2011 IL App (2d) 100614-U
No. 2-10-0614
Order filed December 16, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MARIBEL NAVARETE,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 05-L-520
	)	
NAPERVILLE PSYCHIATRIC VENTURES d/b/a LINDEN OAKS HOSPITAL AT EDWARD and d/b/a LINDEN OAKS HOSPITAL, EDWARD HEALTH VENTURES, a general partner of Naperville Psychiatric Ventures, and EDWARD HOSPITAL,	)	
	)	Honorable
	)	Joseph S. Bongiorno,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

Held: The trial court properly denied motion for judgment notwithstanding the verdict where the evidence raised factual and credibility determinations that were the province of the jury, and properly denied motion for new trial where the jury's general verdict could be sustained on an alternate ground. However, the trial court's entry of summary judgment for defendants on the negligent hiring claim was error and must be reversed.

¶ 1 The plaintiff, Maribel Navarete, was sexually assaulted by a staff person when she was a resident in a facility operated by the defendants, which are a variety of corporations and a partnership that together own and operate Linden Oaks Hospital at Edward. She brought suit, alleging general negligence, negligent hiring, negligent retention, and negligent supervision. The trial court granted summary judgment in favor of the defendants on the negligent hiring claim. After a jury trial, the jury returned a verdict for the defendants. The trial court denied the plaintiff's posttrial motion seeking judgment notwithstanding the verdict or in the alternative a new trial. The plaintiff appeals. We affirm in part and reverse in part.

¶ 2 BACKGROUND

¶ 3 The record in this case is large, and much of it is not directly relevant to the issues presented on appeal. Accordingly, we provide here only a general overview of the evidence. Additional evidence relevant to each issue raised on appeal is included in our analysis of that issue.

¶ 4 From October 2002 until June 2003, the plaintiff was a resident of the Extended Care Unit (ECU) at Linden Oaks Hospital. Linden Oaks was part of the Edward Hospital complex, and was owned by the defendants. The ECU was intended as a living situation for adolescents in the care of the Department for Children and Family Services (DCFS) who were not appropriate foster care placements but did not need inpatient psychiatric care. Linden Oaks provided care for each adolescent resident of the ECU pursuant to a contract between the defendants and DCFS.

¶ 5 Linden Oaks Hospital employees underwent regular training, including training on avoiding inappropriate contact with patients. Part of this training included a review of Linden Oaks' Boundary Violation Prevention Guidelines and a discussion of the policy contained in those guidelines. The guidelines included a "policy of non-fraternization with current and former patients"

and provided that staff should not enter the room of a patient of the opposite sex unless accompanied by another staff person, and the door to a patient's room should not be closed while a staff person was inside.

¶ 6 In November 2000, Linden Oaks hired Khalifah Shabazz as a mental health counselor on the ECU. Although he did not disclose it on his application for employment, Shabazz had a criminal record, under his original name of Jeffrey McGee. He had been working at a DCFS facility before he was hired by Linden Oaks. Shabazz was a large man: he was six feet, six inches tall and weighed over 600 pounds. Shabazz's duties on the ECU included stopping fights, and talking with and counseling the residents. His annual employment reviews were good, and his co-workers viewed him favorably.

¶ 7 When the plaintiff entered Linden Oaks in October 2002, she was 17 years old and had been under the guardianship of DCFS for three years. The guardianship came about following the disclosure that the plaintiff had suffered years of sexual abuse at the hands of her uncles, beginning when she was five years old. She was removed from her family due to the family's refusal to accept her disclosures and was placed in a series of foster homes. She ran away from her foster homes repeatedly and, unable to return to her family's home, lived on the street for periods of time, occasionally engaging in prostitution during these periods. She was diagnosed with depression and post-traumatic stress disorder (PTSD) and had engaged both in self-mutilation (cutting herself) and fighting with her peers from time to time. She had been hospitalized for psychiatric care on at least two occasions since becoming a ward of the State. Nevertheless, the plaintiff was intelligent and was seen as relatively high-functioning. Her placement at Linden Oaks was intended as a possible transition to independent living after she turned 18.

¶ 8 In December 2002, shortly before Christmas, Shabazz entered the plaintiff's room on the ECU during the early morning when she was sleeping, closing the door behind him. According to the plaintiff, Shabazz removed her bedcovers and began performing oral sex on her. He then asked her to perform oral sex on him, and she did so. The plaintiff testified that Shabazz's conduct took her back to when she was small and her uncles abused her, and made her feel helpless in the same way. She did not think she could resist Shabazz or that she would be believed if she reported the incident. She did not tell anyone about the incident. About two weeks later, the same thing happened again. On a third occasion on January 10, 2003, just before the plaintiff's eighteenth birthday, Shabazz again entered the plaintiff's room and closed the door. This time, after Shabazz performed oral sex on the plaintiff, he told her that he wanted some sex, and the plaintiff got on top of him and had intercourse with him. The plaintiff estimated that Shabazz was in her room for about 15 to 20 minutes each time. Throughout this period, he would leave money and gifts for the plaintiff in her room.

¶ 9 On one of these occasions, Shabazz was observed entering and leaving the plaintiff's room. Near the end of the night shift, Darlene Sue Cachey, a counselor on the ECU, was at the nursing station at the end of the hallway where the patients' rooms were located. Shabazz, who worked the next shift, came in early. He spoke with Cachey and then went down the hall. Thomas Cothran, another counselor on the ECU, was at a desk in the middle of the hallway. Shabazz approached him and told him that Shabazz wanted to give the plaintiff a CD. Shabazz worked at a radio station and often brought the ECU residents CDs. Shabazz then entered the plaintiff's room and shut the door. Not long after Shabazz had left the nursing station, Cachey received a phone call from Patricia Keller, the ECU's supervisor. Keller wanted to speak with Shabazz. Cachey stood up and looked

down the hall but did not see Shabazz. She told Keller that Shabazz had been there but that she did not know where he had gone. Keller said she would talk to Shabazz later. Cachey hung up, and then went down the hall to where Cothran was sitting. She told Cothran the phone call was for Shabazz, and Cothran told her that Shabazz was in the plaintiff's room, giving her a CD. Cachey saw that the door to the plaintiff's room was closed, and commented to Cothran that she didn't think that was right, saying, "I think he knows better than that." Shabazz then came out of the plaintiff's room. Cachey thought it was less than four or five minutes that he had been in there; Cothran estimated that it had been 10 or 15 minutes. Both Cothran and Cachey recalled that Shabazz was sweating and grabbed a towel from a supply in the hall to mop himself off. However, they both testified that Shabazz normally sweated a lot due to his size. According to Cachey's later statement to police, she also thought Shabazz looked "guilty" when he came out of the room. However, neither Cothran nor Cachey asked Shabazz why he had shut the door while he was in the plaintiff's room, or went in and checked on the plaintiff. Neither of them reported the incident to a supervisor.

¶ 10 The evidence was conflicting as to the date when Cothran and Cachey saw Shabazz in the plaintiff's room with the door shut. Both of them initially told police that it was in December 2002, just before Christmas, and that the CD Shabazz took into the plaintiff's room was a Christmas gift. When they were cross-examined at trial, however, they stated that they could have been mistaken and the incident could have occurred in January, before the plaintiff's birthday. The plaintiff herself initially told police that the CD given to her by Shabazz was a birthday present, suggesting that Cothran and Cachey observed the third incident on January 10, 2003. However, at trial, she stated that Shabazz had given her the CD before Christmas. She also testified that, after Shabazz left the

room on the first occasion, she went to the door of her room, looked out, and saw Cothran and Cachey in the hallway. They did not question Shabazz and she did not try to tell them anything.

¶ 11 Although the plaintiff did not tell staff about Shabazz's sexual encounters with her, another ECU resident learned of them and told ECU staff about them on February 11, 2003. The plaintiff initially denied that Shabazz had become sexually involved with her. However, on February 20, the plaintiff admitted that the incidents had occurred. The Naperville police were called and began a criminal investigation. Linden Oaks suspended Shabazz pending investigation. Shabazz was eventually convicted of criminal sexual assault. The plaintiff remained a resident of the ECU until June 2003, when she was transferred into an independent living program.

¶ 12 In May 2005, the plaintiff filed a personal injury suit against the defendants. As amended, the plaintiff's complaint stated claims for general negligence, negligent hiring, negligent retention, and negligent supervision. The defendant moved for summary judgment on all of the claims. The trial court granted summary judgment on the negligent hiring claim, but allowed the remaining claims to proceed to trial. A jury trial was held from November 2 to November 10, 2009. The jury returned a general verdict in favor of the defendants. After the trial court denied her posttrial motion, the plaintiff filed this appeal.

¶ 13 ANALYSIS

¶ 14 Motion for Judgment Notwithstanding the Verdict

¶ 15 On appeal, the plaintiff challenges three of the trial court's rulings: its denial of her motion for judgment notwithstanding the verdict; its denial of her motion for a new trial; and its grant of summary judgment in favor of the defendants on her negligent hiring claim. We begin with the plaintiff's argument that she was entitled to a judgment notwithstanding the verdict (judgment *n.o.v.*)

because the testimony at trial established that the defendants' employees failed to follow the boundary guidelines and failed to report Shabazz's violations of those guidelines, resulting in harm to the plaintiff. "A directed verdict or judgment *n.o.v.* should be granted only when 'all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors [the] movant that no contrary verdict based on that evidence could ever stand.' " *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 100 (2010), quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). Like summary judgment, judgment notwithstanding the verdict should not be granted where reasonable minds could differ as to the inferences or conclusions to be drawn from the facts presented. *Id*. Our review of the trial court's denial of the plaintiff's motion for judgment notwithstanding the verdict is *de novo*.

¶ 16 The plaintiff argues that the evidence, including the testimony of the defendants' current and former employees, unquestionably established that Linden Oaks' policy against boundary violations was not enforced on the ECU. We agree. The written policy, which was admitted into evidence, stated that "[s]taff members of the opposite sex from the patient should be advised not to enter patient rooms [*sic*] unless accompanied by another staff person, if possible"; that "[t]he patient's door should never be closed when a staff member is in the patient's room"; and that "[a]ny employee who has reason to believe that a boundary issue or violation has occurred must report this immediately" to a supervisor or the director of nursing. Dr. David Bawden, the defendants' expert, stated that hospitals have an institutional obligation to uphold their own policies. It was undisputed that Shabazz violated the policy by entering the plaintiff's room alone on several occasions and remaining inside with the door shut. It was also undisputed that although Cothran and Cachey witnessed this boundary violation on one occasion, neither of them reported it to anyone. Cothran

testified that, when he first began working on the ECU, he saw violations of the boundary policy and was bothered enough by them to ask his supervisor, Keller, about them. Keller told him that things were "handled a little different" on the ECU. Cachey testified that the reporting of possible boundary policy violations was left to the discretion of the counselors. Jane Mitchell, Linden Oaks' former administrative director for nursing, stated that she did not reprimand Cothran or Cachey for failing to report Shabazz's presence in the plaintiff's room with the door shut because the incident was "not unusual." Taken together, this evidence establishes that the boundary policy was not enforced on the ECU. Indeed, there was no evidence to the contrary.

¶ 17 At trial, the defendants offered various rationales for the failure to enforce the policy. Cothran said he was told that the ECU was different because of the residential setting and a goal of making the ECU more home-like. In addition, staff were more like parents, and sometimes a patient would have a better therapeutic rapport with staff members of the opposite sex. Other witnesses echoed these rationales. However, Brent Horlock, a therapist on the ECU who was also the presenter on the boundary policy at staff trainings, testified that while the ECU was designed to be a home-like environment with the staff acting as parents in some ways, it differed from an actual home in that, in a family's home, the parents could go into the children's bedrooms. The implication of this testimony was that, on the ECU, staff were not permitted to enter the patients' rooms. Moreover, none of the witnesses testified that it was reasonable for ECU staff to not to enforce the boundary policy so as to make the unit more home-like. To the contrary, Mitchell testified that the policy applied to all units in the hospital, that there was no written exception or addendum regarding the ECU, and the only exceptions to the policy that she identified related to emergency situations. Dr. Christopher Sinnappan, the medical director for the ECU at the time, testified that when Cothran saw

Shabazz emerge from having been in the plaintiff's room with the door shut, Cothran should have asked Shabazz what he had been doing and then immediately reported the incident to a supervisor. Similarly, Dr. Deanna Jasek, formerly one of the plaintiff's therapists on the ECU, stated that if she had seen the incident she would have felt the need to report it. Dr. Bawden testified that, under Linden Oaks' boundary violation policy, it would be a violation of that policy for a male staff member to enter a female patient's room and close the door, unless it were a temporary response to an emergency. Thus, the evidence overwhelmingly supports the conclusion that the defendants failed to enforce the boundary policy, both in general and specifically with Shabazz, and thereby breached their duty of care.

¶ 18 The defendants argue that, even if the evidence established that they failed to enforce the boundary policy and that this was a breach of their duty, the plaintiff was also required to prove that this failure was the proximate cause of harm to her, and the evidence regarding this issue does not meet the "overwhelmingly favors the movant" standard. Our review of the record confirms that the evidence raised a factual question regarding whether Linden Oaks' failure to enforce its policy harmed the plaintiff.

¶ 19 The plaintiff's own testimony regarding the effect of her encounters with Shabazz was conflicting. She testified that she had not been cutting herself or fighting with other residents of the ECU before the assaults, but began doing so afterwards. However, she acknowledged that she had engaged in these behaviors before coming to Linden Oaks and was viewed as being at risk of resuming the behaviors when she transferred to Linden Oaks. In fact, on her first day at Linden Oaks, she physically attacked her caseworker. Regarding her immediate reactions to the encounters with Shabazz, the plaintiff stated that, after each assault, she threw up and took hot and cold

showers. However, she also acknowledged that she had mixed feelings about Shabazz's attentions, wrote in her journal that they had discussed marriage, and wrote him a love poem. Neither before nor after the incidents were disclosed did the plaintiff talk to Linden Oaks staff, including her therapists, about the effects on her of the sexual contacts with Shabazz. She explained this by stating that she did not want to jeopardize her chances of getting into an independent living program. As for long-term effects of the assaults, the plaintiff testified that she had nightmares, flashbacks, fears of people who look like Shabazz and that Shabazz would come after her when he was released from prison, difficulty trusting men and staying in relationships, and difficulty in being around people, with the result that she had not completed her education and had not held a job for more than a few months. However, in contrast to the period before she came to Linden Oaks, the plaintiff had not been hospitalized for psychological care since leaving Linden Oaks; she stated that she had felt she needed hospitalization on occasion but had to stay out of the hospital because she had no one to care for her young daughter.

¶ 20 The doctors who treated the plaintiff also had divergent opinions regarding the effect of the sexual contacts with Shabazz on the plaintiff. The plaintiff's current treating psychiatrist, Dr. David Powell, opined without reservation that the incidents had aggravated the plaintiff's symptoms of PTSD, magnified her trust issues, and continued to cause her depression and inability to maintain relationships and employment. However, he acknowledged that his opinion was based on the plaintiff's disclosures during treatment and that he had not reviewed her medical records or statements to the police, and he did not know the specifics of the sexual contacts, including how many there were. Dr. Powell also mistakenly believed that the plaintiff was younger (15 or 16 years old) at the time of the incidents.

¶ 21 Drs. Jasek, Sinnappan, and George Miguel (a psychiatrist), all of whom treated the plaintiff while she was at Linden Oaks, opined that her overall condition had improved during the course of her stay at Linden Oaks. To support their opinions, they pointed to the following facts. The plaintiff was able to take a GED course and a college art course during the winter and spring of 2003. She did not report any nightmares, flashbacks, or other increased symptoms of PTSD after the incidents, and the progress notes of her meetings with therapists after then generally noted her demeanor as calm and cooperative and her affect as "bright." In addition, none of the negative behaviors she engaged in after the incidents (fighting, cutting herself, and an apparent suicide attempt in which she looped an electrical cord around her neck) were new behaviors, and thus the behaviors could be seen simply as fluctuations in the plaintiff's general conduct.

¶ 22 On the other hand, these same doctors also acknowledged that the incidents likely had some immediate and long-term effects on the plaintiff. Dr. Jasek's notes refer to the plaintiff being on suicide precaution on January 24, 2003 (shortly after her birthday), and on February 5, 2003, there is a reference to "several incidents of self-harm" and participation in a group attack on another girl. At the first session after the sexual contacts had been reported to the police, the plaintiff had a "flat affect" and was very tearful. Dr. Jasek stated that, in her professional opinion, Shabazz's sexual contacts with the plaintiff were a major event in her experience at Linden Oaks, it was possible that they could have aggravated the plaintiff's PTSD symptoms, and she could not conclude that they had no effect on the plaintiff. Dr. Miguel stated that on February 20, 2003 (the day the incidents were reported to police), he went to the plaintiff's room and found her lying on the floor, rolling back and forth, and making incoherent noises. When he met with her the following day, he saw cuts to her left forearm, leg, and thigh. Based on his interaction with her on these dates, he believed that the

plaintiff was experiencing an aggravation of her PTSD at the time. It was possible that the sexual contacts with Shabazz created a setback in the plaintiff's treatment. It was also possible that they aggravated the plaintiff's PTSD long-term; he had not formed an opinion about this. Dr. Sinnappan testified that the psychotropic medications prescribed for the plaintiff increased during her stay at Linden Oaks. Specifically, her dosages for lithium and Effexor were increased, and after disclosing the incidents she was given a new prescription for Trazodone to help her sleep. Despite his opinion that the plaintiff's ability to cope with her feelings and to reduce her self-destructive behaviors improved while she was at Linden Oaks, Dr. Sinnappan believed that the sexual contacts between the plaintiff and Shabazz hurt her.

¶ 23 Dr. Bawden, the defense expert who was not one of the plaintiff's treating physicians, opined that the plaintiff experienced no permanent psychological or emotional problems stemming from the assaults. His opinion was based solely on reviewing the plaintiff's medical records, and he had never met the plaintiff. He viewed the sexual interactions between Shabazz and the plaintiff as consensual because there was no record that the plaintiff cried out for help or struggled against the attacks. He acknowledged that the plaintiff felt "overwhelmed" by the incidents and probably felt "repulsed" by Shabazz's advances, but the definition of PTSD in the DSM IV required that the patient have feelings of fear, horror, or helplessness, and it did not appear that the plaintiff's feelings about the incidents met this definition.

¶ 24 Where, as here, the evidence presents substantial factual disputes, judgment notwithstanding the verdict is not appropriate. "A trial court cannot reweigh the evidence and set aside a verdict merely because the jury could have drawn different inferences or conclusions, or because the court feels that other results are more reasonable." *Maple v. Gustafson*, 151 Ill. 2d 445, 452 (1992). As

our review is *de novo*, we are constrained by the same principle. Where there is evidence "demonstrating a substantial factual dispute, or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome," we may not enter judgment notwithstanding the verdict. *Id*. at 454. Under such circumstances, a judgment *n.o.v*. is improper even if the verdict was against the manifest weight of the evidence. *Id*. at 453. Here, the evidence demonstrates a substantial dispute over the existence and degree of harm flowing from the defendants' negligence. Similarly, the jury's resolution of this issue necessarily included assessments of the witnesses' credibility. The trial court's denial of the motion for judgment notwithstanding the verdict therefore was correct.

¶ 25 Motion for a New Trial

¶ 26 The plaintiff also argues that she was entitled to a new trial because of multiple errors in the trial court's rulings that denied her a fair trial of her claims. Courts apply different standards to requests for judgment *n.o.v.* and requests for new trials. *Maple*, 151 Ill. 2d at 453-54. Although the standard for granting a new trial is not quite as strict as that for entering judgment *n.o.v.*, a new trial should be granted only where the jury's verdict is against the manifest weight of the evidence. *Lisowski v. MacNeal Memorial Hospital Ass'n*, 381 Ill. App. 3d 275, 282 (2008). " 'A verdict is against the manifest weight of the evidence where the opposite conclusion is clearly evident' " or the verdict is " 'unreasonable, arbitrary and not based on the evidence.' " *Maple*, 151 Ill. 2d at 554, quoting *Villa v. Crown Cork & Seal Co.*, 202 Ill. App. 3d 1082, 1089 (1990).

¶ 27 The plaintiff points to claimed errors involving her opening statement of the case and the jury instructions. In response, the defendants first argue that we need not reach the errors raised by the plaintiff because all of them relate to the questions of negligence, and we should uphold the jury's

verdict even if all of the plaintiff's contentions are correct, under the "two-issue" rule. The defendants also argue that, even if we were to consider the substance of the plaintiff's arguments, they have no merit. We agree with the defendants' first contention.

¶ 28 The "two-issue" rule applies when the party that prevailed at trial has raised at least two claims or defenses, and the jury has returned a general verdict without making any specified findings of fact. In that situation, where no special interrogatories were submitted that would detail the jury's reasons for its verdict and the verdict is therefore silent, it will be presumed that the jury found in favor of the prevailing party on all of the claims or defenses it raised. *Strino v. Premier Healthcare Assocs., P.C.*, 365 Ill. App. 3d 895, 904 (2006). When the losing party seeks a new trial, the application of the two-issue rule means that no new trial may be granted unless the verdict cannot be sustained on any of the claims or defenses raised. "When there is a general verdict and more than one theory is presented, the verdict will be upheld if there was sufficient evidence to sustain either theory." *Witherell v. Weimer*, 118 Ill. 2d 321, 329 (1987); accord, *Lazenby*, 236 Ill. 2d at 101.

¶ 29 The defendants in this case raised two defenses: they contended that they were not negligent in their actions, and they also contended that any negligence of theirs was not the proximate cause of any harm to the plaintiff. The defendants argue that, under the two-issue rule, the jury must be presumed to have found in their favor on both of these defenses. However, all of the errors raised by the plaintiff relate only to the jury instructions on negligence, and none attack the instructions regarding proximate cause or damages. The defendants argue that, because the jury's verdict could be explained as a finding that the defendants' negligence did not cause the plaintiff any injury, the verdict may be sustained on that ground without ever reaching the question of whether the trial court's instructions on negligence were in error. See *Tabe v. Ausman*, 388 Ill. App. 3d 398, 404

(2009) (where the jury returned a general verdict in favor of the defendants, it would be presumed that the jury accepted both the defendants' defenses of non-negligence and no proximate cause).

¶ 30 We therefore examine whether the verdict can be sustained as being based on the theory that the defendants' acts and omissions did not cause the plaintiff any injury. In the context of a request for a new trial, the issue is whether a jury verdict that rested on this theory would be against the manifest weight of the evidence. *Lazenby*, 236 Ill. 2d at 102. We find that a verdict resting on this ground would not be against the manifest weight of the evidence, for the same reasons we detailed in analyzing the motion for judgment notwithstanding the evidence. The evidence regarding the effects of the incidents on the plaintiff was conflicting, especially given the plaintiff's own admittedly mixed reactions to Shabazz's advances, and the evidence that the plaintiff was able to continue her educational studies at Linden Oaks even after the incidents. While there was sufficient evidence from which the jury could have concluded that the plaintiff was harmed by the incidents, there was also sufficient evidence to support the conclusion that the plaintiff did not object to the advances initially and did not suffer any lasting harm from them, and that any residual difficulty in functioning was due to other causes. If we were considering this evidence as the trier of fact, we might well conclude that, on the evidence described above, the plaintiff carried her burden of proving that the defendants' negligence caused her harm. We are not in that position, however, and where the evidence is conflicting we may not substitute our view of that evidence for the jury's determination. As we cannot say that the jury's verdict was unreasonable, arbitrary or not based on the evidence (*Maple*, 151 Ill. 2d at 554), the trial court did not abuse its discretion in refusing to grant a new trial.

¶ 31 Summary Judgment on Negligent Hiring Claim

¶ 32 The plaintiff's last argument on appeal is that the trial court erred in granting summary judgment in the defendants' favor on her claim of negligent hiring. A motion for summary judgment is properly granted where the pleadings, depositions, admissions, and affidavits establish that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2008); *Gaylor v. Village of Ringwood*, 363 Ill. App. 3d 543, 546 (2006). We review the grant of summary judgment *de novo*. *Ioerger v. Halverson Construction Co., Inc.*, 232 Ill. 2d 196, 201 (2008).

¶ 33 The defendants' motion for summary judgment on the negligent hiring claim was premised on the following undisputed facts. Shabazz was convicted of cocaine distribution in Wisconsin in 1990. At the time of his conviction, his name was Jeffrey McGee; he changed his name to Shabazz after getting out of prison. Over ten years after his conviction, Shabazz applied for employment at Linden Oaks Hospital in April 2001. He was hired in November 2001.

¶ 34 The defendants' contract with the Department of Children and Family Services (DCFS) required them to comply with section 385 of title 89 of the Illinois Administrative Code (89 Ill. Adm. Code 385.10 *et seq.* (2010)) in performing background checks on their employees. Section 385.20 defines "background check" as including checks of the Illinois Sex Offender Registry and the Child Abuse and Neglect Tracking System (CANTS), and the submission of the employee's fingerprints to the Illinois State Police. 89 Ill. Adm. Code 385.20 (2010). Section 385.30 provides that such background checks must be done as a condition of employment for all employees. 89 Ill. Adm. Code 385.30 (2010). The defendants checked Shabazz's name with the Illinois Sex Offender Registry and CANTS and submitted his fingerprints to the Illinois State Police. The checks of the databases were negative, indicating that there were no records of Shabazz having been convicted of a sex crime.

The Illinois State Police reported that Shabazz had no criminal convictions in Illinois. On his application, Shabazz checked the box indicating that he had not been convicted of a felony nor pled guilty to a crime.

¶ 35 The defendants argued that, on these facts, they complied with the applicable regulations (and thus their contractual obligation to DCFS) in their background check of Shabazz. Further, to the extent that they might have owed a duty of care in hiring other than that contained in the regulations, proving such a claim would require expert testimony as to the standard of care required of hospitals such as the defendants, and the plaintiff had not disclosed any such expert opinions. Finally, the defendants contended that even if they had breached their contractual and regulatory obligations, that breach could not be a legal cause of the plaintiff's injuries because notice of Shabazz's prior drug conviction would not have made it reasonably foreseeable that he would sexually assault the plaintiff.

¶ 36 The plaintiff responded by noting that the Illinois State Police report on Shabazz's fingerprints was dated March 3, 2003—two and a half years after he was hired—raising the inference that the defendants did not submit fingerprints to the state police at the time of Shabazz's hiring but instead waited until after Shabazz had been terminated and was under investigation by the Naperville police. Moreover, because there was no copy of the fingerprints in Shabazz's file and the defendants could not identify who submitted the fingerprints, there was a possibility that the fingerprints submitted were not Shabazz's at all. The plaintiff pointed out that Shabazz also provided an incorrect social security number at the time of his hiring. About six months after he was hired (and before the plaintiff began her stay at Linden Oaks), the defendants were notified by the Social Security Administration that the social security number provided by Shabazz did not match his

name. The defendants took no further action regarding this information and did not require Shabazz to submit a copy of his social security card (which had been manually altered to show the incorrect number). Had the defendants taken these steps, the plaintiff argued, they might have discovered that the number was not registered to Shabazz and that the social security card showed Shabazz's former name of Jeffrey McGee, thus increasing the chance that his criminal conviction would have been discovered. The plaintiff noted that when the Naperville police began to investigate Shabazz in February 2003, they promptly discovered his prior criminal record, suggesting that if the defendants had taken the proper steps at the time Shabazz was hired they too would have learned of his criminal history. Finally, the plaintiff pointed to the deposition testimony of Keller, the former director of residential services at Linden Oaks Hospital, that Shabazz would not have been hired if the defendants had known of his prior criminal conviction.

¶ 37 After a hearing, the trial court granted the defendant's motion for summary judgment on the negligent hiring claim, stating: "There is no factual basis in this record to give rise to any liability on the part of the hospital for negligent hiring as the hospital did not know nor could have known of the defendant's [Shabazz's] propensity towards sexual involvement with this minor." On appeal, the plaintiff argues that the trial court viewed the issue of proximate cause too narrowly, and that the evidence she presented (set out above) raised a material factual issue as to whether the defendants failed to comply with the regulatory requirements for background checks and thus were negligent in hiring Shabazz.

¶ 38 In order to maintain a claim for negligent hiring, a plaintiff must show that the employer hired someone whom "the employer knew or reasonably should have known was unfit for the job in the sense that the employment would place the employee in a position where his unfitness would

create a foreseeable danger to others," (*Carter v. Skokie Valley Detective Agency, Inc.*, 256 Ill. App. 3d 77, 80 (1993)), and that the hiring of the employee caused the plaintiff's injury. Here, the evidence presented by the plaintiff raised a genuine issue of fact as to whether the defendants complied with their admitted duty to conduct a background check of the type required by the applicable regulations. Those regulations required the defendants to conduct (or else submit to DCFS an authorization for) a background check of an employee "as a condition of employment." 89 Ill. Adm. 385.30 (d)(1) (2010). The phrase "as a condition of employment" clearly indicates that the background check should be done at the time of hiring the employee. *Lee v. John Deere Insurance Co.*, 208 Ill. 2d 38, 43 (2003) (the plain language of a statute or regulation is the best indicator of its intended meaning).

¶ 39 Here, however, the only evidence that the defendants submitted fingerprints to the Illinois State Police as required comes from an Illinois State Police report dated March 3, 2003—two and a half years after Shabazz was hired and in fact after Shabazz's misdeeds had been reported and he had been suspended. As the plaintiff points out, the delay in submitting the fingerprints and the lack of any testimony from the person who took and submitted Shabazz's fingerprints raises some question as to whether the fingerprints submitted as Shabazz's were indeed his: if Shabazz's fingerprints were taken at the time he was hired, why were they not submitted until after his termination, and if the fingerprints were not taken at the time of his hiring, how and when were the fingerprints taken? For that matter, we also note that the defendants cite no testimony or documentary evidence that the checks of CANTS and the sex offender registry were performed at the time of Shabazz's hiring. Thus, the record amply supports the plaintiff's argument that the

defendants may have breached their regulatory and contractual duties related to background checks at the time they hired the plaintiff.

¶ 40 The defendants argue, however, that even if there was a factual question as to whether they performed an adequate background check on Shabazz at the time he was hired, they cannot be held liable unless that breach of their duty proximately caused the plaintiff's injury. Proximate cause has two components. *Mann v. Producer's Chemical Co.*, 356 Ill. App. 3d 967, 972 (2005). The first is cause in fact, that is, that the defendant's negligence was "a material and substantial element in bringing about the injury" (*First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 258 (1999)) and it is reasonably certain that the injury would not have occurred but for that negligence (*Mann*, 356 Ill. App. 3d at 972). The second is legal causation, that is, "was the injury of a type that a reasonable person would see as a likely result of [the defendants'] conduct?" *Galman*, 188 Ill. 2d at 258-59. When the injury is not caused directly by a defendant's negligence but by the independent acts of a third person, the question becomes whether the intervening cause was "of a type that a reasonable person would see as a likely result of" the negligence. *Id*. at 259. Although the existence of proximate cause is usually to be decided by the trier of fact, if there is insufficient evidence to establish that, in a negligent hiring case, the employer's negligence proximately caused the plaintiff's injuries, the employer may be entitled to judgment as a matter of law. *Carter*, 256 Ill. App. 3d at 81.

¶ 41 The defendants argue that any negligence they may have committed in hiring Shabazz was not the legal cause of the plaintiff's injuries. Specifically, they reason that because Shabazz's prior conviction was not for a sex-related offense, it was not reasonably foreseeable that their possible negligence in hiring Shabazz would pose the danger that eventually occurred, *i.e.*, his sexual assaults of the plaintiff.

¶ 42 In support, the defendants cite three cases, *Giraldi v. Community Consolidated School District # 62*, 279 Ill. App. 3d 679 (1996), *Strickland v. Communications & Cable of Chicago, Inc.*, 304 Ill. App. 679 (1999), and *Carter*, 256 Ill. App. 3d at 82-83. The first two of these cases are readily distinguishable on their facts. In *Giraldi*, a bus driver sexually assaulted a student. The student brought a negligent hiring claim against the driver's employer, which had failed to check with his previous employer, who would have told them that the driver had been fired from his previous job for tardiness, absenteeism and irregular schedules. The court held that the employer's failure to discover this information did not render it liable for negligent hiring because the information would not have made the driver's later sexual assault reasonably foreseeable. *Giraldi*, 279 Ill. App. 3d at 692. Similarly, in *Strickland*, a cable company failed to do a background check on cable repairman, but such a check would only have disclosed driving violations and a suspended license, neither of which would make the repairman's later sexual assault on a customer reasonably foreseeable. *Strickland*, 304 Ill. App. at 683. In both of these cases, the only information that the employer would have discovered via the background check was of such minor misconduct that it could not, as a matter of law, lead a reasonable person to foresee the type of serious assaults later committed by the employees. Here, by contrast, Shabazz's previous conviction for selling drugs was a crime of moral turpitude (*Fortman v. Aurora Civil Service Comm'n*, 37 Ill. App. 3d 548, 551 (1976)) that was serious enough to render him unfit for a position in which he was entrusted with the care of minors (*Mueller v. Community Consolidated School District 54*, 287 Ill. App. 3d 337, 342 (1997)). Keller's statement that the defendants would not have hired Shabazz if they had known of his conviction is a confirmation of the foreseeability that harm could arise from hiring someone with

Shabazz's criminal history and the likelihood that a reasonable prudent person would take steps to avoid that risk. Thus, this case is dissimilar to *Giraldi* and *Strickland* and those cases are inapposite.

¶ 43 The third case on which the defendants rely, *Carter*, was decided on a different component of proximate cause—cause in fact, not legal cause. In *Carter*, 256 Ill. App. 3d at 83, a security guard, Harris, was hired without a background check because the supervisor knew him from a previous security position he had occupied a year earlier and believed that Harris was still "in good standing." Had the supervisor done the background check, he would have discovered that, during the previous year, Harris had accumulated three criminal convictions (two for carrying a weapon off duty and one for aggravated assault and possession of marijuana). Harris later kidnapped, sexually assaulted, and murdered the victim, Emma. The victim was an employee at a gas station where Harris had been assigned to work during the previous week. The assault did not occur at work, however. Rather, shortly before his normal shift Harris arrived at the gas station and asked Emma for a ride to a purported assignment at a different location, and she agreed. After examining comparable cases, the reviewing court held that the security agency's negligence in hiring Harris did not cause the victim's injuries and death, because Harris's employment itself did not create the necessary condition for the harm to occur:

> "It was not the fact Harris was a security guard that got him into Emma's car and proximately caused her injuries and death; it was the fact that she trusted him because she knew him from work where he happened to be employed as a security guard. *** If we [allowed liability under these facts] then we would have had to find [the security agency] liable if, after leaving the Amoco station alone, she had seen him on the street out of uniform and offered him a

> ride or if they ran into each other on a weekend at the supermarket. We do not believe that the concept of proximate cause should be extended this far." *Id*. at 82-83.

In effect, the reviewing court held that, as a matter of law, Harris's employment was not a "but for" cause of the victim's injuries and death, because it was not the employment itself that gave rise to Harris's access to the victim. The court therefore reversed the jury's verdict for the plaintiff.

¶ 44 The defendants note that, just as in this case, in *Carter* the supervisor who failed to perform the background check stated that he would not have hired the employee if he had been aware of his criminal history. *Id*. at 79. They argue that, under *Carter*, any negligence on their part in hiring Shabazz was not the proximate cause of the plaintiff's alleged injuries. However, this argument ignores the factual differences between the two cases. In *Carter*, the victim was someone who was free to reject her attacker's request for a ride and who was in no way subject to his authority by virtue of the position given to him by the defendant security agency. Here, by contrast, it was the fact of Shabazz's employment at Linden Oaks that provided him with access to the plaintiff and a measure of authority and control over her. Thus, unlike the situation in *Carter*, here the defendant's hiring of Shabazz was a cause in fact of the plaintiff's alleged injuries.

¶ 45 Finally, the defendants argue that the summary judgment in their favor on the negligent hiring claim can be sustained because the jury eventually found in their favor at trial and thus, under the two-issue rule discussed above, it can be presumed that the jury would similarly reject the plaintiff's contention that their negligent hiring of Shabazz caused her any harm. However, a jury's eventual verdict on some claims may not be used to justify the entry of summary judgment on a different claim before trial—an action that, by its nature, prevents the jury from ever considering that claim. See *Abrams v. City of Mattoon*, 138 Ill. App. 3d 657, 663 (1986). Summary judgment may only be

granted where the evidence presented demonstrates that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2008). The defendants have failed to meet that burden here, and we therefore reverse the entry of summary judgment in their favor on the negligent hiring claim.

¶ 46 CONCLUSION

¶ 47 For all of the foregoing reasons, we affirm the judgment of the circuit court of Du Page County as to the plaintiff's general negligence, negligent retention and negligent supervision claims. We also affirm the trial court's order of May 19, 2010, denying the plaintiff's posttrial motion for judgment notwithstanding the verdict and for a new trial. However, we reverse the trial court's grant of summary judgment on the plaintiff's negligent hiring claim and remand for further proceedings on that claim.

¶ 48 Affirmed in part and reversed in part; cause remanded.