IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 13, 2015 Session

ELVIS BOGLE EX REL. MINNIE LUCILLE BOGLE V. NIGHTHAWK RADIOLOGY SERVICES, LLC ET AL.

Appeal from the Circuit Court for Davidson County
No. 09C1428 Hamilton V. Gayden, Jr., Judge

No. M2014-01933-COA-R3-CV – Filed April 6, 2016

Plaintiff appeals from a defense verdict in a medical malpractice action. Plaintiff alleged that the one of the defendants, a general radiologist, deviated from the standard of care by failing to diagnose and report that a pacemaker lead had perforated the decedent's heart. The dispositive issue in this appeal is whether the trial court erred by denying Plaintiff's motion to strike the testimony of the defendants' expert witness who testified that the defendant radiologist complied with the standard of care. Plaintiff insists that the expert did not know the applicable standard of care; therefore, his testimony should have been stricken. The defendants insist the expert witness was qualified to provide standard of care opinions for a general radiologist and that the trial court correctly instructed the jury to weigh his testimony along with that of other expert witnesses who testified. Finding no error with the trial court denying Plaintiff's motion to strike, we affirm.

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

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which J. STEVEN STAFFORD, P.J., W.S., and RICHARD H. DINKINS, J., joined.

Jon E. Jones and Patrick Shea Callahan, Cookeville, Tennessee, for the appellant, Elvis Bogle.

James E. Looper, Jr. and Charles E. Moody, Nashville, Tennessee, for the appellees, NightHawk Radiology Services, LLC and Thomas B. Jones.

OPINION

On January 31, 2008, Minnie Lucille Bogle ("the decedent") underwent implantation of a dual-lead permanent pacemaker in her heart at Summit Medical Center ("Summit"). On February 1, 2008, she was discharged from Summit and returned to her

home. On February 2, 2008, she presented to the emergency room at Summit with complaints of severe chest pain, and she was examined by Dr. Frank Murabito, the emergency department physician. Following an initial examination, Dr. Murabito consulted via telephone with Dr. Michael Baker, the on-call cardiologist. Dr. Murabito informed Dr. Baker that the decedent presented with left-side chest pain following the implantation of a dual-lead pacemaker two days earlier. They determined the decedent was stable and appropriate for admission to Summit's step-down unit. Nevertheless, before admitting the decedent to the step-down unit, Dr. Baker requested that Dr. Murabito obtain a CT scan of her chest and call him with the results.

The CT images were completed at Summit and transmitted electronically to NightHawk Radiology Services, LLC ("NightHawk Radiology"). Thomas B. Jones, M.D., a radiologist under contract with NightHawk Radiology, read the images and promptly transmitted his preliminary report to Summit. Subsequently, John David King, M.D., a general radiologist under contract with Summit, reviewed the decedent's CT scan and prepared an independent, final report.

Dr. Baker, the cardiologist who had been consulted by phone on the evening of February 2, arrived at Summit in the early morning hours of February 3, 2008. By that time, the decedent's condition had worsened, Dr. Baker instructed Summit to transfer her to Vanderbilt Medical Center, and she was promptly life-flighted to Vanderbilt. Upon arriving at Vanderbilt, her heart stopped beating. Vanderbilt physicians were able to restart her heart; however, she had suffered a stroke and other organ damage as a result of cardiac arrest. She died on April 7, 2008.

The decedent's husband, Elvis Bogle ("Plaintiff"), timely filed this medical malpractice, wrongful death action on behalf of his wife against multiple healthcare providers on April 28, 2009.[1] Plaintiff filed an Amended Complaint and a Second Amended Complaint on November 20, 2009, and June 4, 2010, respectively. Plaintiff filed a third and final amended complaint on October 10, 2012, in which Dr. Jones and NightHawk Radiology were the only remaining defendants.[2] The case proceeded to trial against these two defendants only.

[1] In 2012, the General Assembly amended the Medical Malpractice Act to replace the term "medical malpractice" with the term "health care liability." *See* Act of Apr. 23, 2012, ch. 798, 2012 Tenn. Pub. Acts. For the purpose of this appeal, we will use the former term, which was in effect at the time Mr. Bogle filed his complaint.

[2] Plaintiff's initial claims against Dr. Baker, Dr. Murabito, and Summit were dismissed on summary judgment. Additionally, an agreed order was entered that provided that neither NightHawk Radiology nor Dr. Jones would be "permitted at trial, either expressly or by implication, to prove, state or suggest that Dr. Baker . . . [or] Dr. Murabito . . . are either partially or wholly at fault or otherwise liable for the injuries or other damages claimed on behalf of the decedent and/or the plaintiff in this action."

In pertinent part, Plaintiff alleged that "[a]t the time [the decedent's CT scan] was taken, the right ventricle lead of the pacemaker had perforated the wall of the right ventricle," and that "[t]his perforation was visible on the [CT scan] but was not noted or mentioned in the report of Dr. Jones and NightHawk Radiology." Plaintiff further alleged that "the applicable standard of acceptable professional practice required that Dr. Jones, acting on behalf of NightHawk Radiology, recognize and report that the right ventricular lead was perforating through the wall of the heart," and that Dr. Jones and NightHawk "violated this standard of care." Plaintiff also sought punitive damages, alleging that "Dr. Jones, with the approval and full knowledge of NightHawk, regularly reviewed [CT scans] at speeds that were superficial, dangerous and reckless," and that "[t]he failure to recognize the perforation of [the decedent's] heart directly resulted from the excessive and reckless speed at which Dr. Jones and NightHawk Radiology 'processed' imaging studies."

The case was tried before a jury over eight days in May 2014. Dr. Jones testified as to three layers of the heart predominantly involved in the decedent's CT scan; from superficial to deepest, the layers include the pericardium, epicardial fat, and the myocardium.[3] According to Dr. Jones, when he read the decedent's CT scan, he observed that the pacemaker lead "appeared" to be in the epicardial fat of the decedent's heart. Stated another way, it appeared to Dr. Jones that the pacemaker lead perforated the myocardium, but not the pericardium. Dr. Jones further testified as follows regarding this observation:

> Q. And before you report that as a perforation, do you have certain criteria that must be met?
>
> A. To know that it's in the epicardial fat, I use pericardial effusion [fluid in the pericardium] as one of my criteria. And a perforation of the pericardium by the pacemaker lead is another criteria.
>
> Q. And why do you have those criteria?
>
> A. I don't want the Mrs. Bogles of the world to be hurt. . . . [W]hen you call this a perforation, everything happens. . . .
>
> The team gets involved, type and cross match. Somebody could have an adverse outcome. I don't want an adverse outcome. I want the right outcome. . . . I want the correct outcome. So I have my criteria for a

[3] The pericardium is the "sac", or "lining", that surrounds the heart. The myocardium, or heart muscle, is contained within the pericardium. Epicardial fat is visceral fat that exists between the pericardium and the myocardium.

> perforated pacemaker being the pacemaker through the pericardium or pericardial effusion.
>
> Q. And, Dr. Jones, do you believe it complies with the standard of care to have these criteria on reporting a pacemaker tip like the one in [the decedent's] case?
>
> A. I believe it is the standard of care.

According to Dr. Jones, the fact that the lead appeared to penetrate the myocardium did not need to be included in a report by a general radiologist interpreting a CT scan with pulmonary embolism protocol because the decedent's CT scan did not show a pericardial effusion or a perforation of the pericardium by the pacemaker lead. Thus, Dr. Jones did not report a perforation of the decedent's heart.

Dr. King, the general radiologist that prepared an independent, final report of the decedent's CT scan, also testified that the pacemaker lead appeared to be in the epicardial fat.[4] Specifically, he stated that "[i]n this case, [the CT] appears to show the [pacemaker] tip is through the muscle [myocardium] but not through the pericardium." Dr. King stated that "[the pacemaker leads] . . . sometimes do penetrate through the muscle [myocardium] and . . . that is not a situation that is typically, in [his] experience addressed in general." Dr. King further testified that in his practice, when the pacemaker lead has penetrated through the myocardium, such that the tip extends out into the epicardial fat, he does not report that finding.

Plaintiff introduced expert testimony from Drs. Andrew Beirhals, Henry Krebs, and Jeffrey Carr concerning the applicable standard of care owed by Dr. Jones in reviewing and reporting a CT scan like that of the decedent. Dr. Beirhals, a cardiothoracic radiologist with subspecialties in lung and heart imaging, testified that the standard of care required Dr. Jones to report any significantly misplaced "line" in the decedent's chest and that, for the purpose of this standard, a pacemaker lead is considered "a line." Dr. Carr, an interventional radiologist with training in vascular interventional radiology, and Dr. Krebs, a radiologist specializing in cardiac CT scans, also testified that the location of the pacemaker lead was a critical finding that had to be reported.

Plaintiff's experts, however, offered conflicting testimony as to whether the CT scan revealed that the decedent's pacemaker lead perforated the myocardium – the middle and thickest layer of the heart wall – or if the pacemaker lead perforated both the myocardium and the pericardium – the most superficial layer of the heart. Specifically, Dr. Beirhals testified that the pacemaker lead did not perforate the pericardium. Dr.

[4] Although Dr. King did not attend the trial, his deposition was read to the jury.

Kreibs testified that he could not say with certainty whether the lead perforated the pericardium. Dr. Carr was the only expert to testify that the pacemaker lead did in fact perforate the pericardium.

Defendants called Leonard Berlin, M.D., to provide expert testimony as to the standard of care for general radiologists. Dr. Berlin is a practicing general radiologist who has focused his career on diagnostic radiology. Dr. Berlin testified that the standard of care, generally, is what a reasonable radiologist would or should do in a similar situation. Dr. Berlin also acknowledged that a radiologist's preliminary report must mention all pertinent findings. Dr. Berlin testified that Dr. Jones's preliminary report complied with the standard of care in every respect. Specifically, Dr. Berlin explained:

> If we look at [the report] . . . Dr. Jones gives the indication and the history is there. He gives the findings. It's succinct. It's short. But it's right on point. . . . [H]e says "left pleural effusion." That's fluid, fluid in the lung. Some fluid in the fissure. The fissure is the lining between several of the lobes of the lung.
>
> He mentions the aorta, with some atherosclerotic changes in the aorta, but there is no aneurysm. He obviously comments on all the pulmonary vessels concluding that there's no pulmonary embolism, clot in those arteries, which is correct.
>
> . . . .
>
> He points out that there is a density, an abnormal shadow, so to speak, in the apex, which is the upper part of the right lung, which probably represents scarring. Very reasonable.
>
> He recommends comparison with old images and studies. Unfortunately, the fact is he doesn't have those available at the time, but he says it would be good to compare them with the previous studies. And he concludes that there's also some infiltrate, which is increased density, in the lower part of the left lung.
>
> . . . .
>
> [P]utting that all together, I think that's a very accurate report; it's a succinct report; and I think it complies with the standard of care in every respect.

Dr. Berlin further testified that Dr. Jones's criteria for reporting a perforation of the heart by a pacemaker lead complied with the standard of care, and the fact that the

pacemaker lead is not mentioned in Dr. Jones's report is not a violation of the standard of care. Specifically, Dr. Berlin testified as follows:

> Q. [A]ssume that Dr. Jones has said that he believes the pacemaker tip may be in the epicardial fat. But that he is not going to make that report unless he has evidence of pericardial effusion or unless the pacemaker tip is clearly through the pericardium. . . .
>
> . . . .
>
> Does that comply with the standard of care in making that determination of how to report?
>
> A. I believe it does.
>
> Q. And can you explain why?
>
> A. Well, because . . . you have the myocardium, which is the muscle of the heart. Then you have the lining around the heart, which is the pericardium. And in the middle, you have some tissue composed somewhat of fat, the epicardial fat.
>
> Now, I know this issue in this case involves perforation, the word "perforation." Perforation, did or did not the pacemaker lead perforate the heart?
>
> . . . .
>
> A perforation is a puncture. If you perforate a balloon, it's a puncture with a needle. It's something that protrudes outside.
>
> A perforation of the heart would be something that perforates not only through the myocardium, the muscle; and the epicardial, fat; but also the pericardium. If it goes outside of the pericardium, that's clearly a perforation.

Plaintiff attempted to cross-examine Dr. Berlin on the basis of his testimony concerning whether a perforation of the myocardium must be reported, believing that his testimony at trial contradicted his deposition testimony:

> Q. Doctor, when you formed your opinion and you decided "I'm going to come to Tennessee and say Dr. Jones wasn't negligent," did you think that

Dr. Jones just never realized that the tip of the pacemaker lead had pierced the myocardium and was in the epicardial fat?

A. Well, my recollection is that he felt that it was in the epicardial fat, as I recall, unless I'm mistaken. That's my recollection.

Q. Well, Doctor, when you studied this, didn't you assume that Dr. Jones did not realize that?

A. I don't think the question came up.

Q. Well, let's show you where this question came up. . . .

> QUESTION: Is it your opinion that Dr. Jones, when he did this reading of the CT, ever realized the tip of the pacemaker lead had pierced the myocardium and was in the epidural fat?
> ANSWER: I assume he did not realize that. Or if he had realized it. . . .

What? What, Doctor? What did you say? If he had realized it, you assumed he would have done what?

A. He possibly -- that's what I said. He probably would have mentioned it in his report.

Q. Why did you assume that if he realized the myocardium was pierced, the tip was in the epicardial fat, why did you assume he would have reported it?

A. Well, at the time I gave the deposition, I had looked at the images, I had looked at some of the depositions. I had looked at the reports, and I guess I never gave a lot of thought to the difference between the myocardium and epicardial fat as far as the location of the lead.

My initial response is because, as I've testified before, I've seen very few chest CTs with leads. I've never seen another malpractice case other than this one in any of my career of a similar case, an allegation of a misplaced lead. And I guess I didn't pay too much attention in advance of the difference between being in the myocardium and the epicardial fat. Now, obviously, subsequent to this deposition and prior to the trial that was held previously, I did more research. And so, look. This is the answer I gave at the time. Yes, Mr. Jones. So again, please sir, what is your question? Let me answer it best I can.

. . . .

Q. Did you assume he would have reported it because he should have reported it?

A. I assumed he should have reported it because I didn't know anything better than that. I didn't have the knowledge to give an honest . . . I did not have the knowledge at the time to give a truly accurate answer of my opinion.

. . . .

A. [I] was incorrect. I gave that opinion. . . . And I'm telling you today that I was wrong with that opinion.

Q. Well, before this deposition occurred, did you ever notice - notify the lawyers that hired you that, "What I said in my deposition and swore to wasn't right, and I need to correct that?" Did you ever do that?

A. No.

During further cross-examination, Dr. Berlin was asked: "[H]ave you ever seen anything in any medical journal that's peer reviewed that says a radiologist doesn't need to report a pacemaker line that goes through the heart muscle, goes through the fat, you don't need to say anything about it unless it also goes through the pericardium?" Dr. Berlin responded that he has "never seen that, nor [has he] ever seen anything that says he should report it." Dr. Berlin further stated:

I have probably researched and written about the standard of care more than most radiologists. I have never before this case ever encountered anything that has anything to do with pacemaker leads. And so, therefore, I don't believe there is any standard of care in the radiology community referable to this particular situation. That's the only answer. So I don't know. I don't think anybody knows. The jury won't know.

Thereafter, counsel for Plaintiff recited the following excerpt from the deposition of Dr. Jones:

[QUESTION:] And you were able to tell that one of the hard leads goes all the way through the heart muscle and is right up next to the pericardium. Is that what you saw?
[DR. JONES]: Yes. It doesn't go through the pericardium.
QUESTION: But it's through the muscle wall?

> [DR. JONES]: It does appear to be through the muscle wall and to the pericardium.
> QUESTION: Did you recognize that on February 3rd when you first reviewed [the decedent's] chest CT?
> [DR. JONES]: Yes.

After reading the foregoing colloquy from Dr. Jones' deposition (and displaying it on the computer monitors in the courtroom for all to see), counsel for Plaintiff resumed his cross-examination of Dr. Berlin:

> Q. [D]id you see that testimony?
>
> A. I see it, yes.
>
> Q. And under the standard of care, when a radiologist sees that, the standard of care requires that he puts that in his report, doesn't it?
>
> A. I do not know.
>
> Q. Just don't know one way or the other?
>
> . . . .
>
> A. That is correct.
>
> . . . .
>
> Q. So you don't know when Dr. Jones didn't report that, whether he complied with the standard of care or not. You're not going to testify about that; is that correct?
>
> A. I have no evidence that he violated the standard of care. I have no opinion that he violated the standard of care.
>
> Q. I'm sorry, sir. I asked you: If he didn't report it, did he violate the standard of care? You said "I don't know." Is that what you just told this jury?
>
> A. All right.
>
> Q. Is that what you told this jury? "I don't know."
>
> . . . .

A. I told the jury -- I told the jury that in his interpretation of this CT, Dr. Jones did not violate the standard of care.

Q. I understood that. That's where you started. But I'm trying to find out where you are now when we have seen what you've really testified to. Did you just tell this jury that you don't know whether Dr. Jones was obligated under the standard of care to put in his report what he saw that night, that the lead's through the myocardium?

A. I just said, in this deposition, that whether his failure to mention that does or does not violate the standard of care.

[Defendants' Counsel]. And, Your Honor, just so it's clear, that's a mischaracterization of Dr. Jones' testimony. Dr. Jones says it appears to be there, he didn't say it absolutely was there.

Q. If it appears to be, that means that's what it looked like to him; is that correct?

A. I'm going to presume so.

Q. And if it looked like that to him, do you know one way or the other whether he should, whether he was supposed to, whether the standard of care required that he put that in his report?

A. I answered in the deposition, I do not know.

Immediately following this testimony, counsel for Plaintiff stated: "Your Honor, we move to disqualify his testimony." The court responded by stating that "[t]he jury will decide."

Following the conclusion of Dr. Berlin's testimony, the defendants brought to the court's attention that Plaintiff's motion to disqualify Dr. Berlin should not have been made in the presence of the jury and requested a cautionary instruction. The trial court gave counsel for both parties the opportunity to draft a curative jury instruction. The defendants submitted a proposed instruction. Plaintiff did not.

The parties subsequently agreed that the special instruction drafted by the defendants would be read to the jury. In pertinent part, the instruction informed the jury to "determine the weight that should be given to Dr. Berlin's opinion, just like you would any other expert that testified, has testified, or will testify in this case." Plaintiff did not object to the jury instruction, and the trial proceeded.

Thereafter, and before proof was closed, Plaintiff moved the court to strike the entire testimony of Dr. Berlin asserting that he "totally disqualified his opinion," and that "[i]t's the Court's role as a gatekeeper" to exclude the testimony. The trial court denied Plaintiff's motion, stating from the bench: "I'm going to submit it to the jury. I think it goes to the weight of the evidence."[5]

At the conclusion of the trial, the jury returned a unanimous verdict on behalf of Dr. Jones on the issue of negligence, without having to answer questions on causation, damages, or the vicarious liability of NightHawk Radiology.

Thereafter, Plaintiff filed a motion for new trial. In support of the motion, Plaintiff asserted that Dr. Berlin's testimony should have been stricken because his testimony "changed and contradicted his deposition testimony about a central opinion in this case and then stated that he did not know whether Dr. Jones met the standard of care or not," and "[i]n the face of that statement, this Court, as a gatekeeper, was required to tell the jury that they could not consider Dr. Berlin's opinions." The trial court denied Plaintiff's motion by order entered September 15, 2014. This appeal followed.

STANDARD OF REVIEW

In general, questions regarding the admissibility, qualifications, relevancy, and competency of expert testimony are left to the discretion of the trial court. *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 263 (Tenn. 1997) (citing *State v. Ballard*, 855 S.W.2d 557, 562 (Tenn. 1993)). A trial court abuses its discretion when it disqualifies a witness who meets the competency requirements of Tenn. Code Ann. § 29-26-115(b)[6] and excludes testimony that meets the requirements of Rule 702 and 703 of the Tennessee Rules of Evidence. *Griffith v. Goryl*, 403 S.W.3d 198, 211 (Tenn. Ct. App. Oct. 31, 2012), *perm. app. denied* (Tenn. Feb. 13, 2013) (citing *Shipley v. Williams*, 350 S.W.3d 527, 552 (Tenn. 2011)).

[5] At the close of Plaintiff's proof, the defendants moved for a directed verdict on punitive damages asserting that Plaintiff failed to establish the standard of care for reading speeds of CT scans. The trial court granted Defendants' motion, ruling from the bench: "[T]here is no recognized standard for reading speed recognized in the medical profession, and therefore, it just boils down to whether or not it was common law negligence in this case."

[6] Tenn. Code Ann. § 29-26-115(b) sets forth the following three requirements for an expert witness to be competent to testify in a medical negligence case: the witness must be (1) "licensed to practice in the state or a contiguous bordering state," (2) in "a profession or specialty which would make the person's expert testimony relevant to the issues in the case," and (3) must have "practiced this profession or specialty in one . . . of these states during the year preceding the date that the alleged injury or wrongful act occurred." *Shipley v. Williams*, 350 S.W.3d 527, 550 (Tenn. 2011) (quoting Tenn. Code Ann. § 29-26-115(b)).

Discretionary decisions are reviewed pursuant to the deferential abuse of discretion standard of review. *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). The abuse of discretion standard does not permit reviewing courts to substitute their judgment for the trial court; nevertheless, this standard of review does not immunize a trial court's discretionary decision from meaningful appellate review. *Id*. (citing *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 211 (Tenn. Ct. App. 2002)). Discretionary decisions must take the applicable law and the relevant facts into account. *Id.* (citing *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008); *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996)). An abuse of discretion occurs when a court strays beyond the applicable legal standards or when it fails to properly consider the factors customarily used to guide the particular discretionary decision. *Id.* (citing *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007)). The reviewing court should review a discretionary decision to determine whether the factual basis for the decision is properly supported by evidence in the record, whether the trial court correctly identified and applied the appropriate legal principles, and whether the trial court's decision was within the range of acceptable alternative dispositions. *Id*. at 525 (citations omitted).

ANALYSIS

Plaintiff contends the trial court erred by denying his motion to strike the testimony of Dr. Berlin. Plaintiff also contends the trial court erred by granting the defendants' motion for directed verdict on his punitive damages claim. As we explain later in this opinion, our affirmance of the verdict in favor of the defendants renders the punitive damages issue moot.

I. ADMISSIBILITY OF DR. BERLIN'S TESTIMONY

Plaintiff contends that the testimony of Dr. Berlin was untrustworthy because he "admitted" that he did not know whether the standard of care required Dr. Jones to report his observation that the pacemaker lead "appeared" to have pierced the myocardium. Plaintiff argues that "Dr. Berlin's admission during cross-examination that he did not know what the standard of care required was an admission that the foundation of his opinion that Dr. Jones 'fully complied with the standard of care' was untrustworthy." Accordingly, Plaintiff contends that Dr. Berlin's entire testimony should have been excluded as untrustworthy under Rule 703 and that his opinion "could not possibly 'substantially assist the trier of fact.'"

The principles governing the admissibility of expert testimony are the same during pretrial proceedings as they are at trial. *Johnson v. John Hancock Funds*, 217 S.W.3d 414, 425 (Tenn. Ct. App. 2006). Specifically, to be admissible, expert testimony must be

relevant, and it must satisfy Tennessee Rules of Evidence 702 and 703. *Id.*; *Shipley*, 350 S.W.3d at 550. [7] Tennessee Rule of Evidence 702 provides that "[i]f scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise." Tennessee Rule of Evidence 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

Accordingly, in its role as gatekeeper, "[a] trial court should admit the testimony of a competent expert unless the party opposing the expert's testimony shows that it will not substantially assist the trier of fact or if the facts or data on which the opinion is based are not trustworthy pursuant to Rules 702 and 703." *Shipley*, 350 S.W.3d at 551. Further,

> [t]he trial court is not to decide how much weight is to be given to the witness' testimony. Once the minimum requirements are met, any questions the trial court may have about the *extent* of the witness's knowledge, skill, experience, training, or education pertain only to the weight of the testimony, not to its admissibility. *See Stovall*, 113 S.W.3d at 725 (noting that arguments concerning a medical expert's qualifications and competency to testify "take issue primarily with [the expert's] qualifications and the *weight* that should be given his opinions . . . . [t]hese are issues for trial and not for summary judgment") (emphasis in original); *Coyle*, 822 S.W.2d at 600 ("The objection raised by the defendant [regarding the expert's qualifications and competency] goes more to the weight of the evidence rather than to its admissibility").

[7] Rule 401 of the Tennessee Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. "[E]vidence is relevant if it helps the trier of fact resolve an issue of fact." *State v. James*, 81 S.W.3d 751, 757 (Tenn. 2002) (quoting Neil P. Cohen, et al., *Tennessee Law of Evidence* § 4.01[4], at 4-8 (4th ed. 2000)). "All relevant evidence is admissible except as [otherwise provided by law]." Tenn. R. Evid. 402.

Id. Once the evidence is admitted, "it will thereafter be tested with the crucible of vigorous cross-examination and countervailing proof." *Id.* (quoting *McDaniel*, 955 S.W.2d at 265). It is also worth emphasizing that the weight to be given to stated expert opinion and the resolution of legitimate but competing expert views are matters appropriately entrusted to the trier of fact. *Id.*

Thus, we begin our analysis of Plaintiff's contention that the entire testimony of Dr. Berlin should have been excluded by recognizing, as noted in more detail above, that expert testimony must satisfy Tennessee Rules of Evidence 702 and 703. *Johnson*, 217 S.W.3d at 425; *Shipley*, 350 S.W.3d at 550. Furthermore, as Rule 702 provides in pertinent part, if specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, "a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise." Tenn. R. Evid. 702.

Dr. Berlin graduated from the University of Illinois College of Medicine in Chicago, Illinois, in 1959. After medical school, he completed an internship followed by a radiology residency at the University of Illinois Hospital. Dr. Berlin joined the United States Air Force in 1963 and served as a medical corps captain. In 1965, after completing his military service, he joined the radiology department at the University of Illinois Hospital in Chicago and then joined Skokie Valley Hospital/Rush North Center in Chicago where he served as chairman of the radiology department for 31 years. Dr. Berlin is board certified by the American Board of Radiology and was recognized as a Fellow of the American College of Radiology. He served in leadership roles in numerous professional organizations within his specialty including serving as chair of the ethics committee for the American College of Radiology for four years. He also served on the expert witness panel for the American College of Radiology and reviewed manuscripts for the American Journal of Roentgenology and Radiology, which is one of the two primary journals in radiology. He received a gold medal for distinguished service by the Chicago Medical Society and was awarded a gold medal by the American College of Radiology, which awards only two or three gold medals each year. Dr. Berlin has also been recognized in peer-reviewed medical journals; in 2007, Medical Imaging recognized him as one of the ten most outstanding practicing radiologists, and in 2008, he received the Editor's Recognition Award from Radiology.

Based upon the foregoing alone, no one could challenge the fact that he is an eminent expert in the field of radiology; thus, we shall focus on whether, as Plaintiff insists, Dr. Berlin admitted that he did not know the standard of care at issue in this case. Plaintiff insists this fact is established from Dr. Berlin's answer to a series of questions posed by Plaintiff's counsel. We respectfully disagree, concluding that the answers Plaintiff focuses upon should not be considered in a vacuum but must be considered in

light of the totality of Dr. Berlin's testimony regarding his knowledge of the applicable standard of care.

Dr. Berlin testified that the standard of care requires a radiologist to identify and report all pertinent findings when interpreting a CT scan. Dr. Berlin stated that a perforation of the heart is a pertinent finding that must be reported. Dr. Berlin further testified that a perforation occurs when something perforates "*not only through the myocardium . . . but also the pericardium*." Thus, a perforation of the heart is a pertinent finding that must be reported *when there is a perforation of the pericardium.*

Dr. Berlin reviewed the decedent's CT scan, as well as Dr. Jones' preliminary report and Dr. King's final report prior to giving his opinion that Dr. Jones' report was a "careful report" that contained all of the pertinent findings that needed to be reported and complied "100 percent" with the standard of care. During his direct-examination, Dr. Berlin analyzed Dr. Jones' report, noting throughout that Dr. Jones reported "certain positive findings" and "findings that were not there." Concerning whether there was a perforation of the decedent's heart, Dr. Berlin testified that "[a] perforation of the heart would be something that perforates not only through the myocardium . . . but also the pericardium." Because the pacemaker lead did not perforate the pericardium, Dr. Berlin testified that the fact Dr. Jones did not mention the location of the pacemaker lead did not violate the standard of care.

Dr. Berlin's opinions were challenged during cross-examination by Plaintiff's counsel, during which he was asked specifically whether a perforation of the myocardium is a pertinent finding that must be reported pursuant to the standard of care. Dr. Berlin first testified that he was not aware of a peer-reviewed medical journal that stated whether a perforation of the myocardium must be reported or not. Dr. Berlin later testified that he did not know whether a standard of care required a radiologist to report a perforation of the myocardium by a pacemaker lead. This is the specific testimony Plaintiff relies upon to disqualify Dr. Berlin.

We have concluded that when the totality of Dr. Berlin's testimony concerning the applicable standard of care is considered, his answers during cross-examination do not render his testimony untrustworthy. Instead, his answers go to the weight to be afforded his testimony, as the trial court correctly stated. *See Griffith v. Goryl*, 403 S.W.3d 198, 205 (Tenn. Ct. App. 2012) ("[W]hen the totality of [the expert's] testimony concerning his knowledge of the standard of care is considered, the mere inclusion of the phrase 'the majority of' in response to one question does not disqualify him from testifying as a medical expert concerning the standard of care at issue in this case.").

Although Plaintiff insists that Dr. Berlin "admitted" that he does not know the applicable standard of care, we believe the jury could reasonably construe Dr. Berlin's testimony on the specific "standard of care" suggested by Plaintiff to be that Dr. Berlin

does not believe such a standard of care exists. Significantly, Dr. Berlin provided a detailed explanation of his opinion in the following colloquy during cross-examination:

> Q. Doctor, you don't know whether the radiology community would consider it reasonable not to report the tip is through the myocardium if the radiologist sees it; is that correct?
>
> A. That is correct.
>
> Q. Okay. So when you say that, aren't you saying, "I don't know whether Dr. Jones met the standard of care or not because I don't know what it is"?
>
> . . . .
>
> Q. [D]on't you need to know what's considered acceptable, what the vast majority of radiologists would consider to be acceptable to know what the standard of care is?
>
> A. I have probably researched and written about the standard of care more than most radiologists. I have never before this case ever encountered anything that has anything to do with pacemaker leads. And so, therefore, I don't believe there is any standard of care in the radiology community referable to this particular situation. That's the only answer. So I don't know. I don't think anybody knows. The jury won't know.

When considered in its totality, a fair reading of Dr. Berlin's testimony reveals that he consistently testified that the standard of care requires a radiologist to report a perforation of the heart when something perforates "*not only through the myocardium . . . but also the pericardium*." Because the pacemaker lead did not perforate the decedent's pericardium, Dr. Berlin opined that Dr. Jones did not deviate from the standard of care by not reporting a perforation of the decedent's heart.

As noted earlier, "[a] trial court should admit the testimony of a competent expert unless the party opposing the expert's testimony shows that it will not substantially assist the trier of fact or if the facts or data on which the opinion is based are not trustworthy pursuant to Rules 702 and 703." *Shipley*, 350 S.W.3d at 551. Further, "[o]nce the minimum requirements are met, any questions the trial court may have about the extent of the witness's knowledge, skill, experience, training or education pertain only to the weight of the testimony, not to its admissibility." *Id.*

For the foregoing reasons, we find no error with the trial court's discretionary decision to deny Plaintiff's motion to strike the expert testimony of Dr. Berlin.

Although we find no error with the trial court's decision to admit Dr. Berlin's testimony, the defendants insisted at oral argument that, if it were error to admit Dr. Berlin's testimony, the error would have been harmless. Conversely, Plaintiff insisted it was not harmless error. As argued by Plaintiff, the introduction of Dr. Berlin's testimony had a "likely injurious effect on the verdict" because of his numerous accolades – as phrased by Plaintiff, a radiologist with "all the gold medals." We are not persuaded by this argument.

The Tennessee Supreme Court has held that an error committed in a civil trial is not harmless "if the trial court's error would have more probably than not affected the judgment or would result in prejudice to the judicial process." *Flax v. DaimlerChrysler Corp.*, 272 S.W.3d 521, 543 (Tenn. 2008). Further, the same rule is found in Rule 36(b) of the Tennessee Rules of Appellate Procedure, which states as follows:

> (b) Effect of Error. A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more likely than not affected the judgment or would result in prejudice to the judicial process. . . .

In addition to the testimony of Dr. Berlin, the jury heard testimony from expert witnesses called by Plaintiff, as well as the testimony of Dr. Jones and Dr. King, both of whom are radiologists. Thus, if a portion of or the entirety of Dr. Berlin's testimony had been stricken, the jury could have reached the same verdict by considering the testimony of Dr. Jones and Dr. King, both of whom testified that the applicable standard of care did not require that Dr. Jones report the perforation of the myocardium and that Dr. Jones did not deviate from the standard of care.

Moreover, any risk of prejudice to Plaintiff was significantly reduced by the trial court's jury instruction, which is not challenged in this appeal. "It is an elementary principle of law that jurors are presumed to follow the instructions of the trial court." *State v. Williams*, 977 S.W.2d 101, 106 (Tenn. 1998); *see Flax v. DaimlerChrysler Corp.*, 272 S.W.3d 521, 544 (Tenn. 2008) ("We presume that the jury followed the trial court's instruction . . . ."). Accordingly, we assume the jury followed the trial court's instruction that they were to "determine the weight that should be given to Dr. Berlin's opinion, just like you would any other expert that testified, has testified, or will testify in this case."

For these reasons, we conclude that the trial court's discretionary decision denying Plaintiff's motion to strike the testimony of Dr. Berlin "did not prejudice the judicial process or more probably than not affect the judgment." *Flax*, 272 S.W.3d at 544.

II. DIRECTED VERDICT

Plaintiff also asserted a claim for punitive damages. At the close of Plaintiff's proof, the defendants moved for a directed verdict on the issue of punitive damages. The motion was granted. Plaintiff contends this was error. As we explain below, our affirmance of the verdict in favor of the defendants renders the punitive damages issue moot.

Plaintiff sought to recover both compensatory damages and punitive damages. The purpose of punitive damages is "not to compensate the plaintiff but to punish the wrongdoer and to deter the wrongdoer and others from committing similar wrongs in the future." *Smartt v. NHC Healthcare/McMinnville, LLC*, No. M2007-02026-COA-R3-CV, 2009 WL 482475, at *27 (Tenn. Ct. App. Feb. 24, 2009) (quoting *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 900 (Tenn.1992)). Punitive damages can only be awarded when there is a finding, by clear and convincing evidence, that the defendant acted either intentionally, fraudulently, maliciously, or recklessly. *Id.* (citing *Culbreath v. First Tenn. Bank Nat. Ass'n*, 44 S.W.3d 518, 527 (Tenn. 2001)).

Significant to this appeal, it is well-settled that a party is entitled to punitive damages only if it recovers actual damages. *Davenport v. Chrysler Credit Corp.*, 818 S.W.2d 23, 32-33 (Tenn. Ct. App. 1991); *see Beal v. Walgreen Co.*, No. W2004-02925-COA-R3-CV, 2006 WL 59811 (Tenn. Ct. App. Jan. 12, 2006) ("[a]s a general rule, in order to recover exemplary or punitive damages, actual damages must be shown, or there must be a basis for the recovery of compensatory damages"); *Solomon v. First Am. Nat'l Bank*, 774 S.W.2d 935, 943 (Tenn. Ct. App. 1989) ("[i]n order to recover exemplary damages, actual damages must be shown"); *Liberty Mut. Ins. Co. v. Stevenson*, 368 S.W.2d 760, 761 (1963) ("[f]or one to obtain [punitive damages] it is necessary . . . that a predicate must have first been laid wherein actual damages have been awarded"). However, "[w]here the plaintiff has proved an entitlement to injunctive relief, an award of punitive damages may be upheld without an award of compensatory damages." *Oakley v. Simmons*, 799 S.W.2d 669, 672 (Tenn. Ct. App. 1990).

As part of Plaintiff's negligence evidence, Plaintiff submitted evidence to the jury regarding the alleged recklessness of Dr. Jones based on the speed at which he read the decedent's CT scan.[8] The jury's unanimous defense verdict, finding that Dr. Jones did not deviate from the recognized standard of care for his profession and specialty in his treatment of the decedent, is proof that such evidence was rejected by the jury. More

[8] The parties stipulated that Dr. Jones spent two minutes and thirty-one seconds reviewing and reporting on the decedent's CT images. Plaintiff's experts testified that this speed was reckless. Specifically, Dr. Bierals testified that the standard of care required Dr. Jones to spend sufficient time reviewing the CT scan and that the stipulated time was insufficient. Dr. Carr testified that the decedent's CT scan was complex and would take significantly longer than the stipulated time to interpret and report.

importantly, because a party is entitled to recover punitive damages only if there is an award of actual damages, *see Davenport*, 818 S.W.2d at 32-33, our affirmance of the jury's finding of no liability precludes consideration of punitive damages.

IN CONCLUSION

The judgment of the trial court is affirmed. Costs of appeal are assessed against the appellant, Elvis Bogle.

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FRANK G. CLEMENT, JR., JUDGE