruments under Dr. Lanford's exclusive control more than likely penetrated her spinal cord leading to paralysis; albeit, Dr. Gibbs favored the localizing spinal needle while Dr. Gruner was partial to the scalpel.

Having reviewed the foregoing expert testimony, it is not necessary for the jury to *infer* any degree of negligence on Dr. Lanford's part; to the contrary, in the event the jury chose to ignore the plethora of expert testimony concerning numerous specific acts that occurred during the surgery, the jury could do little more than speculate. As was the case in *Smith*, the jury was presented with a "battle of the experts" and had to decide which expert to believe. *See Smith*, 2011 WL 4553144, at *2. Similarly, the Burchfields presented expert proof from which the jury could determine that Dr. Renfree was negligent, and Dr. Renfree presented expert proof to refute that testimony. *Burchfield*, 2013 WL 5676268, at *15. Therefore, as this court explained in *Burchfield*, "there was no need for the court to instruct

[4]Dr. Gruner also raised the speed of the surgery and choice of blade as breaches of the standard of care in his response. These statements are selectively omitted as counsel for Dr. Lanford voiced an objection. The trial court then gave a limiting instruction to the jury not to consider these issues.

the jury regarding res ipsa loquitur, as the jury's verdict did not have to be based on circumstantial evidence." *Id*.

Although Mrs. Bearden stops short of arguing that *Seavers* overrules the wealth of case law regarding specific acts of negligence, that is implicitly what she is requesting us to find. She asks us to compare the facts in *Seavers* to the facts in the instant case and conclude that introducing evidence of specific acts of negligence in a res ipsa loquitur suit does not operate to waive the use of this evidentiary doctrine. We find this position strains the breadth of the holding in *Seavers*, and therefore, find it untenable. If we were to read anything into the opinion, we would determine that the Supreme Court continued to bless the evidentiary incongruity between specific acts of negligence and the doctrine of res ipsa loquitur. As quoted *supra*, the plain language of *Seavers* supports the holding that expert testimony may be used to prove standard of care, causation, and that the injury does not ordinarily occur in the absence of negligence *if* the facts of each particular case justify the use of res ipsa.

As we explained in *Smith*, and we again reiterate, the prescient holding of the Supreme Court in *Seavers* was that res ipsa loquitur "is available in medical malpractice cases to raise an inference of negligence even if expert testimony is necessary to prove causation, the standard of care, and the fact that the injury does not ordinarily occur in the absence of negligence." *Smith*, 2011 WL 4553144, at *9 (quoting *Seavers*, 9 S.W.3d at 97). Nevertheless, although *Seavers* abrogated prior decisions that restricted the doctrine to circumstances where "the jury can reasonably infer from common knowledge and experience that the defendant was negligent," *Id.* (quoting *Seavers*, 9 S.W.3d at 92), *Seavers* did not universally vacate the pre-*Seavers* body of law that precludes reliance on res ipsa loquitur once specific acts of negligence is presented. *Id*. As we noted in *Smith*, the Supreme Court's opinion in *Hughes* is "still alive and well." *Id*. (citing *Hughes*, 469 S.W.2d at 382-83). We also believe, though admitting it is not expressly limited to such, that the broader application of res ipsa remains more suited when there is *some* fund of common knowledge concerning the nature and circumstances of an injury. We base this upon the following statement in *Seavers*:

> As recognized by the Restatement and a majority of other jurisdictions, the likelihood of negligence necessary to support a charge under res ipsa loquitur may exist even when there is no fund of common knowledge concerning the nature and circumstances of an injury. *See Connors v. University Assoc. in Obstetrics & Gynecology, Inc*., 4 F.3d 123, 128 (2d Cir. 1993) (applying Vermont law); Restatement (Second) of Torts § 328D cmt. d.
>
> This is especially true in medical malpractice cases where, as here, a claimant suffers a subtle nerve injury while heavily sedated and under the exclusive care

> of a hospital nursing staff. Claimants often have no knowledge of what happened during the course of medical treatment, aside from the fact that an injury occurred during that time. In cases where the standard of care or the nature of the injury requires the exposition of expert testimony, such testimony may be as probative of the existence of negligence as the common knowledge of lay persons. *The use of expert testimony in that regard serves to bridge the gap between the jury's common knowledge and the complex subject matter that is "common" only to experts in a designated field. With the assistance of expert testimony, jurors can be made to understand the higher level of common knowledge and, after assessing the credibility of both the plaintiff's and defendant's experts, can decide whether to infer negligence from the evidence*. *See Connors*, 4 F.3d at 128-29.

Id. at 94-95 (emphasis added).

Based upon the foregoing analysis, we believe *Seavers* has not removed all restrictions. We also believe that if there were no limit on the application of the doctrine of res ipsa loquitur, a Latin phrase that when literally translated means "the thing speaks for itself," the doctrine would lose its fundamental meaning. *Seavers*, 9 S.W.3d at 91, n.7.

As noted earlier, a motion for a directed verdict pursuant to Tennessee Rule of Civil Procedure 50.01 requires the trial court to determine, as a matter of law, whether the evidence is sufficient to create an issue for the jury to decide an issue or claim. *Underwood*, 823 S.W.2d at 176. Moreover, res ipsa loquitur, which is a rule of evidence, is presented to the jury via jury instruction subject to the decision of the trial court. *See, e.g., Hughes*, 469 S.W.2d at 383-84; Res Ipsa Loquitur, 8 Tenn. Prac. Pattern Jury Instr. T.P.I.-Civil 4.01, 6.19 and 6.20.[5] This is because "the trial court is the jury's sole source for the legal principles to

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[5]T.P.I. - CIVIL 6.20 Res Ipsa Loquitur - Medical

> You may, but are not required to, infer from the happening of the injury in this case that a cause of the injury was some negligent conduct by the defendant[s]. This theory requires the plaintiff to prove all of the following:
>
> 1. The plaintiff received an injury that ordinarily would not occur in the absence of negligence. [Whether the injury is one that ordinarily does not occur in the absence of negligence may be determined from the evidence presented in this trial by physicians and surgeons called as expert witnesses.]
> 2. The injury was caused while the care of the plaintiff was under the exclusive care and control of the defendants. [The plaintiff is not required to identify the particular agent or

(continued...)

guide their deliberations." *Grissom v. Metro. Gov't of Nashville*, 817 S.W.2d 679, 685 (Tenn. Ct. App. 1991).

As was the case in *Seavers*, *Smith* and *Burchfield*, the trial court was asked to determine the "remaining question," whether, as a matter of law, the jury should be instructed on res ipsa. The trial court decided in the negative and we have concluded that the trial court correctly decided the issue. Based upon the foregoing, we affirm the trial court's decision to grant a directed verdict as to Mrs. Bearden's res ipsa loquitur claim.

B. PENETRATION OF THE DURA

The operative complaint at the time of trial alleged Dr. Lanford was specifically negligent in performing the ACDF by opening Mrs. Bearden's dura, by injuring the spinal cord with a surgical instrument, and by negligently injuring her cervical spine and neurological system. The anatomy of the operative area of the spine was therefore obviously crucial to Mrs. Bearden's allegations. In brief, the evidence explained Mrs. Bearden's spinal cord was surrounded by spinal fluid and that encasing the spinal fluid and cord was a protective sheath called the dura. The posterior longitudinal ligament ran next to the dura; finally, adjacent to the posterior longitudinal ligament was the cervical disc space, which was the focus of the surgery, namely Dr. Lanford removed the discs at C5-C6 and C6-C7 and fused these levels.

The following facts were essentially undisputed. Dr. Lanford first made an incision into Mrs. Bearden's right collar with a small fifteen-blade scalpel down to her platysma muscle. At that point, he incised the platysma muscle with electrocautery. Next, he dissected to the sternocleidomastoid muscle, carotid artery, esophagus, and trachea, and used retractors to move and hold these vital structures from the surgical path. He inserted a spinal marker needle into the disk space and obtained an intra-operative x-ray of the spine which confirmed he was performing the ACDF at the appropriate level of Mrs. Bearden's spine, or in the C5-C6 disc space. Dr. Lanford then accessed the anterior spine by making an incision and opened the disc space with an eleven-blade scalpel. He removed disc material at C5-C6 with a curette. During the procedure, Dr. Lanford encountered a cerebrospinal fluid leak, which

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[5](...continued)
instrumentality that caused the injury if unable to do so because of the patient's condition at the time the [medication][treatment][operation] was [administered][performed]].

The defendant may overcome an inference of negligence by showing that due care was exercised or that the injury was brought about by a cause other than the defendant's negligence.

was indicative of a hole in the dura, the protective outer lining encasing the spinal cord. Dr. Lanford closed this hole with a sealant called Tisseel, and then completed the procedure. While in recovery post-procedure, Mrs. Bearden began exhibiting partial paralysis and other neurologic abnormalities. An MRI of her spine showed a hyperintensity in the imaging at C5-C6, indicating that she had suffered an injury to her spinal cord at that level. She was ultimately diagnosed with a condition called Brown Sequard Syndrome.

Mrs. Bearden presented her entire case-in-chief on the theory that Dr. Lanford negligently penetrated her spinal cord at C5-C6 with one of three surgical instruments: the spinal marker needle, the eleven-blade scalpel, or the curette. To do so, she attempted to prove that Dr. Lanford negligently pushed one of the instruments through her cervical disc, through the posterior longitudinal ligament, through the dura, through her spinal fluid, and into her spinal cord. During direct examination of her experts, Mrs. Bearden elicited expert testimony that Dr. Lanford penetrated the dura with one of these three sharp instruments and that this was supported by the cerebrospinal fluid leak encountered during the procedure. Moreover, her experts opined that penetration of the dura by Dr. Lanford was a deviation from the standard of care, although her experts later agreed on cross-examination that penetration of the dura can occur even in the absence of negligence.

The overarching theory of Mrs. Bearden's case was that Dr. Lanford negligently mishandled these instrument(s) and, as a result, she more than likely suffered penetrative trauma to her spinal cord leading to Brown Sequard Syndrome; however, Mrs. Bearden presented no evidence that complete or even partial penetration of the dura, in and of itself, by an instrument more than likely caused her any injury, neurological symptoms, or Brown Sequard Syndrome.

Conversely, Dr. Lanford introduced expert testimony from an orthopedic surgeon, Brett Babat, M.D., as well as Dr. Lanford himself, that he had fully complied with the standard of care in handling his instruments, that he did not penetrate the spinal cord, and that spinal cord injury, stroke, and tears in the dura are all complications of spinal surgery that can occur absent negligence. Neuroradiologist, Brian Berger, M.D., testified that dural tears frequently occur during disc surgeries. As an example, he noted tears can occur when a surgeon is removing pieces of the disc secondary to adhesions or scar tissue that may have formed between the surface of the dura, the posterior longitudinal ligament, and the disc. Moreover, Dr. Lanford submitted expert testimony from Dr. Berger and a neurologist, Alfred Callahan, M.D., that explained the hyperintensity in the MRI imaging was within a reasonable degree of medical certainty reflective of a venous stroke, not a sharp penetrative injury. There was absolutely no discussion of the cause of the venous stroke on direct examination. On cross-examination of Dr. Callahan, Mrs. Bearden attempted to elicit testimony from him that the Gelfoam used in conjunction with the Tisseel to seal the tear in

the dura caused the stroke. She was apparently aware of this theory from prior deposition testimony, even though it had not been introduced to the jury at that point. In fact, we recognize there may have been some confusion by Mrs. Bearden as to what was actually entered into evidence, as an extended Rule 104 hearing occurred that morning prior to Dr. Callahan's testimony for the purpose of probing the scientific basis of any assertion that the Gelfoam/Tisseel combination caused the stroke. In any event, Dr. Callahan was presented with the following hypothetical by Mrs. Bearden:

> Q. [S]o, I want you to assume for a second that Dr. Lanford took an 11 blade and pushed it in too far, beyond where he knew where it was, and that blade sliced through the dura. And I want you to assume that that is below the standard of care. You understood [sic]?
> A. I think so.
> Q. Okay. Now, if that's the case, for the purposes of my question, then the Tisseel and the Gelfoam would have been placed on the dura to try to close the hole created by the knife, right?
> A. That's right.
> Q. And you could possibly see that any complication that occurred or any problem that occurred from whatever was used might be directly attributable to the act that was below the standard of care of sticking the knife in too far, can't you?
> A. Yes.

Significantly, counsel for Dr. Lanford objected at this point. The trial court sustained the objection, noting that this line of questioning was beyond the scope of Dr. Callahan's opinion testimony. Dr. Callahan had exclusively been offered as a causation expert and the court found it improper for Mrs. Bearden to attempt to obtain standard of care testimony from him; the jury was instructed to disregard this questioning. Mrs. Bearden did not appeal this objection.

Following Mrs. Bearden's proof, Dr. Lanford made a broad motion for a directed verdict which encompassed the elements of her claims. Moreover, he also made some very specific motions including one tailored to the issue of res ipsa loquitur as discussed above. At that time, the trial court partially granted a directed verdict regarding Mrs. Bearden's right to proceed under the theory of res ipsa loquitur, as well as multiple standard of care and damages issues. The trial of the matter consequently continued, and following the close of all of the proof, Dr. Lanford again moved for directed verdict as to:

> [A]ll claims of liability, and all elements of damages. And, specifically, we move for a directed verdict on any claim of liability regarding post-op care,

> especially on July 7, 2006 . . . . As a result of what the proof was and wasn't and the directed verdict claims, [we] ask the Court to direct a verdict on any claims of liability beyond the needle and knife issue. If I'm not articulating some specific issue that should be excluded; I'll do it in the inverse. The proof the Plaintiff presented at trial, or that could have come up in the Defense's proof that's now closed, only supports claims of liability on needle or knife going to the Jury.

A discourse occurred on the motion during which the trial court found that in addition to the spinal needle and eleven-blade scalpel ("the knife"), evidence had been presented that Dr. Lanford had mishandled the curette, thereby penetrating the spinal cord. The trial court granted the motion, inter alia, as to all care and treatment rendered by Dr. Lanford post-surgery and also excluded all malpractice claims except for those premised on Dr. Lanford's negligent use of the spinal needle, the eleven-blade scalpel, or the curette during Mrs. Bearden's procedure. In doing so, the trial court said:

> I'm going to deny the motion for directed verdict as to any claim based upon the utilization of the surgical needle, the knife or the number - actually, the No. 11 blade, or knife, and the curette . . . I think there was enough evidence for the curette to be considered. *I will grant it as to all others*.

The court further acknowledged that while there had been references during the trial to other operative devices used during the ACDF, such as drills and retractors, there was no claim that these devices could have caused injury. The written order then specifically stated:

> The Motion for Directed Verdict with regard to the Plaintiff's claim/theory regarding care and treatment by Dr. Lanford for anything other than his use of the spinal needle, #11 blade, and the curette used to remove disc material at C5-C6 is GRANTED.

At the jury charge conference, the court presented the special verdict form which it had tailored to the issues and its previous ruling on directed verdict. At that time, Mrs. Bearden argued, for the very first time, that the verdict form should include a question on negligence associated with penetration of the dura; however, she was unable to point to any expert testimony she had presented that reflected that injury to the dura alone caused injury to Mrs. Bearden. Instead, she insisted Dr. Lanford's causation experts had testified that venous infarction and, subsequently, Brown Sequard Syndrome had occurred secondary to a repair of the dura. Therefore, she believed she was entitled to argue in the alternative that negligent injury to the dura caused venous stroke leading to Brown Sequard Syndrome.

At the hearing on the Motion for New Trial, Mrs. Bearden again insisted it was error to exclude negligent penetration of the dura. The trial court observed that there was no proof that penetration of the dura alone caused injury to Mrs. Bearden, and that the defense expert's testimony was limited to the opinion that her MRI imaging showed she had suffered a venous stroke leading to Brown Sequard Syndrome. Moreover, the trial court noted it had unequivocally granted all claims for directed verdict except for negligent penetration of the spinal cord by the spinal needle, eleven-blade scalpel, or curette.

At the outset, we note that under the proper circumstances a plaintiff is certainly afforded wide latitude in pleading alternative claims for relief. Tenn. R. Civ. P. 8.05; *Miller v. United Automax*, 166 S.W.3d 692, 696 (Tenn. 2005). However, in the present matter, Mrs. Bearden never attempted to move the court to add this novel theory to her claims; instead, she surprised defense counsel and the court at the jury charge conference with her new strategy, effectually trying to ride the coattails of the defense experts' testimonies to argue liability based on venous stroke. She argued that the defense experts' opinions were that the venous stroke was caused by the mass effect of using Gelfoam and Tisseel to repair the dura.

A claim for medical malpractice cannot succeed absent proof by a preponderance of the evidence of causation. Tenn. Code Ann. § 29-26-115(a); *Kilpatrick v. Bryant*, 868 S.W.2d 594, 598 (Tenn. 1993). Taking the strongest legitimate view of the evidence in favor of Mrs. Bearden, the non-movant, we agree with the trial court that there is no evidence to support that injury to the dura alone caused injury to Mrs. Bearden. Mrs. Bearden has cherry-picked excerpts of her expert testimony and excerpts of the defense expert testimony in an attempt to piecemeal this theory together, and it does not pass muster. No qualified expert linked the injury to the dura to the Brown Sequard Syndrome in the manner Mrs. Bearden suggests. In fact, the defense experts never delved into the application of the sealant except on cross-examination. As discussed above, when Mrs. Bearden attempted to link a hypothetical negligent penetration of the dura alone to the stroke, defense counsel objected, and the objection was sustained as outside the scope of Dr. Callahan's testimony. Mrs. Bearden did not appeal this ruling. The bottom line is we are presented with a complaint that does not denote this theory, no motion to amend the complaint, and a record that does not support it. Therefore, we affirm the trial court's ruling.

C. BLUNT TRAUMA

Mrs. Bearden claims it was error for the court to have directed a verdict as to her "blunt trauma" claim and "holding that Plaintiff had to prove that Dr. Lanford penetrated the spinal cord." We find no merit to these contentions due in part to the fact no such claim was ever properly articulated in the pleadings nor was such a claim tried. Moreover, at no point in her briefing, did Mrs. Bearden attempt to set forth facts that explained or defined her

unspecified blunt trauma theory. Based on the phrase "blunt instrument," we surmise she is using this phrase interchangeably with "blunt trauma" and arguing some theory premised on injury by unnamed blunt instruments or objects.

At the outset, we must observe that although Mrs. Bearden appeals "blunt trauma," she devoted approximately one page of her briefing to this issue, the bulk of which quoted two testimony excerpts; one from her expert witness, Dr. Malcolm, on direct examination, and the other from the attempted impeachment of defense neurologist expert, Alfred Callahan, M.D. In her reply briefing, she merely added another terse excerpt from cross-examination of the defense's orthopaedic surgeon expert, Lawrence Babat, M.D.

Specifically, Mrs. Bearden cited the following exchange with Dr. Malcolm:

> Q. And - and what is a differential? When you say differential, what is a differential diagnosis?
> A. Sir, when we first start talking to the patient and they have a complaint, there are things that come to mind as to what could be causing their complaint. And in school, we're taught to come up with a very broad disc - or broad list of problems in order to keep an open mind, not - not rule out things until we've examined the patient and ordered exams to put it all together and correlate it, and at that point, you prioritize what's most likely to the least likely. In this case, the most likely is a sharp instrument; the least likely would be something like a stroke or in between, perhaps a blunt instrument.

She further cited testimony from Dr. Babat:

> Q. And you would agree that such an instrument, even a blunt instrument, can cause this injury?
> A. [Y]es.

The impeachment excerpt from Dr. Callahan is similarly vague.

At the close of all the proof, the trial court granted a motion for directed verdict on "all claims" except for negligent penetration of the spinal cord by the spinal needle, eleven-blade scalpel, or curette, noting that Mrs. Bearden's theory of the case and expert testimony were wholly based on allegations that Mrs. Bearden had suffered a devastating injury to her spinal cord *as a result of penetration by one of these three sharp surgical instruments in the hands of Dr. Lanford*. Although her experts differed in their opinions as to which of the three *sharp* instruments allegedly penetrated the spinal cord, the testimony uniformly conveyed that sharp penetration of the spinal cord caused Mrs. Bearden to suffer

neurological injury, or Brown Sequard Syndrome. Nevertheless, her experts did not put forth sufficient evidence to identify what blunt instruments or objects were at issue, the manner in which the standard of care was breached in utilizing blunt, as distinguished from sharp, objects or instruments, or how any alleged injury occurred secondary to any blunt instrument.

As noted earlier, a motion for a directed verdict requires the trial court to determine as a matter of law whether the evidence is sufficient to create an issue for the jury to decide and a directed verdict is proper only when reasonable minds could reach but one conclusion. *Underwood*, 823 S.W.2d at 176 (citing *Williams*, 860 S.W.2d 857). A case should go to the jury, even if the facts are undisputed, if reasonable persons could draw conflicting inferences from the facts and the range of reasonable inferences to be drawn from the evidence depends upon the unique facts of each case. *Id*. An inference is reasonable and legitimate only when the evidence makes the existence of the fact to be inferred more probable than the nonexistence of the fact. *Id.* However, a claim for medical malpractice cannot succeed absent proof by a preponderance of the evidence of all of the elements of the claim, *see* Tennessee Code Annotated § 29-26-115, and Mrs. Bearden failed to submit competent proof to support any claim other than the claims based upon the utilization of the surgical needle, the eleven-blade scalpel, and the curette, which were properly submitted to the jury. Thus, the trial court did not err in granting a directed verdict to the "other claims," including one identified as "blunt trauma."

II. SPECIAL VERDICT FORM

The special verdict form used by the trial court, which Mrs. Bearden contends, inter alia, was too limiting, read as follows:

> Was Defendant negligent by failing to comply with the recognized standard of acceptable professional practice for the medical profession and specialty in this community or a similar community by causing a surgical instrument to penetrate the spinal cord of the Plaintiff? (The plaintiff has the burden of proof).
>
> If your answer is "no," stop here, sign the verdict form and return it to the Court. If your answer is "yes," proceed to Question 2.

At the close of all proof, the court granted a motion for directed verdict on all claims *except for negligent penetration by the spinal needle, eleven-blade scalpel, or curette*, noting that Mrs. Bearden's theory of the case and expert testimony were wholly based on allegations

that Mrs. Bearden had suffered a devastating injury to her spinal cord as a result of penetration by one of three sharp surgical instruments in the hands of Dr. Lanford. The written order granting directed verdict stated, inter alia:

> The Motion for Directed Verdict with regard to the Plaintiff's claim/theory regarding care and treatment by Dr. Lanford for anything other than his use of the spinal needle, #11 blade, and the curette used to remove disc material at C5-C6 is GRANTED.

The heart of Mrs. Bearden's claim is Dr. Lanford acted negligently when he inserted the spinal marker needle into the disc space at the beginning of the procedure to confirm he was at the proper level, when he made his incision and opened the disc space with the eleven-blade scalpel, or when removing disc material with the curette. Although her experts differed in their opinions as to which of the three sharp instruments allegedly penetrated the spinal cord, their testimony uniformly conveyed that *injury to the spinal cord and sharp penetration of the spinal cord* caused Mrs. Bearden to suffer neurological injury, or Brown Sequard Syndrome. Mrs. Bearden contends the written order did not restrict her claims to *penetration of the spinal cord*, thus, she insists, she should have been allowed to include theories premised on "blunt trauma," and eliminated her ability to address defense theories. She argues that because the defense asserted that the sealant used to close the hole in the dura caused venous stroke, she should concomitantly be allowed to assert that but for Dr. Lanford's alleged negligence in causing the hole necessitating the sealant, stroke would not have occurred.

At the jury charge conference, the trial court stated that other evidence, which was not consistent with Mrs. Bearden's allegations or the rules of evidence, had permeated the case and were a potential distraction from the ultimate issues. In doing so, the court found that any negligence associated with a hole in the dura was not in and of itself malpractice related to any injury suffered by Mrs. Bearden. Instead, the hole in the dura was subsumed by the injury to the spinal cord leading to Brown Sequard Syndrome. Consequently, the court determined, over the objection of Mrs. Bearden, that it was necessary to employ a special verdict form.

The record and the written order above reveal that the trial court unequivocally granted a directed verdict as to all claims except for the issue of whether the eleven-blade scalpel, spinal needle, or the curette penetrated the spinal cord. While the trial court never used the word "penetration," we are not swayed by this argument of semantics. In ruling on the directed verdict, the court was viewing the elements of the malpractice claims as a whole per the motion for directed verdict and not in a vacuum. The court's findings were dispositive to allegations that any other deviations from the standard of care caused injury to Mrs. Bearden, or injury to her spinal cord, leading to Brown Sequard Syndrome. In other words,

Mrs. Bearden's evidence and allegations did not support a claim that negligently infringing upon or creating a hole in the dura led to the her spinal cord injury.

Tennessee Rule of Civil Procedure 49 affords trial courts considerable leeway in using special verdict forms and tailoring special interrogatories to meet the needs of each unique case. *Concrete Spaces, Inc. v. Sender*, 2 S.W.3d 901, 910 (Tenn. 1999). "The propriety of jury instructions given in a particular case is a question of law, which we review de novo with no presumption of correctness." *Latiff v. Dobbs*, No. E2006-02395-COA-R3-CV, 2008 WL 238444, at *11 (Tenn. Ct . App. Jan. 29, 2008). "When issues involving the jury charge are raised on appeal, we review the jury charge in its entirety and consider it as a whole in order to determine whether the trial court committed prejudicial error." *Id*. The charge will not be invalidated as long as it fairly defines the legal issues involved in the case and does not mislead the jury. *Id*.; *see also Stanfield v. Neblett*, 339 S.W.3d 22, 40 (Tenn. Ct. App. 2010).

A final judgment shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process. Tenn. R. App. P. 36(b). Based upon our review of the record, the trial court tailored the jury verdict to the evidence in order to avoid confusion; accordingly, we find no fault with the trial court narrowing the issues with the use of the jury verdict.

III. CONDUCT DURING JURY SELECTION AND OPENING STATEMENTS

Mrs. Bearden advocates that defense counsel improperly engaged in an exchange with a potential juror during voir dire and in statements made during opening statements.

A. VOIR DIRE

During voir dire, one of the potential jurors was an insurance claims examiner who had previously referred patients to Dr. Lanford's neurological group for workers' compensation evaluations over an extended period of time. This potential juror was questioned as to whether she had any evidence of Dr. Lanford acting negligently or recklessly with respect to the cases she had submitted to him. Mrs. Bearden objected, but was overruled. The trial court offered to consider a limiting instruction upon request, albeit this was not done by Mrs. Bearden.

The trial judge possesses wide discretion in determining restrictions to place on counsel during the examination of prospective jurors. *Kennedy v. State*, 210 S.W.2d 132, 136 (Tenn. 1947). Accordingly, we review this very brief exchange between counsel and the

prospective juror under an abuse of discretion standard. *Id*. The central purpose of voir dire examination is to apprise counsel of the prospective jurors' qualifications, interests, or biases so peremptory challenges may be exercised in an educated and strategic manner. *Painter v. Toyo Kogyo of Japan*, 682 S.W.2d 944, 947 (Tenn. App. 1984); *Friar v. Kroger Co.*, No. 03A01-9710-CV-00470, 1998 WL 170140 (Tenn. Ct. App. Apr. 14, 1998). Thus, the parties have the right, via their counsel, to explore these issues, subject to the legal limitations implemented by the trial judge. *Id.*; *Long v. State*, 213 S.W.2d 37, 40 (Tenn. 1948).

Having reviewed the brief discussion, we are unable to conclude that the trial court abused its discretion by allowing defense counsel to elicit questions from the prospective juror to reveal her potential bias toward Dr. Lanford. While the questioning was inartfully worded, it is nevertheless understandable that Dr. Lanford's counsel would want to be aware of whether this particular juror felt Dr. Lanford had previously rendered inappropriate or suboptimal care to insurance claimants with whom she had dealt. More importantly, nothing revealed in this inquiry could reasonably be believed to constitute reversible error.

B. Opening Statements

During opening statements, Mrs. Bearden's counsel immediately raised an objection, which was also immediately sustained, when counsel for Dr. Lanford stated that Dr. Lanford was:

> Exceptionally experienced, never had anything like this happen before or since, and in this litigious environment that we live in, a physician practicing this long, never been sued, except in this case, before or since.

On appeal, both sides adamantly differ over the implications raised by this commentary. Mrs. Bearden asserts that counsel for Dr. Lanford knowingly misrepresented the facts, as he had represented Dr. Lanford in a prior suit. Moreover, Mrs. Bearden believes it was error for the trial court to later disallow cross-examination of Dr. Lanford on prior suits. On the other hand, counsel for Dr. Lanford maintains he was interrupted by the objection, and would have qualified his comment had he been permitted to proceed.

A pre-trial motion in limine was granted precluding discussion of prior lawsuits. The record shows that the trial court allowed a voir dire of Dr. Lanford on this issue during Mrs. Bearden's proof, which demonstrated five prior lawsuits dating back to the 1990s: three were filed by pro se litigants, and one involved a fall at a hospital wherein Dr. Lanford was dismissed. The trial court excluded this evidence finding it was irrelevant and that there was a substantial likelihood of it being outweighed by unfair prejudice.

The trial court controls what is permitted in argument by counsel. *Freeman v. Blue Ridge Paper Products, Inc.*, 229 S.W.3d 694, 712 (Tenn. Ct. App. 2007) (citing *Davis v. Hall*, 920 S.W.2d 213, 217 (Tenn. Ct. App. 1995)). We will not reverse a trial court's discretionary refusal to grant a new trial for inappropriate statements, remarks, comments, or argument of counsel unless there was resulting prejudice. *In re Moore*, No. 01-A-019106CV00234, 1992 WL 19264 (Tenn. Ct. App. Feb. 7, 1992). The burden is on the non-prevailing party to show that the statements were clearly unwarranted, of a type and delivered in a manner that reasonably may be said to have deprived the party a fair and impartial trial, and made purely for the purpose of appealing to passion, prejudices, and sentiment which cannot be removed by sustaining the objection of opposing counsel. *Id*.; *Perkins v. Sadler*, 826 S.W.2d 439, 442 (Tenn. Ct. App. 1991).

The trial court sustained Mrs. Bearden's objection during opening statements, and the jury in this matter was properly instructed that any questions, objections, statements, or arguments made by the attorneys during the trial were not evidence. In looking at these events and the record as a whole, we do not find the questioning and argument and other events described by Mrs. Bearden are sufficiently prejudicial to constitute grounds for reversal.

IV. EVIDENTIARY ISSUES

We review decisions related to the admission or exclusion of evidence under an abuse of discretion standard. *See Dockery v. Board of Prof'l Responsibility*, 937 S.W.2d 863, 866 (Tenn. 1996); *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 442 (Tenn. 1993) (holding that when arriving at a determination to admit or exclude evidence, trial courts are generally "accorded a wide degree of latitude and will only be overturned on appeal where there is a showing of abuse of discretion"); *see* Tenn. R. Evid. 401; *see also Brandy Hills Estates, LLC v. Reeves*, 237 S.W.3d 307, 318 (Tenn. Ct. App. 2006). Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to the propriety of the decision made." *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001). The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. *Id*.

A. MEDICAL LITERATURE

Mrs. Bearden submits three grounds hinging upon the manner in which medical literature was used by Dr. Bearden at trial. She contends the trial court erred in allowing Dr. Bearden's counsel to introduce substantive evidence and bolster his expert witnesses via these treatises and to display specific medical articles to the jury and witness via projection screen.

Prior to trial, Mrs. Bearden filed a Motion in Limine "that counsel be directed to follow the requirements of Rule 618[6] when attempting to use a learned treatise," relying on the parameters set forth in *Hunter v. Ura*, 163 S.W.3d 686 (Tenn. 2005). Additionally, Mrs. Bearden cited excerpts of testimony from the first trial as grounds for her concern that Dr. Lanford might "improperly ask" her experts vague questions about "the literature." The trial court orally granted the motion at the pre-trial conference, but emphasized it did not agree with Mrs. Bearden's representation of the holding in *Hunter*. At that time, the court volunteered that its practice was to allow lawyers to demonstratively display learned treatises on a screen, or via other methods, during questioning of a witness, although it would not be entered into evidence. The court advised it was willing to give a contemporaneous limiting instruction that it was not substantive proof, and that questions under the umbrella of this rule of evidence particularly lent themselves to evaluation on a case-by-case basis. The trial court's written order generally tracked the ruling from the bench, with the qualification that:

> The parties may ask a witness, "Do you find the literature supports your opinion?" But the parties may not go into greater detail or elaborate on that point.

The court expressly reserved the right to make further rulings on this issue as the testimony developed and no mention was made of the demonstrative display of learned treatises during impeachment.

Mrs. Bearden contends Dr. Lanford improperly introduced three separate articles from a medical journal entitled "Spine" on cross-examination of her expert, Dr. Malcolm. It is undisputed that this medical literature was authenticated by Dr. Malcolm as authoritative and reliable. In obtaining authentication, Dr. Lanford requested that the witness read aloud the respective titles which were "Cervical Disc Herniation Producing Brown Sequard Syndrome," "Brown Sequard Syndrome Produced by C3-C4 Cervical Disc Herniation," and "Brown Sequard Syndrome Produced by Cervical Disc Herniation." Mrs. Bearden offered two objections during this exchange between Dr. Lanford and Dr. Malcolm. She initially objected that there was "no foundation yet for literature," and she subsequently objected that

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[6]Tennessee Rule of Evidence 618, which governs the usage of learned treatises for the purposes of impeachment, states:

> To the extent called to the attention of an expert witness upon cross-examination or relied upon by the witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established ass a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice, may be used to impeach the expert witness's credibility but may not be received as substantive evidence.

this line of questioning was an "improper use of medical literature," arguing, "he's not trying to impeach; he's just trying to get some authentication." In overruling both objections, the court observed that Dr. Lanford was permitted to have an appropriate witness identify and authenticate the documents.

On re-direct by counsel for Mrs. Bearden, Dr. Malcolm acknowledged he had not read these particular publications, but had scanned the articles while he was holding the documents. He testified that these articles were peer-reviewed, but represented isolated reports of Brown Sequard Syndrome for the purpose of advising the medical community that disc herniation was another possible cause.

As discussed earlier, Mrs. Bearden's next expert, Dr. Gruner, testified during direct examination that the most common causes of Brown Sequard Syndrome were trauma, demyelinating disease, infection, and intraoperative injury to the spinal cord. On cross-examination, Dr. Gruner agreed that at a minimum, expert witnesses should stay up to date on medical literature, but then conceded he had not conducted any literature searches or reviews related to Brown Sequard Syndrome during the two years in which he had been involved in the case. He was then presented with two articles, "Cervical Disc Herniation Producing Brown Sequard Syndrome" and "Cervical Stenosis Presenting with Acute Brown Sequard Syndrome." At the time each of these articles were first provided to Dr. Gruner, Mrs. Bearden objected based on lack of foundation. The trial court responded by giving the jury a limiting instruction that learned treatises were not substantive evidence. Both of these articles were displayed to the jury via projection screen during the questioning; however, Mrs. Bearden did not contemporaneously object to this display or any display for that matter. Dr. Gruner was then asked a series of questions for the purpose of establishing that Brown Sequard Syndrome could be caused by disc herniation or spinal stenosis.[7]

The record suggests that counsel for Mrs. Bearden inconsistently objected with respect to the medical literature used by Dr. Lanford during both direct and cross-examination of witnesses; nevertheless, it is asserted that the error occurred when Dr. Lanford elicited testimony from his expert, Brian Berger, M.D., that instances of venous or cord stroke are "well documented in the literature," and that there are "reports" of venous or cord strokes causing Brown Sequard Syndrome. Another defense expert witness, Brett Babat, M.D., also testified that he had reviewed literature about Brown Sequard Syndrome, and that disc herniation and cord strokes are recognized causes of same. Mrs. Bearden contends that in this manner, Dr. Lanford improperly used references to medical literature to bolster his experts'

[7]Dr. Gruner was also asked questions about the other two articles regarding cervical disc herniation, but Mrs. Bearden does not expressly challenge this testimony within her brief.

opinions; however, no objections were made when these questions were posed to the experts by counsel for Dr. Lanford. Mrs. Bearden never voiced an objection to the presentation of medical literature via projection screen nor any references made by counsel during closing argument; moreover, she failed to present these two issues in her Motion for New Trial. Therefore, we find all of the contentions in this regard were waived for purposes of appeal. *See* Tenn. R. App. 3(e); *Fahey v. Eldridge*, 46 S.W.3d 138, 141 (Tenn. 2001).

To the extent Mrs. Bearden sporadically objected, we will assume, arguendo, these objections were properly preserved for appeal. Expert witnesses may be impeached by asking whether he or she agrees or disagrees with statements contained in treatises and scientific materials, although the publications must first be properly authenticated. Questions "designed to elicit the basis of the experts" testimony are also properly admissible. *Hunter v. Ura*, 153 S.W. 3d at 709. Parties are given wide latitude on cross-examination to adduce "any information that may clarify, qualify, or undercut testimony on direct examination, impair its effectivenss, or affect the inferences the trier-of-fact might draw, 'within reasonable limits.'" *Mayo v. Shine*, 392 S.W.3d 61, 68 (Tenn. Ct. App. 2012) (quoting *Overstreet v. Shoney's Inc.*, 4 S.W.3d 694, 708 (Tenn. Ct. App. 1999)). Once an expert has given an opinion, he or she may be vigorously cross-examined to undermine the evidentiary weight of the opinion. *Brown v. Crown Equip. Corp.*, 181 S.W.3d 268, 275 (Tenn. 2005); *Johnson v. John Hancock Funds*, 217 S.W.3d 414, 426 (Tenn. Ct. App. 2006). Cross-examination may be used to "require an expert to disclose and explain the facts or data upon which his or her opinion is based." *Duran v. Hyundai Motor America, Inc.*, 271 S.W.3d 178, 197-98 (Tenn. Ct. App. 2008). Likewise, an expert may be cross-examined regarding the facts or data that he or she failed to consider and the reasons for failing to do so. *Id*.

In reviewing the substance and context of the expert testimony, we find that the manner in which Dr. Lanford utilized medical literature was consistent with determining the factual bases of Dr. Gruner's opinions and pointing out to the jury that he had failed to review certain medical literature for purposes of formulating his opinions. Additionally, although Dr. Malcolm merely read the titles of the articles, it is apparent he did so for the purposes of authentication.

We find that if the trial court indeed erred by acceding to the questions propounded to Dr. Gruner or by allowing the titles of the articles to be read, the errors were harmless and not reversible. To establish that allowing this questioning was reversible error, Mrs. Bearden had to establish that the error involved a substantial right which "more probably than not affected the judgment or would result in prejudice to the judicial process." Tenn. R. App. P. 36(b); *see Blackburn v. Murphy*, 737 S.W.2d 529, 533 (Tenn. 1987). The questions enumerated by Dr. Lanford's counsel were related to other possible causes of Brown Sequard Syndrome. Considering the jury concluded that Dr. Lanford did not deviate from the standard

of care by penetrating Mrs. Bearden's spinal cord with a surgical instrument, we do not believe that the questions regarding herniation or spinal stenosis "more probably than not affected the judgment or would result in prejudice to the judicial process," Tenn. R. App. P. 36(b), as the jury never reached the issue of causation.

B. Remaining Evidentiary Issues

All remaining issues relate to the admission or exclusion of evidence, which we review under an abuse of discretion standard. *Miller v. Alman Constr. Co.*, 666 S.W.2d 466, 468 (Tenn. Ct. App. 1983). Specifically, Mrs. Bearden claims the trial court erred by allowing the speculative and unreliable opinions of Dr. Callahan; allowing improper use of character evidence; admitting prejudicial testimony from a police officer regarding a physical confrontation with Mrs. Bearden which Dr. Lanford argued refuted the extent of her neurological injury and impairment; allowing evidence of informed consent to the procedure by Mrs. Bearden, admitting evidence of a workers' compensation settlement and order and refusing rebuttal evidence regarding same; and finally, limiting cross-examination of witnesses. With respect to these issues, we have undertaken a detailed review of the record and are not persuaded that the trial court invoked an incorrect legal standard or made illogical decisions unfairly causing an injustice to Mrs. Bearden. Therefore, we affirm the trial court's decisions as to each of these claimed errors.

In Conclusion

The judgment of the trial court is affirmed on all grounds. Costs of appeal are assessed against the appellant, Mrs. Bearden.

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FRANK G. CLEMENT, JR., JUDGE