2016 IL App (4th) 150603-U

NO. 4-15-0603

FILED
April 29, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FIRST BANKERS TRUST COMPANY, INC., as Guardian for the Estate of Dramara S. Sivels, Jr., a Disabled Minor; Dramara S. Sivels, Jr., by His Parents and Next Friends; Morgan C. Allin; and Dramara Sivels, Sr., Plaintiffs-Appellants,	)	Appeal from Circuit Court of Sangamon County No. 11L184
v.	)	Honorable
MEMORIAL MEDICAL CENTER, Defendant-Appellee.	)	Patrick W. Kelley, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding the trial court did not err in (1) denying plaintiffs' motion for judgment notwithstanding the verdict or for a new trial and (2) allowing certain witness testimony.

¶ 2 In April 2015, plaintiffs, First Bankers Trust Company, Inc., as guardian for the estate of Dramara S. Sivels, Jr. (D.J.), filed a sixth amended complaint against defendant, Memorial Medical Center (MMC), alleging defendant's negligence caused severe and permanent brain damage in D.J. Following a jury trial in April 2015, the jury found in favor of MMC. In May 2015, plaintiffs filed a motion for judgment notwithstanding the verdict (*n.o.v.*) or for a new trial. In July 2015, the trial court denied the motion.

¶ 3 On appeal, plaintiffs argue the trial court erred in (1) denying their motion for judgment *n.o.v.* or for a new trial and (2) allowing certain witness testimony. We affirm.

¶ 4 I. BACKGROUND

¶ 5 D.J. was born at 1:46 a.m. on Friday, April 6, 2007, at MMC. His parents are Dramara S. Sivels, Sr. (Dramara), and Morgan C. Allin. In August 2011, plaintiffs filed a negligence complaint naming 12 defendants, including MMC. In September 2013, plaintiffs added another defendant to their complaint. Prior to trial, all defendants except MMC were dismissed.

¶ 6 The case proceeded against MMC based on the sixth amended complaint filed in April 2015. Therein, plaintiffs alleged D.J. was born "in a depressed state" and "during his neonatal hospitalization, he was noted to be lethargic, nursed poorly, and had episodic flaring of nostrils with respiration." During his hospitalization and before his discharge, D.J. did not feed for a period of 12 or more hours. There was a subsequent period of nine or more hours when D.J. did not feed. On April 7, 2007, D.J. vomited at approximately 7:30 a.m. He was examined at 11 a.m. and determined to be fit for discharge. At the time of the discharge, MMC personnel gave D.J.'s parents several phone numbers to call if they needed advice or had any questions or concerns. D.J. was discharged at approximately 12:40 p.m. on April 7, 2007.

¶ 7 At approximately 5 p.m. on the day of discharge, D.J.'s parents called the phone number for the family maternity suites at MMC and spoke with a nurse. D.J.'s parents expressed their concerns, stating "D.J. was lethargic, eating very poorly, if at all, vomiting and had started to turn yellow." The complaint alleged the nurse did not tell them to bring D.J. back to the hospital or call his pediatrician's office. The nurse also allegedly told them D.J. was "slightly jaundiced even before he was discharged" and told them to "put D.J. in the windowsill to get some sunlight."

¶ 8 On April 8, 2007, D.J.'s parents made additional phone calls in the late afternoon to MMC to report D.J.'s condition. During one of the calls, a nurse told them to call D.J.'s

pediatrician. They did so and left a message. Shortly thereafter, a telenurse from St. Louis Children's Hospital in St. Louis, Missouri, called back. At the end of their conversation, the nurse told them to take D.J. to the hospital. At the MMC emergency department, D.J. was diagnosed with "possible sepsis." He was later transferred to St. John's Hospital in Springfield, Illinois, where he was diagnosed with group B streptococcus. The bacterial infection led to the development of meningitis.

¶ 9 In count I, plaintiffs alleged MMC had a duty, acting through its employees and agents, to possess and apply the knowledge and use the skill and care of reasonably careful nurses acting under the same or similar circumstances. Notwithstanding that duty, plaintiffs alleged MMC breached its duty by failing to recognize and appreciate the seriousness of D.J.'s respiratory distress, feeding difficulties, and blood-glucose levels. Further, plaintiffs alleged the nurses failed to utilize the chain of command to prevent D.J. from being discharged. As to the April 7, 2007, phone call, plaintiffs alleged the nurse failed to contact D.J.'s pediatrician directly or advise D.J.'s parents to contact their pediatrician immediately or to bring D.J. to the hospital immediately.

¶ 10 Plaintiffs alleged D.J. is permanently disabled as a direct and proximate result of one or more of the negligent acts or omissions of MMC. Plaintiffs claimed D.J. "has required and will continue to require in the future substantial sums to provide for his medical, rehabilitative and occupational treatment, and will require lifetime care-taking services."

¶ 11 In count II, plaintiffs alleged MMC had a duty to use the skill and care of a reasonably careful hospital providing care to a neonate under the same or similar circumstances. Notwithstanding that duty, plaintiffs alleged MMC breached its duty as an institution by failing to have a discharge policy for newborns that adhered to the guidelines for perinatal care. As a

result of MMC's negligence, plaintiffs alleged D.J. is permanently disabled.

¶ 12 In April 2015, the case was tried before a jury. At trial, the trial court entered summary judgment for MMC on count II, and plaintiffs do not appeal that ruling. The court also directed a verdict for MMC on plaintiffs' claim that D.J.'s discharge was premature because the nurses failed to employ the chain of command, and plaintiffs do not appeal that ruling. Thus, the case before the jury centered on the claim concerning the April 7, 2007, telephone call and its aftermath.

¶ 13 Dramara testified regarding the birth of his son. He stated Morgan attempted to breastfeed D.J. "but he wouldn't latch onto her breast." At approximately 4:30 p.m., a lactation specialist arrived to provide techniques to help stimulate nursing. A nipple shield was used and resulted in a successful breastfeeding. Dramara stated D.J. "never really cried or showed interest in wanting to eat." Dramara, Morgan, and D.J. left the hospital at approximately 12:40 p.m. on April 7. After returning home, Morgan tried to breastfeed, but D.J. would not do so. D.J. took a bottle, ingested "about a half ounce of formula," and then vomited.

¶ 14 With D.J.'s feeding problems, along with yellow "clusters at the tip of his nose," Dramara and Morgan decided to call one of the numbers on the discharge papers. After listening to Dramara's concerns, the nurse on the phone told them to take D.J.'s temperature. The nurse stated D.J. might have a slight fever, which might have been caused by having him wrapped too tightly in his blankets. The nurse told them to loosen the blankets. As to the yellow on his nose and in his eyes, the nurse stated it was not uncommon for babies to be jaundiced. She told Dramara to put D.J. in the sunlight. As for D.J. throwing up, the nurse stated he might have mucus in his lungs. She also told them to keep trying to breastfeed. The nurse did not tell them to call D.J.'s doctor or go to the emergency room. After the phone call, Morgan tried to

breastfeed again, but D.J. would not latch onto her breast. They resorted to giving him a bottle, but he only had about half an ounce and vomited a couple of times.

¶ 15 The next day, April 8, 2007, was Easter Sunday. After putting D.J. in the sunlight and giving him bottles throughout the day, they attended a family lunch. Dramara stated D.J. "slept a lot there" but "woke up with a very high pitched scream." They returned home and called MMC. Eventually, Dramara talked with the telenurse at St. Louis Children's Hospital at 4:46 p.m. He explained the situation, and the nurse told him to go to the emergency room. Dramara, Morgan, and D.J. went to MMC. D.J. was later transferred to St. John's Hospital, where he spent 11 days. One of the treating doctors recommended the parents sign a do-not-resuscitate order because D.J. "only had a 20 percent chance of survival from the stroke he suffered." After St. John's Hospital, D.J. was transported to St. Louis Children's Hospital, where he remained for approximately four weeks.

¶ 16 On cross-examination, Dramara stated he, Morgan, and D.J. returned home on April 7, 2007, at approximately 1 p.m. At his deposition testimony, Dramara had stated he told the nurse on the phone about D.J.'s jaundice, his feeding problems, and his "periodic grunting and his breathing." Dramara also stated there had been no bottle feeding prior to the phone call to MMC.

¶ 17 Morgan testified she received a copy of the discharge instructions prior to leaving the hospital. Over the next four hours, Morgan stated, "the feeding was the big issue" with D.J. Morgan called MMC and was told to take D.J.'s temperature. At the end of the phone call, they were told to call back if D.J. did not get better or got worse. Morgan testified she did not call any other health-care provider on April 7, 2007, because, "after getting instructions from those nurses and being reassured that he was okay, we took their word." The next day, D.J. "had a

little jaundice on his body." She did not call any health-care providers while she was at the family gathering on April 8, 2007. At the gathering, D.J. woke up with an "extremely loud screaming screech." Morgan and Dramara "immediately packed up and left." Once they returned home, they called the hospital.

¶ 18 Dr. Jerome Klein testified as an expert in newborn infections. He stated signs of bacterial infections in newborns include feeding difficulties, lethargy, and overall appearance. He stated group B streptococcus is a bacterial organism that can "go to the brain and cause meningitis." Group B streptococcus is present in the genital flora and when the mother's membranes are ruptured, the organism can travel from the genitalia into the amniotic sac and be swallowed by the fetus. Women are tested for group B streptococcus between weeks 35 and 37 of their pregnancy. Dr. Klein stated Morgan tested negative at 35 weeks but acquired the organism between then and D.J.'s birth.

¶ 19 Plaintiffs' counsel then questioned Dr. Klein about the phone call D.J.'s parents made to the hospital at approximately 5 p.m. on April 7, 2007. He reviewed Dramara's deposition and hospital records. He opined D.J.'s infection was progressing in the afternoon after discharge and the organism "had gotten into the upper respiratory tract" to a point where "it invaded the bloodstream." The bacteria were responsible for the feeding problems and the difference in alertness that was noted earlier but were then more prominent. Although D.J. was likely bacteremic at that time, Dr. Klein stated bacteremia is treatable with the administration of antibiotics. Based on what Dramara described on the evening of April 7, 2007, Dr. Klein opined an infectious disease doctor would recommend antimicrobial agents (ampicillin) be administered. He also opined D.J.'s infection was treatable at any time on April 7, 2007.

¶ 20 Dr. Klein then described the progression of the disease on Sunday, April 8, 2007.

In his opinion, the bacteria got into the meninges of the brain sometime around midday on Sunday. He opined D.J.'s meningitis "started around noon on Sunday" and his cerebral palsy, brain damage, and other injuries would have been prevented had antibiotics been given "hours before that time on Sunday or Saturday."

¶ 21 Dr. Subhash Chaudhary, a pediatric infectious disease specialist, testified he practiced at MMC and St. John's Hospital. He treated D.J. and testified to his notes, which stated as follows:

> "A few hours after reaching home, parents noted that he had yellowish discoloration of face and he was not feeling well. Mother tried breastfeeding and he will not take, so formula was given which he threw up. He would take half ounce and immediately or a little later he would throw up. In view of this, they contacted [MMC] Nursery and were told that baby had slight jaundice before leaving nursery and they were given the impression the baby may be throwing up because there was a lot of mucus."

Dr. Chaudhary stated a pediatric infectious disease specialist would normally see jaundice in a newborn after two days of life. However, in D.J.'s case, with jaundice occurring before two days of life, plus his feeding issues and throwing up, there would be a need to "rule out serious infection."

¶ 22 Dr. Richard Boyer, a pediatric radiologist, examined D.J.'s brain images and opined as to when his meningitis began. He stated D.J.'s first ultrasound took place at 11:27 p.m. on April 8, 2007. Dr. Boyer opined the findings were "highly suggestive of a baby with

meningitis." Based on his study of other films of D.J.'s brain, Dr. Boyer opined the meningitis started on Sunday, April 8, 2007, around midday.

¶ 23 Dr. Stephen Glass, a child neurologist, testified as to how group B streptococcus bacteria causes brain damage. He stated D.J. has "a widespread brain injury," and his cerebral palsy will result in "life-long problems in tone, posture, and the control of movement." D.J. has seizures and has abnormal tone issues. Dr. Glass opined D.J.'s symptoms are directly related to the meningitis caused by the group B streptococcus.

¶ 24 Camille DiCostanzo, a registered nurse and neonatal nurse practitioner, testified regarding the nursing standard of care. She defined the standard of care as what a reasonable nurse would do in the same type of circumstances. Along with reviewing medical records, DiCostanzo reviewed Dramara's testimony as to the contents of the 5 p.m. phone call concerning D.J.'s feeding problems, the yellow marks or dots on his nose and eyes, and his temperature. DiCostanzo stated the nurse on the 5 p.m. phone call did not tell Dramara or Morgan to call their pediatrician or go to the hospital. DiCostanzo opined this violated the standard of care because "this was a persisting problem."

¶ 25 Dr. Jill Maron, a neonatologist, testified to the standard of care if a pediatrician had been notified at 5 p.m. on April 7, 2007, that D.J. was vomiting, jaundiced, and had a fever. Generally, Dr. Maron stated doctors "like to see the newborn go to breast every two to three hours." Dr. Maron found D.J.'s feeding pattern to be "inconsistent" and, based on his condition, a pediatrician would have given D.J. antibiotics to rule out sepsis.

¶ 26 Dr. Charles Prober, a pediatrician, testified as a defense expert on infectious diseases. He stated approximately 35% of pregnant women in the United States carry group B streptococcus in their bodies, but in most cases it will not result in infection in the baby. The

babies that do get the infection are divided between early onset, which is within the first five to seven days of life, and late onset, which is later than seven days. Dr. Prober stated "early onset infections are rapidly moving." He opined D.J. had "clear evidence of a group B strep infection" on April 8, 2007. He stated Morgan was likely colonized with the bacteria at the time of delivery, D.J. was not septic on April 6, 2007, or April 7, 2007, and there was a rapid progression of the disease during the afternoon and evening of April 8, 2007.

¶ 27 Dr. Jeffrey Sroka, a pediatrician, testified as a defense expert. He reviewed D.J.'s medical records and depositions from health-care providers. Based on the breastfeeding records and the progress notes from 8 a.m. on April 6, 2007, and 11 a.m. on April 7, 2007, Dr. Sroka found nothing to indicate sepsis was occurring. He stated nothing in the records indicated D.J.'s case involved anything other than a normal newborn when he was discharged. On cross-examination, he testified a newborn's failure to feed well should occasion a search for infection. Jaundice after the first 24 hours and vomiting may be symptoms of septicemia.

¶ 28 Jean Oesterreich, the MMC discharge nurse, testified she started working at MMC in 1983 and had spent 29 years in the maternity ward. She testified she was not aware of anything that would have precluded her from saying D.J. was healthy to go home at 12:40 p.m. on April 7, 2007. She stated the phone numbers given to parents allow them to call to get reassurance on the instructions given in the hospital. While she did not recall having a conversation with D.J.'s parents, she stated a call would typically be routed to the discharge nurse in a non-emergency situation.

¶ 29 Following closing arguments, the jury found for MMC and against plaintiffs. In May 2015, plaintiffs filed a motion for judgment *n.o.v.* or for a new trial. In July 2015, the trial court denied the motion. This appeal followed.

¶ 30 II. ANALYSIS

¶ 31 A. Motion for Judgment *N.O.V.* or a New Trial

¶ 32 Plaintiffs argue the trial court erred in denying their motion for judgment *n.o.v.* or for a new trial. We disagree.

¶ 33 "A motion for [judgment *n.o.v.*] should be granted only when the evidence and inferences therefrom, viewed in the light most favorable to the nonmoving party, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand." *Ries v. City of Chicago*, 242 Ill. 2d 205, 215, 950 N.E.2d 631, 637 (2011) (citing *Maple v. Gustafson*, 151 Ill. 2d 445, 453, 603 N.E.2d 508, 512 (1992)). "[J]udgment *n.o.v.* is inappropriate if 'reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented.' " *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178, 854 N.E.2d 635, 652 (2006) (quoting *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337, 351, 654 N.E.2d 1365, 1374 (1995)). Moreover, a reviewing "court cannot reweigh the evidence and set aside a verdict because different conclusions could have been drawn." *Dukes v. Pneumo Abex Corp.*, 386 Ill. App. 3d 425, 444, 900 N.E.2d 1128, 1143 (2008). This court reviews a trial court's decision on a motion for judgment *n.o.v. de novo*. *Hamilton v. Hastings*, 2014 IL App (4th) 131021, ¶ 24, 14 N.E.3d 1278.

> "In contrast, on a motion for a new trial, the trial court will weigh the evidence and order a new trial if the verdict is contrary to the manifest weight of the evidence. [Citation.] A verdict is against the manifest weight of the evidence only where the opposite result is clearly evident or where the jury's findings are unreasonable, arbitrary and not based upon any of the evidence.

> [Citation.] This court will not reverse the trial court's ruling on a motion for a new trial unless it is affirmatively shown that the trial court abused its discretion." *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 38, 983 N.E.2d 414.

¶ 34 To prove a claim of negligence, "a plaintiff must establish the existence of a duty, a breach of the duty, and an injury to the plaintiff that was proximately caused by the breach." *Vancura v. Katris*, 238 Ill. 2d 352, 373, 939 N.E.2d 328, 342 (2010). The elements of a medical-negligence claim are (1) the standard of care in the medical community by which the medical professional's conduct is measured, (2) that the medical professional deviated from that standard of care, and (3) that a resulting injury was proximately caused by the deviation from the standard of care. *Neade v. Portes*, 193 Ill. 2d 433, 443-44, 739 N.E.2d 496, 502 (2000). "Unless the medical professional's negligence is so grossly apparent or the treatment at issue is so common that it is considered to be within the common knowledge of a layperson, expert medical testimony is required to establish the applicable standard of care and the medical professional's deviation therefrom." *Gulino v. Zurawski*, 2015 IL App (1st) 131587, ¶ 60, 43 N.E.3d 1102.

¶ 35 In the case *sub judice*, it is undisputed MMC owed a duty of reasonable care to D.J. and his parents. The parties also agree on the standard of care at issue. DiCostanzo testified the applicable standard of care was what a reasonable nurse would do in the same type of circumstances. In the instructions to the jury, plaintiffs claimed D.J. was injured and MMC was negligent in that its nursing personnel failed to advise D.J.'s parents during the April 7, 2007, phone call to either call their pediatrician or bring him to the hospital. Thus, as both parties agree, the crux of this case depends on what was said during that April 7, 2007, phone call.

> "The long-standing rule is that positive direct testimony

> may be contradicted and discredited by adverse testimony, circumstantial evidence, discrepancies, omissions, or the inherent improbability of the testimony itself. [Citations.] The fact finder is not bound to believe a witness when, based upon all of the other evidence or the inherent improbability or contradictions in the testimony, the fact finder is satisfied of the falsity of the testimony. [Citation.] However, the fact finder may not arbitrarily or capriciously reject unimpeached testimony. [Citation.] Where the testimony of a witness is neither contradicted by direct adverse testimony or by circumstances nor inherently improbable and the witness has not been impeached, the testimony cannot be disregarded by the fact finder." *Baker v. Hutson*, 333 Ill. App. 3d 486, 493, 775 N.E.2d 631, 637 (2002).

"Even uncontradicted evidence is not a basis for overturning a jury verdict if the jury reasonably might have doubted the credibility or accuracy of the witnesses' testimony." *Perry v. Murtagh*, 278 Ill. App. 3d 230, 239, 662 N.E.2d 587, 594 (1996).

¶ 36 Here, Dramara was the only witness to recall the contents of the April 7, 2007, phone call to a nurse at MMC. When asked on direct examination what he said to the nurse, Dramara stated, in part, as follows:

> "I told her that we had just been discharged earlier that day, that our son still hadn't ate, that Morgan had tried to breastfeed him a couple of times and wouldn't take it, so we tried the bottle and he threw it up, and we also was concerned about the yellowing on his

> nose. I told her that it was little spots on his nose, like little dots and clusters on his nose, and we was concerned about that and so we called mainly because of the feed."

Dramara also stated "the whites of [D.J.'s] eyes was a tad bit yellow, nothing that we felt was something wrong." He stated the nurse asked him and Morgan to take D.J.'s temperature and, after Dramara reported the temperature, the nurse stated D.J. might have a slight fever and they should loosen his blankets. As to the yellow on his nose and in his eyes, Dramara stated the nurse told him it is common for newborns to be jaundiced and they should "put him in sunlight in a window sill" when it became light outside. As to the vomiting, the nurse stated D.J. might have mucus in his lungs and Morgan should keep trying to breastfeed. According to Dramara, the nurse did not tell them to call D.J.'s doctor or go to the emergency room.

¶ 37 Plaintiffs argue Dramara's testimony was uncontradicted and never impeached. However, in his deposition testimony, Dramara claimed he told the nurse about D.J.'s "periodic grunting and his breathing." Dramara also did not state in his deposition testimony that D.J. had vomited and the whites of his eyes were "a tad bit yellow." Dramara admitted testifying at his deposition there was no bottle feeding prior to the April 7, 2007, phone call, in contradiction to his trial testimony. He testified D.J. did not eat again after vomiting in the hospital. However, he conceded there were no difficulties prior to discharge with breastfeeding D.J. Questioned on his deposition testimony as to his statements made in the emergency department on April 8, 2007, Dramara admitted he told the doctors D.J. had not vomited since being discharged, D.J. had no fever, and D.J. experienced a decrease in eating orally as opposed to eating nothing at all.

¶ 38 Here, having viewed all the evidence in a light most favorable to MMC, we cannot say the evidence so overwhelmingly favored plaintiffs that no contrary verdict could

stand. Both parties presented extensive evidence of experts and those involved to support their theories. Whether MMC's nurse violated the standard of care depended on what Dramara reported over the phone. Discrepancies as to the content were raised, and it was the jury's responsibility "to determine the credibility of the witnesses and weigh their testimony." *Barth v. State Farm Fire & Casualty Co.*, 228 Ill. 2d 163, 180, 886 N.E.2d 976, 985 (2008). It is not this court's duty to reweigh the evidence and set aside the jury's verdict because different conclusions could have been drawn. We find the trial court did not err in denying plaintiffs' motion for a judgment *n.o.v.* Moreover, as the jury's verdict was not against the manifest weight of the evidence, we find the court did not abuse its discretion in denying plaintiffs' motion for a new trial.

¶ 39 B. Nurse Oesterreich's Testimony

¶ 40 Plaintiffs argue the trial court erred in allowing nurse Oesterreich to testify to MMC's supposed policy or procedure for routing parent phone calls and to testify hypothetically to her personal practice in responding to such calls in violation of the rules of evidence. We disagree.

¶ 41 "The decision to allow or exclude testimony is within the discretion of the trial court." *Mulloy v. American Eagle Airlines, Inc.*, 358 Ill. App. 3d 706, 711, 832 N.E.2d 205, 209 (2005). "The court's discretion is broad and inherent, and its decision in such an instance will not be overturned unless no reasonable person would take the view adopted by it." *Webber v. Wight & Co.*, 368 Ill. App. 3d 1007, 1024, 858 N.E.2d 579, 594 (2006).

¶ 42 During the trial, plaintiffs filed a motion *in limine* to bar testimony from Oesterreich that she was the nurse most likely to have talked on the phone with D.J.'s parents. Plaintiffs also filed a motion *in limine* to bar Oesterreich from testifying to the standard of care.

The trial court stated Oesterreich could not testify she was the most likely person to take the call or that she probably took it. She could testify to a policy in place.

¶ 43 Over the next couple of days, the parties again discussed Oesterreich's upcoming testimony and the trial court wanted to make sure everyone was on the same page. Defense counsel stated Oesterreich would testify regarding "her standard of care" and how she would respond to certain questions. Plaintiffs' counsel indicated he would object to any testimony as to what "she would have done [or] what she might have done." The following exchange then took place:

> "MR. FARCHIONE [(defense counsel)]: The evidence in this case is that she did take [the call.] That's what we believe. They believe differently. But we believe that based on the procedures that are followed by these nurses, and she'd been there for 35 years, that she was the most likely one to take that phone call. Now, because of that, we have the right to argue that.
>
> THE COURT: We're getting back into the, well over a hundred Motions in Limine I've already decided. And as I recall, I decided the policy would come in but there would be no testimony whatsoever whether this nurse actually took the call, whether she probably did or might have.
>
> MR. FARCHIONE: We can ask her if you took a phone call and that phone call said this and this, what is your standard, what would you do. I would say call the pediatrician. There's nothing wrong with her saying that because we believe based on

the policy in this, how things are done, that she was the most likely one. I mean, if we can't get into that, there are a number of cases that are older cases, this is an older case, of course nobody remembers. So, we have to look at—

THE COURT: Well, you're free to argue based on policy and who was there at the time, that's an argument you can make. But she can't testify to—

MR. FARCHIONE: But what you said is she can't say I was the one who took the call.

THE COURT: Or I might have taken the call or there's a good chance I did.

MR. FARCHIONE: But we can ask her if you were the one to have taken the call. *** We have narrowed it down to her being the most likely. So, we, in essence, have a choice because this was so long ago and none of the nurses have a direct memory, all we can say is this is our normal course of business, which have been the questions that have been asked of a number of witnesses. You know, if you can't remember, what is your normal course of business, how do you normally do things. There's nothing wrong with a question like that.

THE COURT: Right, right, I get it.

MR. BAIZER [(plaintiffs' counsel)]: Judge, first of all, there's no chance she took the call. And you'll hear that on cross-

examination.

THE COURT: This is all argument.

MR. BAIZER: There's no chance. So, they can't call the other nurses because they didn't disclose them. Otherwise, we would have taken their depositions. Why do you think they're not calling Nurse Telford, Nurse Polley and Nurse Steward, because none of them support what they want the facts to be. And why do you think they're not calling their nursing expert? This is—

THE COURT: All right. Here's my ruling on this, it's going to be the same as the Motion in Limine, she can't testify as to nursing standard of care. She can testify as to what she would have done. And as I recall when we were hearing that motion it was conceded and at that point Plaintiffs conceded she can testify to what she did but not to the nursing standard of care. So, we're back at this again. But, anyway, that's my ruling.

MR. BAIZER: I just want to put my objection on the record and I won't object when she testifies. My objection is that there's no foundation, that it's hypothetical, that it's irrelevant.

THE COURT: Okay. And the objection is noted. I've been very clear, though, that she won't testify as to the odds that she took the call.

MR. FARCHIONE: We get that. We're not even questioning that.

THE COURT: She can testify if she had taken the call, she would have done whatever.

MR. FARCHIONE: She can testify to that?

THE COURT: Yes. But she can't testify what a reasonable careful nurse would have done."

¶ 44 Oesterreich testified she was the nurse who discharged D.J. She had 32 years' experience as a nurse, which included 29 years in the maternity department. Her responsibility as a discharge nurse is to ensure the mother and baby are healthy. She stated every report regarding D.J. "was all very reassuring." At the point of discharge, Oesterreich would go over the home-care instructions, which included a phone number "so that parents can call in and get basically a reassurance of the instructions that we have gone over with them while they are in the hospital." Another phone number dealt specifically with lactation specialists.

¶ 45 Oesterreich testified she was aware plaintiffs made a phone call at approximately 5 p.m. on the day of discharge. When defense counsel asked her what the procedure is for the nurse taking a call, plaintiffs' counsel objected on the basis of foundation. After the trial court overruled the objection, Oesterreich stated whoever answers the call gets basic information from the caller and "it really depends on what the caller is calling about as to what happens next." Counsel also asked her to assume she received a phone call from a recently discharged mother, who stated she "got home four hours ago, my baby is not eating, it's throwing up feeds, has yellow marks on his nose and eyes and an axillary temperature of 99.5 degrees, what would you do?" Oesterreich responded with several questions she would ask regarding how long since the baby had eaten, whether the baby was circumcised, and whether the mother had been snuggling with the baby or wrapped the baby in a way to make the baby warm. Oesterreich stated:

> "If a mother told me that the baby would not eat, I can't get him to wake up, he's not responding to anything I do, uhm, he's, it's just not right, I would say you need to call your doctor or take the baby to the emergency room. It says that right on the bottom of the discharge sheet that we give them, anything this is concerning to you, call your doctor."

¶ 46 MMC argues Oesterreich's testimony was relevant and admissible because she was the only nurse on duty at the time of the call who testified at trial and her testimony was properly founded upon her substantial personal knowledge from her nearly 30 years of nursing experience at MMC. At trial, plaintiffs' theory was that Oesterreich did not take the April 7, 2007, phone call from Dramara. The jury heard Dramara's testimony that he did not recognize the nurse on the line and he would have recognized Oesterreich because they were on a first-name basis. MMC's theory centered on its belief that Oesterreich did take the call—she was on duty at the time. The other nurses on duty were known to the parties, but plaintiffs did not call them to testify. Plaintiffs could have asked them whether they took the call and what they would have said if presented with the concerns from the parents. Plaintiffs chose not to do so and instead presented testimony of nurses who were not on duty at the time of the call.

¶ 47 In its case, MMC had the right to establish its theory by calling Oesterreich and asking her what she would have said had she taken the call and heard the concerns from D.J.'s parents. Subject to the limitations the trial court placed on what Oesterreich could say, her testimony was relevant and admissible to counteract plaintiffs' claim as to what an unidentified witness told Dramara, and we find the court did not abuse its discretion in allowing it.

¶ 48 III. CONCLUSION

¶ 49 For the reasons stated, we affirm the trial court's judgment.

¶ 50 Affirmed.